A
TREASURY
OF
LEGAL QUOTATIONS

A Treasury of Legal Quotations

Selected by

PAUL C. COOK

With An Introduction by

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VANTAGE PRESS NEW YORK WASHINGTON HOLLYWOOD

FIRST EDITION

Published by Vantage Press, Inc.
120 West 31st Street, New York 1, N. Y.

Manufactured in the United States of America
Library of Congress Catalog Card Number: 60:15584

PREFACE

There are numerous powerful and beautiful statements of legal philosophy by outstanding jurists which are in effect "lost" in the opinions and other legal writings. These gems of wisdom and literary style are rarely ever discovered by the lay public, and members of the legal profession only occasionally chance upon one of them in the course of their reading. Much of value is lost by reason of the fact that there has been no reference work containing a collection of these legal quotations, because they are not only valuable literary contributions, but they are also *sources* of the law. Beneath specific rules of law lie the general principles, and underneath the general principles is found the legal philosophy which is the ultimate source of law. As Justice Cardozo said in *The Growth of the Law:*

> "It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing ever in reserve as a court of ultimate appeal. Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its

subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there."

The primary purpose, then, of this work is to provide a convenient source book for use in writing briefs and other legal papers. In addition it is hoped that it will be helpful to lawyers and others in preparation of speeches and informal talks, and also it contains very interesting materials for just browsing.

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INTRODUCTION

Since 1886 approximately 4,200 volumes have been published reporting the legal opinions of the state appellate courts and the Federal courts. Each of these 4,200 volumes contains about 1,000 pages. This makes an incredible total of over 4,000,000 pages of reported cases handed down during the past 75 years, and these legal opinions deal with a myriad of problems which have arisen in the relationship of man to man and in man's relationship to his government. These pages record more than simply a recital of the facts and the announcement of a decision for one party or the other, and they are not merely partisan arguments setting forth one side of the issues in dispute. The legal opinions are debates of the conflicting considerations of fairness, practicability, morality, public policy, business or social ends, and philosophy which must be weighed in arriving at a just result.

The problem of the thousands of judges who wrote these opinions is especially hard because they are concerned not merely with disposition of the controversy at hand, but in making their decisions they are formulating rules of conduct to govern men in the future. Many great minds have spent millions of laborious, soul-searching hours in deciding these cases and in writing their opinions. Among these jurists have been some of the most outstanding intellects produced by our country—men of great intelligence, vast learning, broad vision, high moral standards, and keen insight into human nature and philosophy. In these legal opinions they have set forth many passages of great literary merit and valuable philosophical content. No more forceful writing can be found anywhere in literature, for instance, than in the quotations from the opinions of Justice Oliver Wendell Holmes.

Lawyers are constantly searching through these 4,200 volumes of legal opinions in their study and briefing of points of law, but laymen never have occasion to read them. Here is a book which attempts to pan out the many nuggets hidden in the opinions and present them in a convenient reference book so that they will be readily available to laymen and lawyers alike. These thoughts make wonderful reading on hundreds of vital subjects, and both literature and the law will be richer as a result of these "new discoveries."

The fruit of Paul Cook's skillful and scholarly ranging and digging into the writings and opinions of our greatest jurists is an understanding of the nature and purpose of law and the judicial process, truly "A Treasury of Legal Quotations."

Joe Ewing Estes
Chief Judge, U.S. District Court
Northern District of Texas

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ANONYMOUS

'Qui tam' for an assault; the defendant's character as a malicious, quarrelsome man was rejected. Per *Curiam:* The general character is not in issue. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause.

Thompson v. *Church,* 1 Root 312 (1791). Quoted in 1 Wigmore on *Evidence,* p. 287.

AUSTIN, JOHN

I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature.

1 Austin's *Jurisprudence,* p. 224.

BLACK, HUGO L.

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of

caveat emptor should not be relied upon to reward fraud and deception.

Opinion in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937).

The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions.

Opinion in *United States* v. *Jacobs*, 306 U.S. 363, 369 (1939).

Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution.

Dissenting opinion in *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188 (1940).

Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the United States Reports.

Dissenting opinion in *Feldman* v. *United States*, 322 U.S. 487, 499 (1944).

BRANDEIS, LOUIS D.

(Speaking of the nature of Workmen's Compensation Acts) In the effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation; even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, cooperative

methods must be pursued; some form of insurance—that is, some form of taxation.

Dissenting opinion in *New York Central Railroad Co.* v. *Winfield,* 244 U.S. 147, 164 (1917).

The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

Dissenting opinion in *International News Service* v. *The Associated Press,* 248 U.S. 215, 262 (1918).

Constitutional rights should not be frittered away by arguments so technical and unsubstantial. "The Constitution

deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."

> Dissenting opinion in *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U.S. 407, 431 (1921).

At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.

> Dissenting opinion in *Burdeau* v. *McDowell,* 256 U.S. 465, 477 (1921).

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is

the paramount public need is, necessarily, largely a matter of judgment.

> Dissenting opinion in *Truax* v. *Corrigan*, 257 U.S. 312, 356 (1921).

Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command.

> Dissenting opinion in *State of Washington* v. *W. C. Dawson & Company*, 264 U.S. 219, 238 (1924).

It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen.

> Dissenting opinion in *Jaybird Mining Company* v. *Weir*, 271 U.S. 609, 619 (1926).

It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different

statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken.

Dissenting opinion in *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 42 (1927).

In the case at bar, also, the logic of words should yield to the logic of realities.

Ibid., p. 43.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the

path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 375 (1927).

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928).

And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Ibid., p. 479.

The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible. Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon

experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the 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. To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Dissenting opinion in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 310 (1932).

Stare decisis is not, like the rule of *res judicata*, a univer-

sal, inexorable command. "The rule of *stare decisis,* though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Hertz* v. *Woodman,* 218 U.S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 405 (1932).

Strong, responsible unions are essential to industrial fair play. Without them the labor bargain is wholly one-sided. The parties to the labor contract must be nearly equal in strength if justice is to be worked out, and this means that the workers must be organized and that their organizations must be recognized by employers as a condition precedent to industrial peace.

The Curse of Bigness; Miscellaneous Papers of Louis D. Brandeis, p. 43.

Labor cannot on any terms surrender the right to strike.

In last resort, it is its sole effective means of protest. The old common law, which assures the employer the right to discharge and the employee the right to quit work, for any reason or for no reason in either case, is a necessary guaranty of industrial liberty.

Ibid., p. 43.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Ibid., p. 291.

. . . The question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration. Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can

only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Ibid., p. 292.

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.

Ibid., p. 308.

BROWN, HENRY B.

. . . In view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes, as they arise.

Opinion in *Holden* v. *Hardy*, 169 U.S. 366, 387 (1898).

CARDOZO, BENJAMIN N.

Consequences cannot alter statutes, but may help to fix their meaning.

Opinion in *In re Rouss*, 116 N.E. 782, 785 (1917).

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. . . . If that is so, there is a contract.

> Opinion in *Wood* v. *Lucy, Lady Duff-Gordon,* 118 N.E. 214 (1917).

Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. . . . We need not go into the question of the accuracy of the description. . . . The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. . . . The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice.

> Concurring opinion in *Imperator Realty Co., Inc.* v. *Tull,* 127 N.E. 263, 266 (1920).

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Opinion in *Meinhard* v. *Salmon,* 164 N.E. 545, 546 (1928).

The letters between plaintiff and defendant were from one merchant to another. They are to be read as business men would read them, and only as a last resort are to be thrown out altogether as meaningless futilities. . . . Read the privilege of change with inflexible adherence to its form, and one turns it into nonsense. If the change of price, to be valid, must be declared while revision is still pending, no change may be permitted after the revision is accomplished, which is the very time of all when a change will be essential. To read the reservation thus is to rob it of its efficacy as an implement to be used in furtherance of a business purpose. In the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted. The defendant like the plaintiff supposed that in signing these documents it was doing something understood to be

significant and serious. It not only accepted the plaintiff's order, but it asked the plaintiff to confirm the terms of the acceptance, and followed this with a cable of the order to its manufacturer abroad. Was it all sound and fury, signifying nothing? If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided.

Opinion in *Outlet Embroidery Co., Inc.* v. *Derwent Mills, Limited,* 172 N.E. 462, 463 (1930).

A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow.

Dissenting opinion in *Reed* v. *Allen,* 286 U.S. 191, 209 (1932).

It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Opinion in *Shepard* v. *United States,* 290 U.S. 96, 104 (1933).

Words after all are symbols, and the significance of the symbols varies with the knowledge and experience of the mind receiving them.

Opinion in *Cooper* v. *Dasher,* 290 U.S. 106, 109 (1933).

The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels.

Dissenting opinion in *Freuler* v. *Helvering,* 291 U.S. 35, 49 (1934).

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Opinion in *Snyder* v. *Massachusetts,* 291 U.S. 97, 114 (1934).

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also.

The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Ibid., p. 122.

Under these decisions, the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety. The Interstate Commerce Commission, probing the economic situation of the railroads of the country, consolidating them into systems, shaping in numberless ways their capacities and duties, and even making or unmaking the prosperity of great communities . . . is a conspicuous illustration.

Dissenting opinion in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440 (1935).

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. . . . Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will

be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief list or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Opinion in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. . . . Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that "the law is not indifferent to considerations of degree." . . . It cannot be indifferent to them without an expansion of the commerce clause that

would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie.

Separate opinion in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 327 (1936).

Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction.

Opinion in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324, 336 (1937).

Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels . . . must not lead us to leap to a conclusion that a word

which in one set of facts may stand for oppression or enormity is of like effect in every other.

> Opinion in *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937).

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dic-

tated by a study and appreciation of the meaning, the essential implications, of liberty itself.

Ibid., p. 325.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.

Ibid., p. 326.

The great generalities of the constitution have a content and a significance that vary from age to age.

The Nature of the Judicial Process, p. 17.

The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.

Ibid., p. 22.

I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition.

Ibid., p. 29.

A constructive trust is nothing but "the formula through which the conscience of equity finds expression." Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.

Ibid., p. 42.

In these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall

be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation.

Ibid., p. 60.

Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another.

Ibid., p. 87.

The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the flow of principle, to hold the standard aloft and visible to those who must run the race and keep the faith.

Ibid., p. 92.

We no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit. We read

covenants into them by implication when we find them "instinct with an obligation" imperfectly expressed.

Ibid., p. 100.

Evil stands the case when it is to be said of a judicial decree as the saying goes in the play of the 'Two Gentlemen of Verona' (Act I, sc. ii):

> 'I have no other but a woman's reason;
> I think him so, because I think him so.'

Ibid., p. 107.

. . . A judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief. Let us suppose, for illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times. This does not mean, however, that a judge is powerless to raise the level of prevailing conduct. In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to intrench themselves if not dislodged. Despite their temporary hold, they do not stand comparison with accepted norms of morals. Indolence or passivity has tolerated what the considerate judgment of the community condemns. In such cases, one of the highest functions of the

judge is to establish the true relation between conduct and profession. There are even times, to speak somewhat paradoxically, when nothing less than a subjective measure will satisfy objective standards.

Ibid., p. 108.

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

Ibid, p. 112.

In each system, hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision. But the truth is, as I have said, that even when there is ignorance of the rule, the cases are few in which ignorance has determined conduct. Most often the controversy arises about something that would have happened anyhow.

Ibid., p. 145.

There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.

Ibid., p. 150.

The law has shaped its judgments upon the fictitious assumption that a surety, who has probably lain awake at nights for fear that payment may some day be demanded, has in truth been smarting under the repressed desire to force an unwelcome payment on a reluctant or capricious creditor. The extended period has gone by; the surety has made no move, has not even troubled himself to inquire; yet he is held to be released on the theory that were it not for the extension, of which he knew nothing, and by which his conduct could not have been controlled, he would have come forward voluntarily with a tender of the debt. Such rules are survivals of the days when commercial dealings were sim-

pler, when surety companies were unknown, when sureties were commonly generous friends whose confidence had been abused, and when the main effort of the courts seems to have been to find some plausible excuse for letting them out of their engagements. Already I see some signs of a change of spirit in decisions of recent dates. I think we may well ask ourselves whether courts are not under a duty to go farther, and place this branch of the law upon a basis more consistent with the realities of business experience and the moralities of life.

Ibid., p. 153.

The genesis, the growth, the function, and the end of law —the terms seem general and abstract, too far dissevered from realities, raised too high above the ground, to interest the legal wayfarer. But believe me, it is not so. It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing ever in reserve as a court of ultimate appeal. Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there. If we

cannot escape the Furies, we shall do well to understand them.

The Growth of the Law, p. 25.

If you ask what degree of assurance must attach to a principle or a rule or a standard not yet embodied in a judgment before the name law may properly be affixed to it, I can only fall back upon a thought which I shall have occasion to develop farther, the thought that law, like other branches of social science, must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty. When there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law, though the judgment has not yet been rendered, and though, conceivably, when rendered, it may disappoint our expectation.

Ibid., p. 33.

Law is something more than a succession of isolated judgments which spend their force as law when they have composed the controversies that led to them. "The general body of doctrine and tradition" from which the judgments were derived, and "by which we criticize them" must be ranked as law also, not merely because it is the chief subject of our study, but because also the limits which it imposes upon a judge's liberty of choice are not purely advisory, but involve in greater or less degree an element of coercive power. At all events, if this is not law, some other word must be invented to describe it; and to it we shall then transfer the major portion of our interest. Judgments themselves have

importance for the student so far, and so far only, as they permit a reasonable prediction that like judgments will be rendered if like situations are repeated.

Ibid., p. 36.

We shall unite in viewing as law that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in the prediction is always present. When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain. Farther down is the vanishing point where law does not exist, and must be brought into being, if at all, by an act of free creation.

Ibid., p. 44.

Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. . . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. We should know, if thus informed, that magic words and incantations are as fatal to our science as they are to any other. Methods, when classified and sepa-

rated, acquire their true bearing and perspective as means to an end, not as ends in themselves. We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion.

Ibid., p. 66.

In the present state of our knowledge, the estimate of the comparative value of one social interest and another, when they come, two or more of them, into collision, will be shaped for the judge, as it is for the legislator, in accordance with an act of judgment in which many elements cooperate. It will be shaped by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice. The web is tangled and obscure, shot through with a multitude of shades and colors, the skeins irregular and broken. Many hues that seem to be simple, are found, when analyzed, to be a complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards, or even to describe them, have never wholly succeeded.

Ibid., p. 85.

When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared. He may not nullify or pervert a statute because convinced that an erroneous axiology is reflected in its terms. Even when the legislature has not spoken, he is to regulate

his estimate of values by objective rather than subjective standards, by the thought and will of the community rather than by his own idiosyncrasies of conduct and belief.

Ibid., p. 94.

The friends of constitutional government are prompt to repel encroachments upon liberty, yet liberty in the literal sense is desired only by the anarchists, with whom the friends of constitutional government would scorn to claim accord.

The Paradoxes of Legal Science, p. 6.

We are told at times that change must be the work of statute, and that the function of the judicial process is one of conservation merely. But this is historically untrue, and were it true, would be unfortunate. Violent breaks with the past must come, indeed, from legislation, but manifold are the occasions when advance or retrogression is within the competence of judges as their competence has been determined by practice and tradition.

Ibid., p. 7.

The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny. This had led, as you know, to the maxim of construction that statutes derogating from the common law are to be strictly construed, a maxim which recalls what has been said by Sir Frederick Pollock of rules of statutory construction generally: they cannot well be accounted for except on the theory that the legislature generally changes the

law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest possible bounds.

Ibid., p. 9.

If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant. So long as it is inconstant, and to the extent of such inconstancy, there can be no constancy in law. The kinetic forces are too strong for us. We may think the law is the same if we refuse to change the formulas. The identity is verbal only. The formula has no longer the same correspondence with reality. Translated into conduct, it means something other than it did. Law defines a relation not always between fixed points, but often, indeed oftenest, between points of varying position. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not.

Ibid., p. 10.

There is need to import some of this same conception of relativity into our conception of the development of law. We render judgment by establishing a relation between moving objects—moving at different speeds and in different directions. If we fix the relation between them upon the assumption that they are stationary, the result will often be to exaggerate the distance. True constancy consists in fitting our statement of the relation to the new position of the objects and the new interval between them.

Ibid., p. 11.

From these and kindred illustrations a working rule emerges. In default of a better name, I may style it the principle of relativity in the adaptation of the law to conduct. When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them, then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective, without legislation, but by the inherent energies of the judicial process, to restore the equilibrium.

Ibid., p. 14.

Manners and customs (if we may not label them as law itself) are at least a source of law. The judge, so far as freedom of choice is given to him, tends to a result that attaches legal obligation to the folkways, the norms or standards of behavior exemplified in the life about him.

Ibid., p. 15.

Our course of advance, therefore is neither a straight line nor a curve. It is a series of dots and dashes.

Ibid., p. 26.

What has once been settled by a precedent will not be unsettled over night, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pro-

nouncement. On the other hand, conformity is not to be turned into a fetich. The disparity between precedent and ethos may so lengthen with the years that only covin and chicanery would be disappointed if the separation were to end.

Ibid., p. 29.

There are certain forms of conduct which at any given place and epoch are commonly accepted under the combined influence of reason, practice and tradition, as moral or immoral. If we were asked to define the precise quality that leads them to be so characterized, we might find it troublesome to make answer, yet the same difficulty is found in defining other abstract qualities, even those the most familiar. The forms of conduct thus discriminated are not the same at all times or in all places. Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate. In saying this, we are not to blind ourselves to the truth that uncertainty is far from banished. Morality is not merely different in different communities. Its level is not the same for all the component groups within the same community. A choice must still be made between one group standard and another. We have still to face the problem, at which one of these levels does the social pressure become strong enough to convert the moral norm into a jural one? All that we can say is that the line will be higher than the lowest level of moral principle and practice, and lower than the highest. The law will not hold the crowd to the morality of saints and seers. It will follow, or strive to follow, the principle and practice of the men and women of

the community whom the social mind would rank as intelligent and virtuous.

Ibid., p. 36.

A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic. For the most part we should deal with them as provisional hypotheses to be reformulated and restrained when they have an outcome in oppression or injustice.

Ibid., p. 61.

We see then why so much of the discussion of proximate cause in case and in commentary is mystifying and futile. There is a striving to give absolute validity to doctrines that must be conceived and stated in terms of relativity. No doubt, the tests propounded have value and significance. The difficulty in applying them, however, has its origin in the failure to remember that they are in truth, not tests, but clews. They help to guide the judgment in laying emphasis upon one cause or another among the many that are secreted in the tangles of the web.

Ibid., p. 85.

Liberty as a legal concept contains an underlying paradox. Liberty in the most literal sense is the negation of law, for law is restraint, and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would

leave liberty the exclusive possession of the strong or the unscrupulous.

Ibid., p. 94.

In delimiting the field of liberty, courts have professed for the most part to go about their work empirically and have rather prided themselves on doing so. They have said, we will not define due process of law. We will leave it to be "pricked out" by a process of inclusion and exclusion in individual cases. That was to play safely, and very likely at the beginning to play wisely. The question is how long we are to be satisfied with a series of *ad hoc* conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches. I do not suggest that political or social science has formulated a conception of liberty so precise and accurate that, applied as a touchstone by the courts, it will mechanically disclose the truth. I do suggest and believe that empirical solutions will be saner and sounder if in the background of the empiricism there is the study and the knowledge of what men have thought and written in the anxious search and groping for a co-ordinating principle.

Ibid., p. 96.

The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end. (speaking of statutes)

Ibid., p. 125.

The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.

Ibid., p. 129.

Many an appeal to freedom is the masquerade of privilege or inequality seeking to intrench itself behind the catchword of a principle. There must be give and take at many points, allowance must be made for the play of the machine, or in the clash of jarring rivalries the pretending absolutes will destroy themselves and ordered freedom too. Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action. There is to be no compromise here, for thought freely communicated, if I may borrow my own words, is the indispensable condition of intelligent experimentation, the one test of its validity. There is no freedom without choice, and there is no choice without knowledge—or none that is not illusory. Here are goods to be conserved, however great the seeming sacrifice. We may not squander the thought that will be the inheritance of the ages.

Mr. Justice Holmes, 44 Harvard Law Review 682, 687 (1931).

The judicial process is one of compromise, a compromise between paradoxes, between certainty and uncertainty, between the literalism that is the exaltation of the written word and the nihilism that is destructive of regularity and order.

Selected Writings of Benjamin Nathan Cardozo, p. 25.

In condemning or in extolling the ideals of certainty and order and coherence, it is important to fix their meaning. Not a little confusion of thought and speech has grown out of the failure to heed this admonition. There is such a thing as certainty and order and coherence from the standpoint of the lawyer, and such a thing as certainty and order and coherence from the standpoint of the layman. Often we confuse the two. If a choice is necessary between them, we may find it wise to prefer the kind known to the layman, for it is his conduct that is to be regulated, it is from him, not from the lawyer, for the most part, that conformity is due. If the law as declared in a judgment is made to accord with established custom or with the plain and unquestioned dictates of morality it will seldom fail that certainty is promoted, not hindered, though lawyers may espy a flaw in the symmetry of the legal sphere, a break in the *elegantia juris* so precious to their hearts. The layman cares little about *elegantia* and has never had occasion to make a survey of the legal sphere. What is important for him is that the law be made to conform to his reasonable expectations, and this it will seldom do if its precepts are in glaring opposition to the *mores* of the times. Genuine certainty will very often be better attained, the ideal of the legal order more fully realized, by causing these expectations to prevail, than by developing the formula of an ancient dictum to the limit of its logic. Once more it is a question of degree, a matter of more or less, an adjustment of the weights and a reading of the scales.

Ibid., p. 28.

Jurisprudence must accept something of this provisional quality for the deliverances of her judges, or avow her own

failure to establish a due co-ordination between the precepts of the law and those of expediency and justice. No doubt the provisional element will be diminished by the necessity of avoiding retrospective changes that would frustrate the reasonable expectations of well-intentioned men. One of the most obvious exactions of the very expediency and justice which are the final ends of law is that expectations so conceived shall not be thwarted and disappointed with hardship to the innocent. The necessity for such adjustments will sometimes call for the continuance of an existing rule of law after its intrinsic error or inconvenience has declared itself in practice. Even so, the times are many when the declaration of a new rule, the announcement of a new doctrine, will work no disappointment to any one who has shaped his conduct by it, or if disappointment, perhaps, to some, yet only to those who are using it as a weapon of deceit or malice. In such conditions, we need not trouble ourselves if the retroactive declaration makes the weapon ineffective. My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty.

Ibid., p. 34.

Was there ever such a profession as ours, anyhow? We speak of ourselves as practicing law, as teaching it, as deciding it; and not one of us can say what law means. Start a discussion as to its meaning, try to tell how it is born, whence it comes, out of what we manufacture it, and before the dispute is fairly under way, the vociferous disputants will be springing at each other's throats. Their inability

to agree about the basic implications of their calling has in it elements of comedy when at the end of the dispute they are seen to be peacefully engaged in the manufacture of the finished products—out of what, they cannot tell you, and by a formula they cannot state.

Ibid., p. 43.

CLARK, WALTER

There is no superstitious sanctity attaching to a precedent. . . . Courts can only maintain their authority by correcting their errors to accord with justice and the advance and progress of each age.

Dissenting opinion in *State* v. *Falkner*, 108 S.E. 756, 763 (1921).

COHEN, MORRIS R.

The notion that a jurist can dispense with any consideration as to what the law ought to be arises from the fiction that the law is a complete and closed system, and that judges and jurists are mere automata to record its will or phonographs to pronounce its provisions.

Positivism and the Limits of Idealism in the Law, 27 Columbia Law Review 237, 238.

COOK, WALTER W.

The theory that the equity law does not conflict with or override the common law was a sugar-coating which the chancellors gave the bitter pill, which they were administer-

ing to the common law courts in the days when they were struggling for supremacy.

The Utility of Jurisprudence in the Solution of Legal Problems, 5 Lectures on Legal Topics 335, 358 (1924).

DICKINSON, EDWIN D.

Almost every legal concept or principle is found to be but the terminal of a scale which shades at its opposite extremity into another of exactly contrary tendency, and the line between the two oscillates from specific case to case according to the context. Thus the law of nuisance plays between the principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that every man is bound to use his property in such a manner as not to injure the property of his neighbor.

Administrative Justice and the Supremacy of Law in the United States, p. 135.

FRANK, JEROME

Each week the courts decide hundreds of cases which purport to turn not on disputed "questions of fact" but solely on "points of law." If the law is unambiguous and predictable, what excuses can be made by the lawyers who lose these cases? They should know in advance of the decisions that the rules of law are adverse to their contentions. Why, then, are these suits brought or defended? In some few instances, doubtless, because of ignorance or cupidity or an effort to procure delay, or because a stubbornly litigious client insists. But in many cases, honest and intelligent coun-

sel on both sides of such controversies can conscientiously advise their respective clients to engage in the contest; they can do so because, prior to the decision, the law is sufficiently in doubt to justify such advice.

Law and the Modern Mind, p. 8.

Which is to say that the factor of uncertainty in law has little bearing on practical affairs. Many men go on about their business with virtually no knowledge of, or attention paid to, the so-called legal rules, be those rules certain or uncertain. If the law but slightly affects what a man does, it is seldom that he can honestly maintain that he was disadvantaged by lack of legal stability.

Ibid., p. 35.

And yet most of the profession insists that the judiciary cannot properly change the law, and more or less believes that myth. When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves. And this self-delusion has led to many unfortunate results. With their thinking processes hampered by this myth, the judges have been forced, as we have seen, to contrive circumlocutions in order to conceal from themselves and the laity the fact that the judiciary frequently changes the old legal rules. Those evasive phrases are then dealt with as if they were honest phrases, with consequent confusion and befuddlement of thought. Legal fictions are mistaken for objective legal truths and clear legal thinking becomes an unnecessarily arduous task.

Ibid., p. 37.

The weakness of the use of formal logic is now exposed. The court can decide one way or the other and in either case can make its reasoning appear equally flawless. Formal logic is what its name indicates; it deals with form and not with substance. The syllogism will not supply either the major premise or the minor premise. The "joker" is to be found in the selection of these premises. In the great run of cases which come before the courts, the selection of principles, and the determination of whether the facts are to be stated in terms of one or another minor premise, are the chief tasks to be performed. These are difficult tasks, full of hazards and uncertainties, but the hazards and uncertainties are ordinarily concealed by the glib use of formal logic.

Ibid., p. 66.

The law is not a machine and the judges not machine-tenders. There never was and there never will be a body of fixed and predetermined rules alike for all. The acts of human beings are not identical mathematical entities; the individual cannot be eliminated as, in algebraic equations, equal quantities on the two sides can be cancelled. Life rebels against all efforts at legal over-simplification. New cases ever continue to present novel aspects. To do justice, to make any legal system acceptable to society, the abstract preestablished rules have to be adapted and adjusted, the static formulas made alive.

Ibid., p. 120.

But it is surely mistaken to deem law merely the equivalent of rules and principles. The lawyer who is not moder-

ately alive to the fact of the limited part that rules play is of little service to his clients. The judge who does not learn how to manipulate these abstractions will become like that physician, described by Mill, "who preferred that patients should die by rule rather than live contrary to it." The number of cases which should be disposed of by routine application of rules is limited. To apply rules mechanically usually signifies laziness, or callousness to the peculiar factors presented by the controversy. Viewed from any angle, the rules and principles do not constitute law. They may be aids to the judge in tentatively testing or formulating conclusions; they may be positive factors in bending his mind towards wise or unwise solutions of the problem before him. They may be the formal clothes in which he dresses up his thoughts. But they do not and cannot completely control his mental operations and it is therefore unfortunate that either he or the lawyers interested in his decision should accept them as the full equivalent of that decision. If the judge so believes, his thinking will be the less effective. If the lawyers so believe, their opinions on questions of law (their guesses as to future decisions) will be unnecessarily inaccurate.

Ibid., p. 131.

The attempt to cut down the discretion of the judge, if it were successful, would remove the very creativeness which is the life of the law. For try as men will to avoid it, judging involves discretion and individualization. The judge, in determining what is the law of the case, must choose and select, and it is virtually impossible to delimit the range of his choice and selection. But many have feared that discre-

tionary element in justice, and even when they come to see that it is unavoidable, treat it as something to be deplored and not altogether *comme il faut.*

Ibid., p. 138.

Every lawyer of experience comes to know (more or less unconsciously) that in the great majority of cases, the precedents are none too good as bases of prediction. Somehow or other, there are plenty of precedents to go around. A recent writer, a believer in the use of precedents, has said proudly that "it is very seldom indeed that a judge cannot find guidance of some kind, direct or indirect, in the mass of our reported decisions—by this time a huge accumulation of facts as well as rules." In plain English, as S. S. Gregory or Judge Hutcheson would have put it, a court can usually find earlier decisions which can be made to appear to justify almost any conclusion.

Ibid., p. 152.

Perhaps one of the worst aspects of rule-fetichism and veneration for what judges have done in the past is that the judges, in writing their opinions, are constrained to think of themselves altogether too much as if they were addressing posterity. Swayed by the belief that their opinions will serve as precedents and will therefore bind the thought processes of judges in cases which may thereafter arise, they feel obliged to consider excessively not only what has previously been said by other judges but also the future effect of those generalizations which they themselves set forth as explanations of their own decisions. When publishing the rules

which are supposed to be the core of their decisions, they thus feel obligated to look too far both backwards and forwards. Many a judge, when unable to find old word-patterns which will fit his conclusions, is overcautious about announcing a so-called new rule for fear that, although the new rule may lead to a just conclusion in the case before him, it may lead to undesirable results in the future—that is, in cases not then before the court. Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law." Such injustice is particularly tragic because it is based on a hope doomed to futility, a hope of controlling the future. Of course, present problems will be clarified by reference to future ends; but ends, although they have a future bearing, must obtain their significance in present consequences, otherwise those ends lose their significance. For it is the nature of the future that it never arrives. If all decisions are to be determined with reference to a time to come, then the law is indeed chasing a will-o'-wisp. "Yesterday today was tomorrow." To give too much attention to the future is to ignore the problem which is demanding solution today. Any future, when it becomes the present, is sure to bring new complicat-

ing and individualized problems. "Future problems" can never be solved.

Ibid., p. 153.

To the somnambulist, sleep-walking may seem more pleasant and less hazardous than wakeful walking, but the latter is the wiser mode of locomotion in the congested traffic of a modern community. It is about time to abandon judicial somnambulism.

Ibid., p. 159.

But what, with unfortunately few exceptions, judges have failed to see is that, *in a sense, all legal rules, principles, precepts, concepts, standards—all generalized statements of law —are fictions.* In their application to any precise state of facts they must be taken with a lively sense of their unexpressed qualifications, of their purely "operational" character. Used without awareness of their artificial character they become harmful dogmas. They can be immensely useful and entirely harmless if used with complete recognition that they are but psychological pulleys, psychical levers, mental bridges or ladders, means of orientation, modes of reflection, "As-Ifs," convenient hypostatisations, provisional formulations, signposts, guides.

Ibid., p. 167.

What the law ought to be constitutes, rightfully, no small part of the thinking of lawyers and judges. Such thinking should not be diminished, but augmented. For the most part

it has been unconscious; it should, as Holmes has said, be made more largely conscious.

Ibid., p. 168.

The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability. A wise lawyer will hesitate to guarantee, although he may venture to surmise, what decision will be rendered in a case heard and decided by a judge alone. Only a very foolish lawyer will dare guess the outcome of a jury trial.

Ibid., p. 172.

What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge's charge. Do not those unintelligible words uttered by the judge in the presence of the jury resemble the talismanic words of Word-Magic? Since the twelve men in the box do not comprehend what the man on the bench is telling them to do, what he is telling them must be assumed to be self-efficacious, capable of working automatically by "transform-

ing the suggested idea into accomplished fact by means of the suggestion itself." Such an assumption smacks of child-magic, which hopefully employs formulas and key-words to conquer the environment without substantial effort. Of course, the belief in the magic efficacy of the judge's words is at most only half-hearted. What has happened is that the judge's instructions have become part of an elaborate ceremonial routine. Once, in simpler times, there was perhaps a thorough belief that what the judge said about the law had marked effect on the jury. But today, although that belief has atrophied, the elaborate ceremony continues, just as, we hear, religious or magical rites, once performed with entire conviction as to their power, often degenerate into formalism until "right" or "wrong" come to mean merely the exact execution or neglect of all the details of a prescribed ritual. So the judicially intoned formulas are now like debased or devitalized magic incantations, which "depend for their efficacy on being uttered rather than on being heard."

Ibid., p. 181.

Increasing constructive doubt is the sign of advancing civilization. We must put question marks alongside many of our inherited legal dogmas, since they are dangerously out of line with social facts.

Ibid., p. 245.

FRANKFURTER, FELIX

But if experience is any guide, the present decision will give momentum to kindred litigation and reliance upon it

beyond the scope of the special facts of this case. To be sure, the Court's opinion endeavors to circumscribe carefully the bounds of jurisdiction now exercised. But legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate difficulties which I have not been able to overcome and potential abuses to which the doctrine is not unlikely to give rise.

Separate opinion in *Texas* v. *Florida,* 306 U.S. 398, 434 (1939).

The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society.

Concurring opinion in *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 487 (1939).

The judicial history of this doctrine of immunity is a striking illustration of an 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 un-

avoidable 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 of constitutionality is the Constitution itself and not what we have said about it.

Ibid., p. 491.

And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

Opinion in *Palmer* v. *Massachusetts,* 308 U.S. 79, 83 (1939).

The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to

the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

Opinion in *Helvering* v. *Hallock*, 309 U.S. 106, 118 (1940).

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Ibid., p. 119.

Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Ibid., p. 121.

To be effective, judicial administration must not be leaden-footed.

Opinion in *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor.

Opinion in *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362, 369 (1940).

Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power

because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one.

Opinion in *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Opinion in *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.

Opinion in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 185 (1941).

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.

Ibid., p. 198.

The intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction. To illumine these dark places in legislative composition all the sources of light must be drawn upon. But the various aids to construction are guides of experience, not technical rules of law. . . . One of the sources which may be used for extracting meaning from legislation is the deliberative commentary of the legislators immediately in charge of a measure. Contemporary answers by those authorized to give answers to questions raised about the meaning of pending legislation obviously go a long way to elucidating doubtful legislative purpose. But this rule of good sense does not mean that every loose phrase, even of the proponent of a measure, is to be given the authority of an encyclical. The language of a chairman of a committee, like the language of all people, is merely a symbol of thought. A speaker's casual, isolated general observation should not be tortured into an expression of disregard for an established, far-reaching policy of the law.

Dissenting opinion in *Baltimore & Ohio Railroad Co.* v. *Kepner,* 314, U.S. 44, 59 (1941).

As is true of many problems in the law, the answer is to

be found not in legal learning but in the realities of the record.

Opinion in *Indianapolis* v. *Chase National Bank, Trustee,* 314 U.S. 63, 69 (1941).

Litigation is the pursuit of practical ends, not a game of chess.

Ibid., p. 69.

In law, as in life, lines have to be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines.

Dissenting opinion in *Pearce* v. *Commissioner of Internal Revenue,* 315 U.S. 543, 558 (1942).

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions.

Opinion in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4, 11 (1942).

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes

it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

Concurring opinion in *Tiller, Executor* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 68 (1943).

Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.

Dissenting opinion in *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, 319 U.S. 239, 248 (1943).

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legis-

lators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied. In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation. In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially

nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders. The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia. Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations

enjoin is not an abdication of the judicial function. It is a due observance of its limits.

Dissenting opinion in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 665 (1943).

In taxing "property passing under a general power of appointment exercised . . . by will," Congress did not deal with recondite niceties of property law nor incorporate a crazy-quilt of local formalisms or historic survivals.

Opinion in *Estate of Rogers* v. *Commissioner of Internal Revenue,* 320 U.S. 410, 414 (1943).

It will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in *Smyth* v. *Ames,* 169 U.S. 466, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant.

Dissenting opinion in *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 627 (1944).

Here we are concerned with the requirement of "due process of law" in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past

but a standard for judgment in the progressive evolution of the institutions of a free society.

Separate opinion in *Malinski* v. *New York*, 324 U.S. 401, 414 (1945).

Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.

Dissenting opinion in *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U.S. 573, 580 (1946).

The course of decision in this Court has thus far jealously enforced the principle of a free society secured by the prohibition of unreasonable searches and seizures. Its safeguards are not to be worn away by a process of devitalizing interpretation. The approval given today to what was done by arresting officers in this case indicates that we are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

Dissenting opinion in *Davis* v. *United States*, 328 U.S. 582, 597 (1946).

Slight extensions from case to case gradually attain a considerable momentum from "judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Ibid., p. 610.

If I begin with some general observations, it is not because I am unmindful of Mr. Justice Holmes' caution that "General propositions do not decide concrete cases." *Lochner* v. *New York*, 198 U.S. 45, 76. Whether they do or not often depends on the strength of the conviction with which such "general propositions" are held. A principle may be accepted "in principle," but the impact of an immediate situation may lead to deviation from the principle. Or, while accepted "in principle," a competing principle may seem more important. Both these considerations have doubtless influenced the application of the search and seizure provisions of the Bill of Rights.

Dissenting opinion in *Harris* v. *United States*, 331 U.S. 145, 157 (1947).

It is true of opinions as of other compositions that those who are steeped in them, whose ears are sensitive to literary nuances, whose antennae record subtle silences, can gather from their contents meaning beyond the words.

"The Administrative Side" of Chief Justice Hughes, 63 Harvard Law Review 1, 2 (1949).

By the very nature of the functions of the Supreme Court, each member of it is subject only to his own sense of the trusteeship of what are perhaps the most revered traditions in our national system.

Ibid., p. 4.

GRAY, JOHN CHIPMAN

Practically in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or buys a piece of land, or engages in any other transactions, he has the vaguest possible idea of the law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the legal consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist.

The Nature and Sources of Law, Section 225.

A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's

duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present.

Ibid., Section 370.

In law, however, the evil of lax definitions, though real, has not been without compensation. Men are very ready to accept new ideas, provided they bear old names; and the indefiniteness of many legal terms has been the cover under which improvements have been worked insensibly into the law,—improvements which would have been made more slowly, if at all, had the terms borne a more rigid meaning. If the words "contract," "consideration," "tort," "trust" had been defined by Statute four hundred years ago, a serious obstacle would have been put in the way of legal development. As knowledge grows in any department, the classification in that department changes; and with a change in classification is involved a change in the meaning of terms. So long as the object of knowledge is alive, there can be no final definitions; and it is the truth of this which furnishes so strong an argument against schemes of codification. But although it be true that classification must and ought to change as the law grows, and an official attempt to fix it is pernicious, it by no means follows that it should not be unofficially investigated. If we are moving in the right direction, there is a constant possibility of improvement in stat-

ing and arranging the law; and although we recognize, in all humility, that any statement and arrangement will some time be superseded, it is a step for further advance to see what has been won from chaos already.

Some Definitions and Questions in Jurisprudence, 6 Harvard Law Review 21 (1893).

"The law" or "the laws" of a society are the rules in accordance with which the courts of that society determine cases, and which, therefore, are rules by which members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them "the law," is the fact that the courts do act upon them. It is not that they are more likely to be obeyed than other rules. I am much more likely to drive over a country bridge at a gait faster than a walk than I am to wear a nose-ring, although the former is against the law, while the latter is not. It is not that they relate to more important matters. To take Macaulay's instance, it is against the law for an apple-woman to stop up the street with her cart; it is not against the law for a miser to allow the benefactor to whom he owes his whole success to die in the poorhouse. Acts are against the law or not against the law in any case because the courts will or will not enforce the rules of conduct with which such acts conflict. It may be said that "the law" comprises the rules of conduct which are authorized or enforced by the State whether through the courts of law or not. Thus it is the law that I can shoot a burglar who is breaking into my house, or can call upon a policeman for aid against a robber. But the limits of this right to self-help and to aid from the executive officers of the State are defined

by the courts; and the courts, by preventing any one taking action against me for the shooting of the burglar or the arrest of the robber, are the authorities through which the State ultimately enforces all rules of conduct which it does enforce. The power, then, of a man to have the aid of the courts in carrying out his wishes on any subject constitutes a legal right of that man, and the sum of such powers constitutes his legal rights.

Ibid., p. 24.

Jurisprudence, then, is the science which deals with the principles on which courts ought to decide cases. The deontological element has often been excluded from the definition of jurisprudence; it has been declared that jurisprudence is not like ethics, the science of what ought to be, but simply the science of what is. . . . But this is not the meaning commonly attributed to the word, nor does there seem any reason for excluding the element of what ought to be; for by excluding that element, we exclude the whole future of the science, and shut it up to a dry enumeration of past achievements. To do so is like confining chemistry to the elements and compounds already known, and saying to an investigator who is in search of some new combination that he is stepping outside the limits of the science.

Ibid., p. 27.

A court generally decides in accordance with custom, because a community generally thinks its customs right, and a judge shares the moral sentiments and prejudices of the community in which he lives: the custom and the judge's

ethical creed are usually identical; but which of the two is the real source of the law is shown in the cases where they differ. Where the custom is one way and the judge's judgment of what is moral is another way, the judge follows the latter, and disregards the custom. He would not so disregard a precedent, still less a Statute. Judges constantly are following Statutes and precedents which they consider pernicious; but has it ever been heard that a judge declared a custom to be without precedent in the courts and pernicious, and yet followed it? On the contrary, judges constantly refuse to follow customs which they deem unreasonable, *a fortiori* customs which they deem immoral; that is, they set their judgment of whether a practice is reasonable and moral higher than the mere fact of the practice as a source of law.

Ibid., p. 31.

HALSBURY, LORD

A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Opinion in *Quinn* v. *Leathem*, 1901, A.C. 495, 506.

HAND, LEARNED

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him,

appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

Opinion in *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203 (1926).

Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.

Opinion in *Helvering* v. *Gregory*, 69 F. (2d) 809, 810 (1934).

When the very merits of the case are clear; when only one result can honestly emerge; and when the jury has in fact been satisfied, we no longer look upon criminal procedure as a sacred ritual, no part of which can be omitted without breaking the charm. Trial by jury is a rough scales at best; the beam ought not to tip for motes and straws.

Opinion in *United States* v. *Brown*, 79 F. (2d) 321, 326 (1935).

We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution.

Opinion in *United States* v. *Kaplan*, 89 F. (2d) 869, 871 (1937).

The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretation teaches, if it teaches anything. At times one is more likely to reach the truth by an unanalyzed and intuitive conclusion from the text as a whole, than by following, step by step, the accredited guides.

Opinion in *Van Vranken* v. *Helvering*, 115 F. (2d) 709, 711 (1940).

No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trades-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech," like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

Opinion in *National Labor Relations Board* v. *Federbush Co., Inc.*, 121 F. (2d) 954, 957 (1941).

Compunctions about judicial legislation are right enough as long as we have any genuine doubt as to the breadth of the legislature's intent; and no doubt the most important single factor in ascertaining its intent is the words it employs. But the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.

> Dissenting opinion in *Commissioner of Internal Revenue* v. *Ickelheimer,* 132 F. (2d) 660, 662 (1943).

There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.

> Opinion in *Federal Deposit Ins. Corporation* v. *Tremaine,* 133 F. (2d) 827, 830 (1943).

There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and,

although their words are by far the most decisive evidence of what they would have done, they are by no means final.

> Concurring opinion in *Guiseppi* v. *Walling*, 144 F. (2d) 608, 624 (1944).

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

> Opinion in *Cabell* v. *Markham*, 148 F. (2d) 737, 739 (1945).

And yet I dare say that an ingenious actuary might find upon irrefragable computation that in general loss of time, misprision of judges, consequent appeals, discouragement of suitors and the like, the annual loss to our country through bad pleadings equalled the cost of four new battleships, or a complete refashioning of primary education.

> *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Lectures on Legal Topics 87, 94 (1921).

I am by no means enamored of jury trials, at least in civil cases, but it is certainly inconsistent to trust them so reverently as we do, and still to surround them with restrictions

which if they have any rational validity whatever, depend upon distrust.

Ibid., p. 101.

The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.

Review of Judge Cardozo's *The Nature of the Judicial Process*, 35 Harvard Law Review 481 (1922); reprinted in *Jurisprudence in Action*, p. 235.

No quantitative valuation of these elements is possible; the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance. There are no *vade mecums*

to this or any other art. It is in the end a question of more or less, and the judicial function lies in the interstices of the social tissues.

Ibid., p. 236.

Of the contrivances which mankind has devised to lift itself from savagery there are few to compare with the habit of assent, not to a factitious common will, but to the law as it is. We need not go so far as Hobbes, though we should do well to remember the bitter experience which made him so docile. Yet we can say with him that the state of nature is "short, brutish and nasty," and that it chiefly differs from civilized society in that the will of each is by habit and training tuned to accept some public, fixed and ascertainable standard of reference by which conduct can be judged and to which in the main it will conform.

Is There a Common Will?, 28 Michigan Law Review 46, 52 (1929); reprinted in *The Spirit of Liberty*, p. 55.

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by par-

ish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

> *Sources of Tolerance*, 79 University of Pennsylvania Law Review 1, 12 (1930); reprinted in *The Spirit of Liberty*, p. 81.

Man may be a little lower than the angels, but he has not yet shaken off the brute. His passions, his thinking, his body carry their origins with them; and he fails, if he vainglori-ously denies them. His path is strewn with carnage, the murderer lurks always not far beneath, to break out from time to time, peace resolutions to the contrary notwithstanding. What he has gained has been with immeasurable waste; what he shall gain will be with immeasurably more. Trial and error is the confession, not indeed of an impotent, but of a wayward, creature, blundering about in worlds not realized. But the Absolute is mute; no tables come from Sinai to guide him; the brazen sky gives no answer to his prayers. He must grope his way through the murk, as his remote forerunners groped, in the dank, hot world in which they moved. Look where he will, there are no immutable laws to which he can turn; no, not even that in selfless abnegation he must give up what he craves, for life is self-assertion. Conflict is normal; we reach accommodations as wisdom may teach us that it does not pay to fight. And wisdom may; for wisdom comes as false assurance goes—false assurance, that grows from pride in our powers and ignorance of our igno-

rance. Beware then of the heathen gods; have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly scepticism and an open soul. Nor be cast down; for it is always dawn. Day breaks forever, and above the eastern horizon the sun is now about to peep. Full light of day? No, perhaps not ever. But yet it grows lighter, and the paths that were so blind will, if one watches sharply enough, become hourly plainer. We shall learn to walk straighter. Yes, it is always dawn.

> *Democracy: Its Presumptions and Realities,* 1 Federal Bar Association Journal, No. 2, p. 40, 45 (1932); reprinted in *The Spirit of Liberty,* p. 101.

Law does not mean then whatever people usually do, or even what they think to be right. Certainly it does not mean what only the most enlightened individuals usually do or think right. It is the conduct which the government, whether it is a king, or a popular assembly, will compel individuals to conform to, or to which it will at least provide forcible means to secure conformity. If this is true, there must be some way to learn what is this conduct. The law is the command of the government, and it must be ascertainable in some form if it is to be enforced at all.

> *How Far Is a Judge Free in Rendering a Decision?* (radio address delivered May 14, 1933); reprinted in *The Spirit of Liberty,* p. 104.

But an independent judiciary is an inescapable corollary of "enacted law" in the sense I am using it. Such laws do not indeed represent permanent principles of jurisprudence—as-

suming that there are any such—but they can be relatively stable; and, provided that the opportunity always exists to supplant them when there is a new shift in political power, it is of critical consequence that they should be loyally enforced until they are amended by the same process which made them. That is the presupposition upon which the compromises were originally accepted; to disturb them by surreptitious, irresponsible and anonymous intervention imperils the possibility of any future settlements and pro tanto upsets the whole system. Such laws need but one canon of interpretation, to understand what the real accord was. The duty of ascertaining its meaning is difficult enough at best, and one certain way of missing it is by reading it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face. Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.

> *The Contribution of an Independent Judiciary to Civilization* (address delivered November 21, 1942); reprinted in *The Spirit of Liberty*, p. 173.

You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save;

that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual.

Ibid., p. 181.

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow. What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not

even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

The Spirit of Liberty (address delivered May 21, 1944); reprinted in *The Spirit of Liberty*, p. 189.

Our opinions are at best provisional hypotheses. The more they are tested, after the tests are well scrutinized, the more assurance we may assume; but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own.

Quoted in *Judge Learned Hand and the Interpretation of Statutes*, 60 Harvard Law Review 370, 393 (1947).

HOBHOUSE, LEONARD T.

If liberty is a social conception, there can be no liberty without social restraint. For any one person, indeed, there might be a maximum of liberty if all social restraints were removed. Where physical strength alone prevails the strongest man has unlimited liberty to do what he likes with the weaker; but clearly the greater the freedom of the strong man, the less the freedom of the weaker. What we mean by liberty as a social conception is a right to be shared by all members of society, and very little consideration suffices to show that, in the absence of restraints enforced on or accepted by all members of a society, the liberty of some must

involve the oppression of others. . . . Excess of liberty contradicts itself. In short there is no such thing; there is only liberty for one and restraint for another.

Social Evolution and Political Theory, p. 189.

HOLDSWORTH, W. S.

Practical convenience rather than theoretical considerations have, from the days of the Year Books onward, determined what activities are possible, and what are impossible to a corporation.

9 *History of English Law*, p. 51.

HOLMES, OLIVER WENDELL

While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.

Opinion in *Otis* v. *Parker*, 187 U.S. 606, 608 (1903).

When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

Opinion in *Blackstone* v. *Miller*, 188 U.S. 189, 206 (1903).

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Dissenting opinion in *Northern Securities Company* v. *United States*, 193 U.S. 197, 400 (1904).

Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently —and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

Ibid., p. 401.

There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in

degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination.

Opinion in *Missouri, Kansas and Texas Railway Company* v. *May,* 194 U.S. 267, 269 (1904).

Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and 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.

Ibid., p. 270.

Constitutions are intended to preserve practical and substantial rights, not to maintain theories.

Opinion in *Davis* v. *Mills,* 194 U.S. 451, 457 (1904).

No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

Opinion in *Aikens* v. *Wisconsin,* 195 U.S. 194, 206 (1904).

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to

study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.

Dissenting opinion in *Lochner* v. *New York*, 198 U.S. 45, 75 (1905).

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Ibid., p. 75.

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is

held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Ibid., p. 75.

But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain.

Opinion in *Board of Trade of the City of Chicago* v. *Christie Grain and Stock Company*, 198 U.S. 236, 247 (1905).

Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights.

Dissenting opinion in *Haddock* v. *Haddock*, 201 U.S. 562, 630 (1906).

But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished. I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply be-

cause it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis.

Ibid., p. 631.

The trust is not a metaphysical entity or a Prince Rupert's drop which flies to pieces if broken in any part. It is a provision to benefit descendants and a niece. There is no general principle by which the benefits must stand or fall together.

Opinion in *Landram* v. *Jordan*, 203 U.S. 56, 63 (1906).

As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied.

Opinion in *Guy* v. *Donald*, 203 U.S. 399, 406 (1906).

But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.

Opinion in *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 598 (1907).

Constitutional rights like others are matters of degree.

Opinion in *Martin* v. *District of Columbia,* 205 U.S. 135, 139 (1907).

As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.

Opinion in *Ellis* v. *United States,* 206 U.S. 246, 260 (1907).

Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation.

Opinion in *Interstate Railway Co.* v. *Massachusetts,* 207 U.S. 79, 86 (1907).

It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

Ibid., p. 88.

But to generalize is to omit. . . .

Opinion in *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908).

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.

Opinion in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908).

The Government argues that the schedules are not pleadings, discovery or evidence, and that therefore the section does not apply; but we are not satisfied that the fagot can be taken to pieces and broken stick by stick in this manner so easily. We quite agree that vague arguments as to the spirit of a constitution or statute have little worth. We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. A statute may indicate or require as its justification a change in the policy of the law,

although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

> Opinion on circuit in *Johnson* v. *United States,* 163 Fed. 30, 31 (1908).

It is sufficient answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we never should have heard of the police power.

> Opinion in *Paddell* v. *City of New York,* 211 U.S. 446, 450 (1908).

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.

> Opinion in *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 356 (1909).

And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tra-

dition and the habits of the community count for more than logic.

Opinion in *Laurel Hill Cemetery* v. *City and County of San Francisco,* 216 U.S. 358, 366 (1910).

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights.

Opinion in *Noble State Bank* v. *Haskell,* 219 U.S. 104, 110 (1911).

With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.

Ibid., p. 112.

It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

Dissenting opinion in *Hyde and Schneider* v. *United States,* 225 U.S. 347, 391 (1912).

But it is not lightly to be supposed that a legislature is less faithful to its obligations than a court.

Opinion in *Gray* v. *Taylor,* 227 U.S. 51, 56 (1913).

I take it that probably many, certainly some, rules of law based on less than universal considerations are made absolute and universal in order to limit those over refined speculations that we all deprecate, especially where such rules are based upon or affect the continuous physical relations of material things.

Concurring opinion in *Leroy Fibre Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 232 U.S. 340, 353 (1914).

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. . . . Negligence is all degree—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years.

Ibid., p. 354.

But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

Opinion in *Gompers* v. *United States*, 233 U.S. 604, 610 (1914).

Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that

it embraces the fundamental conception of a fair trial, with opportunity to be heard.

Dissenting opinion in *Frank* v. *Mangum*, 237 U.S. 309, 347 (1915).

This is not a matter for polite presumptions; we must look facts in the face.

Ibid., p. 349.

We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

Opinion in *Bullen* v. *State of Wisconsin*, 240 U.S. 625, 630 (1916).

Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.

Opinion in *The Kronprinzessin Cecilie*, 244 U.S. 12, 24 (1917).

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge

could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.

Dissenting opinion in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 221 (1917).

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.

Ibid., p. 222.

One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking.

Opinion in *Day* v. *United States,* 245 U.S. 159, 161 (1917).

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Opinion in *Towne* v. *Eisner,* 245 U.S. 418, 425 (1918).

A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that

courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

Opinion in *Greer* v. *United States,* 245 U.S. 559, 561 (1918).

But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke.

Opinion in *Gardiner* v. *William S. Butler & Co., Inc.,* 245 U.S. 603, 605 (1918).

On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect.

Opinion in *Union Pacific Railroad Co.* v. *Hadley,* 246 U.S. 330, 332 (1918).

I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic.

Separate opinion in *Ruddy* v. *Rossi,* 248 U.S. 104, 111 (1918).

But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Opinion in *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).

The Fourteenth Amendment is not a pedagogical requirement of the impracticable.

Opinion in *Dominion Hotel, Inc.* v. *State of Arizona,* 249 U.S. 265, 268 (1919).

If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines.

Ibid., p. 269.

It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the

pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just.

Concurring opinion in *Arizona Employers' Liability Cases*, 250 U.S. 400, 433 (1919).

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing pur-

poses of the law that an immediate check is required to save the country.

Dissenting opinion in *Abrams* v. *United States,* 250 U.S. 616, 630 (1919).

We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

Opinion in *State of Missouri* v. *Holland,* 252 U.S. 416, 433 (1920).

Men must turn square corners when they deal with the Government.

Opinion in *Rock Island, Arkansas & Louisiana Railroad Co.* v. *United States,* 254 U.S. 141, 143 (1920).

Upon this point a page of history is worth a volume of logic.

Opinion in *New York Trust Company* v. *Eisner,* 256 U.S. 345, 349 (1921).

But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.

Opinion in *American Bank & Trust Company* v. *Federal Reserve Bank of Atlanta, Georgia,* 256 U.S. 350, 358 (1921).

Delusive exactness is a source of fallacy throughout the law.

Dissenting opinion in *Truax* v. *Corrigan,* 257 U.S. 312, 342 (1921).

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the 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.

Ibid., p. 344.

It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage.

Opinion in *Pine Hill Coal Co., Inc.* v. *United States,* 259 U.S. 191, 196 (1922).

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . .

Opinion in *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.

Opinion in *Diaz* v. *Carlota and Clementina Gonzalez y Lugo*, 261 U.S. 102, 105 (1923).

We fear to grant power and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts . . . and when legislatures are held to be authorized to do anything

considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change. I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. Coming down to the case before us I think, as I intimated in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.

Dissenting opinion in *Tyson and Brother* v. *Banton*, 273 U.S. 418, 445 (1927).

When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk.

Opinion in *Baltimore & Ohio Railroad Company* v. *Goodman*, 275 U.S. 66, 69 (1927).

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is

not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

> Dissenting opinion in *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company,* 276 U.S. 518, 533 (1928).

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

> Dissenting opinion in *Louisville Gas & Electric Company* v. *Coleman,* 277 U.S. 32, 41 (1928).

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is

still more obvious that they must be received with a certain latitude or our government could not go on.

Dissenting opinion in *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 209 (1928).

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Consitution requires.

Ibid., p. 211.

It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogther. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits.

Dissenting opinion in *Panhandle Oil Company* v. *Knox*, 277 U.S. 218, 223 (1928).

While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.

Dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 469 (1928).

The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer.

Opinion in *Weiss* v. *Wiener,* 279 U.S. 333, 335 (1929).

A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds.

Dissenting opinion in *Farmers Loan & Trust Company* v. *Minnesota,* 280 U.S. 204, 218 (1930).

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

Opinion in *United States* v. *Wurzbach,* 280 U.S. 396, 399 (1930).

There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.

Opinion in *Lucas* v. *Earl,* 281 U.S. 111, 114 (1930).

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.

Opinion in *Corliss* v. *Bowers,* 281 U.S. 376, 378 (1930).

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the 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. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words "due process of law," if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much

more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.

Dissenting opinion in *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930).

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

Opinion in *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931).

It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough

how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*. In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts. It is only after a series of determinations on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.

Codes, and the Arrangement of the Law, 5 American Law Review 1 (1870) (Reprinted in 44 Harvard Law Review 725).

Law is not a science, but is essentially empirical.

Ibid. (Reprinted in 44 Harvard Law Review 725, 728).

The growth of law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate rea-

son; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.

> *The Theory of Torts,* 7 American Law Review 652 (1873) (Reprinted in 44 Harvard Law Review 773, 775). (See also *The Common Law,* p. 127).

The little piece of history above, very well illustrates the paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view. It is easy for the scholar to show that reasons have been misapprehended and precedents misapplied. On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that which the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public

policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves in this way, new reasons more fitted to the time have been found for them, and that they gradually receive a new content and at last a new form from the grounds to which they have been transplanted. The importance of tracing the process lies in the fact that it is unconscious, and involves the attempt to follow precedents, as well as to give a good reason for them, and that hence, if it can be shown that one half of the effort has failed, we are at liberty to consider the question of policy with a freedom that was not possible before. What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris,* or logical cohesion of part with part. The truth is, that law hitherto has been, and it would seem by the necessity of its being is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

Common Carriers and the Common Law, 13 American Law Review 608, 630 (1879) (Quoted in 44 Harvard Law Review 719). (See also *The Common Law,* p. 35).

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

The Common Law, p. 1.

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule

adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

Ibid., p. 5.

When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory. They may be, notwithstanding the manner of their appearance. If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified.

Ibid., p. 37.

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.

Ibid., p. 41.

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of

policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree.

> *Privilege, Malice, and Intent*, 8 Harvard Law Review 1, 7 (1894).

Another illustration may be drawn from other cases upon boycotts. Acts which would be privileged if done by one person for a certain purpose may be held unlawful if done for the same purpose in combination. It is easy to see what trouble may be found in distinguishing between the combination of great powers in a single capitalist, not to speak of a corporation, and the other form of combination. It is a question of degree at what point the combination becomes large enough to be wrong, unless the knot is cut by saying that any combination however puny is so. Behind all is the question whether the courts are not flying in the face of the organization of the world which is taking place so fast, and of its inevitable consequences. I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only

an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.

Ibid., p. 8.

But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.

The Path of the Law (address delivered in 1897); reprinted in *Jurisprudence in Action*, p. 276.

The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.

Ibid., p. 277.

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Ibid., p. 279.

We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a

contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing.

Ibid., p. 283.

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. It is with regard to them that a sec-

ond fallacy comes in, which I think it important to expose. The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those parts are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come. This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for cer-

tainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Everyman has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

Ibid., p. 284.

Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have

foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal.

Ibid., p. 286.

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.

Ibid., p. 287.

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that some-

thing similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions. So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, as has been illustrated by a remarkable French writer, M. Tarde, in an admirable book, *Les Lois de l'Imitation*. Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason

is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men. Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words. At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because

it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Ibid., p. 287.

The impediments to rational generalization, which I illustrated from the law of larceny, are shown in the other branches of the law, as well as in that of crime. Take the law of tort or civil liability for damages apart from contract and the like. Is there any general theory of such liability, or are the cases in which it exists simply to be enumerated, and to be explained each on its special ground, as is easy to believe from the fact that the right of action for certain well known classes of wrongs like trespass or slander has its special history for each class? I think that there is a general theory to be discovered, although resting in tendency rather than established and accepted. I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience,

or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant.

Ibid., p. 292.

I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

Ibid., p. 295.

We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer

ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Ibid., p. 296.

One mark of a great lawyer is that he sees the application of the broadest rules. There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and text-books.

Ibid., p. 296.

The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what

is given up to gain them, and whether they are worth the price.

Ibid., p. 298.

Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge.

Ibid., p. 300.

. . . From a practical point of view, history . . . is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations. Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the

present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old. Notwithstanding the contrasts which I have been making, the practical study of the law ought also to be scientific. The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

Law in Science and Science in Law (address delivered January 17, 1899); reprinted in *Collected Legal Papers,* p. 224.

Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties. Every living sentence which shows a mind at work for itself is to be welcomed. It is not the first use but the tiresome repetition of inadequate catch words which I am observing—phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years. That comes from the same source as dislike of novelty —intellectual indolence or weakness—a slackening in the eternal pursuit of the more exact.

Ibid., p. 230.

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations.

Ibid., p. 232.

I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as

it is our duty to do, if it is difficult it can be decided better by twelve men at random from the street.

Ibid., p. 233.

I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well trained judge. I have not found them freer from prejudice than an ordinary judge would be. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.

Ibid., p. 237.

We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.

Ibid., p. 238.

But if different rights are of different extent, if they stand on different grounds of policy and have different histories, it does not follow that because one right is absolute, another is—and if you simply say all rights shall be so, that is only a pontifical or imperial way of forbidding discussion.

Ibid., p. 241.

We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.

Law and the Court (address delivered February 15, 1913); reprinted in *Collected Legal Papers,* p. 295.

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

Ibid., p. 295.

I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.

Excerpt from letter to Dr. John C. H. Wu, 1929; reprinted in *Justice Oliver Wendell Holmes; His Book Notices and Uncollected Letters and Papers,* p. 201.

HUGHES, CHARLES EVANS

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is

recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided. . . . This does not mean that a judge should be swift to dissent, or that he should dissent for the sake of self-exploitation or because of a lack of that capacity for cooperation which is of the essence of any group action, whether judicial or otherwise. . . . Nothing is more distressing on any bench than the exhibition of a captious, impatient, querulous spirit. . . . A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error in which the dissenting judge believes the court to have been betrayed.

The Supreme Court of the United States, p. 67.

HUTCHESON, JR., JOSEPH C.

Covetousness, rapacity, and greed are as unvirtuous and unlovely in a governmental bureau as they are in the citizen, and courts should be as quick to call them what they are in the one case as in the other.

Dissenting opinion in *National Bank of Commerce of San Antonio* v. *Scofield,* 169 F. (2d) 145 (1948).

It is one thing, though, to recognize and properly apply a sound principle. It is quite another to run that same sound

principle into the ground. It is one thing for a dog to have a tail. It is quite another for the tail to wag the dog.

Opinion in *Deal* v. *Morrow,* 197 F. (2d) 821 (1952).

JACKSON, ROBERT H.

Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want. Therefore we must do our utmost to make clear and easily understandable the reasons for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition.

Separate opinion in *Douglas* v. *City of Jeannette,* 319 U.S. 157, 182 (1943).

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Opinion in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall

be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Ibid., p. 642.

If we are to hold that a given rate is reasonable just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone. If on the other hand we are to bring judgment of our own to the task, we should for the guidance of the regulators and the regulated reveal something of the philosophy, be it legal or economic or social, which guides us. We need not be slaves to a formula but unless we can point out a rational way of reaching our conclusions they can only be accepted as resting on intuition or predilection. I must admit that I possess no instinct by which to know the "reasonable" from the "unreasonable" in prices and must seek some conscious design for decision.

Separate opinion in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 645 (1944).

LAMM, HENRY

"Presumptions," as happily stated by a scholarly counselor, ore tenus, in another case, "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

Opinion in *Mackowik* v. *Kansas City, St. J. & C. B. R. Co.*, 94 S.W. 256, 262 (1906).

MACMILLAN, HUGH P.

This picturesque incident, like the annual service at Westminster Abbey which precedes the opening of the Law Courts in London, serves to recall what is too often forgotten, that the practice of the law is more than a mere trade or business, and that those who engage in it are the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves anew.

> *The Ethics of Advocacy* (address delivered in 1916); reprinted in *Jurisprudence in Action*, p. 307.

Justice is not a simple thing. I do not hesitate to say that in a large number of the actual cases which come before our higher Courts it is next to impossible to say in favour of which side ideal justice would decide. The Courts must decide one way or the other, for it is the business of the State to see that disputes take end. Indeed it is sometimes more important that there should be finality than that perfect justice should be interminably sought. But the essential thing is that no case should be decided without each party to the dispute being afforded the fullest opportunity of presenting his side of it to the Court. Common law and statute law alike, so long as they stand recorded in decisions and Parliament Roll, are, as Herbert Spencer would say, merely static. They are rules for the adjustment of human relations based no doubt on experience. But experience is always in the past. The law formulated in the light of past experience becomes dynamic when it has to be applied to the events of the present. In the Law Courts history never repeats itself. No two cases are ever the same. No lawgiver can be so prescient as

to anticipate all the contingencies of human life. It is in the process of applying and adapting abstract law to the concrete cases of the moment, in all their diversity of circumstances, that the function of the advocate comes into play, and the contribution that he thus makes to the development of the body politic is a more important one than is commonly realised. Law is not an exact science, as Lord Halsbury reminds us. Despite the majesty and gravity with which its administration is properly invested, it is a very human affair after all. It has to do not with scientific axioms or scientific formulae, but with the everyday concerns of ordinary citizens. The raw material of the cases that come into Court is composed of the struggles and rivalries, the desires and emotions to which human relationships give rise. This material cannot be analysed with the cold precision of the chemist in his laboratory. Considerations of equity and expediency mingle themselves with the more exact matter of the law. Justice cannot be laid to the line or equity to the plummet. The material is too intractable, too psychological, if you will, to be dealt with by any such mechanical process. You cannot argue against the mathematical fact that one and one make two. But in the human affairs with which the Law Courts deal the problems are not like this. There is almost always somethings to be said either way. And it is of the greatest importance that that something should be said, not only in order that each party may leave the judgment seat satisfied that, whatever has been the decision, the case has had a fair hearing, but in order that the Court may not reach its judgment without having had in view all that could be urged to the contrary effect. In order that the decisions of the Courts may give satisfaction to the parties and at the same time command public respect and acceptance, they must proceed

upon full arguments on both sides. For it has long been proved that the most effectual and only practicable method of arriving at the rights of a dispute is by critical debate in the presence of an impartial third party, where every statement and argument on either side is submitted to the keenest scrutiny and attack. Where every step on the way to judgment has been tested and contested, the chance of error in the ultimate decision is reduced to a minimum. The better the case is presented on each side, and the keener and more skilful the debate before him, the more likely is it that the judge will reach a just and sound judgment. That is why it has been said that a strong Bar makes a strong Bench. It is, then, as contributing an essential element to the process of the administration of justice that the profession of the advocate discharges a public function of the highest utility and importance. Alike to the citizen seeking justice and to the Courts administering it, the existence of a class of trained advocates possessing knowledge of the law, skill in the orderly presentation of facts, cogency in logical argument, and fairness and moderation in controversy, is indispensable. These qualifications cannot be acquired without training and study. Those who seek proficiency in the exercise of them must devote their lives to the task. In short, advocacy must be their profession.

Ibid., p. 309.

Now what is there morally reprehensible in taking one or other side in the contest which is to issue in judgment? You may entertain the private opinion that you have the weaker side in fact or in law. What has that to do with it? Is the weaker side not to get a chance? Perhaps the side which the

advocate personally thinks to be the weaker may turn out to be in truth the stronger, and may in the end justly prevail. There is no advocate but has often had that experience. And why should the services of the advocate be regarded as tainted because he is paid for rendering them? That they should be so regarded is in a sense a curious left-handed tribute to the Bar, for I think that the idea arises from the feeling that the kind of services which an advocate renders to his client are not properly measurable in money. That is true. The client often confides to his advocate's hands all that he holds dearest—his goods, his reputation, his happiness, and sometimes even his life. Such a trust seems to transcend the ordinary commercial relations of debtor and creditor. But if the profession of advocacy is to exist, I see no dishonour in the advocate living by the exercise of it. The making of gain should not be his object; if that is his object, the fields of commerce afford far more golden opportunities. But he is fairly entitled to the due reward of the labour and skill which he expends, and I think it will be conceded that in no department of life does the making even of a sufficient competence involve the expenditure of more unremitting toil.

Ibid., p. 316.

But if it be conceded that there is nothing intellectually immoral in the profession of advocacy, it must on the other hand be equally conceded that there is no sphere in which more subtle ethical problems present themselves in practice for solution. The very nature of the advocate's task involves this. If no profession is nobler in its right exercise, so no profession can be baser in its abuse. And hence the advocate is bound by a host of unwritten obligations, which are designed

to maintain the integrity of his professional conduct. The code of honour of the Bar is at once its most cherished possession and the most valued safeguard of the public. In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to the State, and a duty to himself. To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat. Transgression of the honourable obligations which these duties impose upon the advocate is not like making a mere mistake in business. It involves infringement of his moral duty. It is a matter of conscience. And his offence cannot be hid, for all his work is done in the presence of his brethren and the public. His conduct is always exposed to the searching if salutary scrutiny of many critics.

Ibid., p. 318.

McKENNA, JOSEPH

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the appli-

cation of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Opinion in *Weems* v. *United States*, 217 U.S. 349, 373 (1910).

MANSFIELD, LORD

The law of England would be a strange science indeed if it were decided upon precedents only. Precedents only serve to illustrate principles, and to give them a fixed authority. But the law of England, exclusive of positive law enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each case have been found to fall within one or the other of them.

Opinion in *Jones* v. *Randell*, 1 Cowp. 37, 41 (1774).

MARSHALL, JOHN

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires,

that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . In considering this question, then, we must never forget, that it is a constitution we are expounding.

Opinion in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 407 (1819).

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases.

Ibid., p. 414.

MATTHEWS, STANLEY

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

Opinion in *Hurtado* v. *People of California,* 110 U.S. 516, 530 (1884).

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

Ibid., p. 531.

MILL, JOHN STUART

If all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that person than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Liberty, p. 79.

MULKEY, JOHN H.

As a general rule, a court follows the old beaten track of precedents, without ever stopping to inquire into the reasons upon which they rest, until it discovers that to follow it in some particular case will result in great hardship or manifest injustice, when, for the first time, it feels itself bound to reconsider the reasons upon which the precedents it has hitherto followed rest, and upon such reconsideration it may find that the grounds upon which the original case was decided are not sound, and that all the subsequent cases have simply followed it without examining the reasons upon which

it rests, or it may turn out that the reasons upon which the original case was decided have ceased to exist. In either of the cases supposed, where the case has not become a rule of property, the court should disregard the precedents, and announce such a rule as is consonant with reason and justice. The value of every case as a precedent, which is not founded upon some statutory provision and has not become a rule of property, depends entirely upon the reasons which support it. If it is founded upon a misapprehension of facts, or is supported by false logic, or the reasons upon which it rests have ceased to exist, and the case has not become a rule of property, it should be disapproved, and no longer be recognized as authoritative.

Opinion in *Dodge* v. *Cole,* 97 Ill. 338, 37 Am. Rep. 111, 119 (1881).

The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people. Precedents are useful as evidences of what the law is, and serve as guides in the application of those principles. Where it is clear the circumstances of the case in hand require an application of these principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing it.

Ibid., p. 122.

MURPHY, FRANK

The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State. The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Opinion in *Thornhill* v. *Alabama,* 310 U.S. 88, 95 (1940).

POLLOCK, SIR FREDERICK

All sciences are exposed to the danger of being infested by catchwords invented in the first place with very little critical judgment and not always, perhaps, with perfect sincerity, and repeated with none until they acquire a false air of venerable truth. Jurisprudence is no exception to the common fate; in our system the evil is aggravated by our respect for

precedent. Only a strong and fearless Court can break fetters of this kind.

Judicial Caution and Valour (address delivered in 1929); reprinted in *Jurisprudence in Action*, p. 386.

POUND, ROSCOE

Law must be stable, and yet it cannot stand still.

Interpretations of Legal History, p. 1.

Much of the administration of justice is a compromise between the tendency to treat each case as one of a generalized type of case, and the tendency to treat each case as unique.

Jurisprudence; reprinted in *The History and Prospects of the Social Sciences*, p. 472.

ROBERTS, OWEN J.

Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case. The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless indeed a

modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes on the same question when another case comes before the court. This might, to some extent, obviate the predicament in which the lower courts, the bar, and the public find themselves.

Dissenting opinion in *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 113 (1944).

ROOSEVELT, THEODORE

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.

Message of December 8, 1908, to the Congress of the United States, 43 *Congressional Record*, part 1, p. 21.

SHAW, LORD

Causation is not a chain, but a net. At each point, influ-

ences, forces, events, precedent and simultaneous meet, and the radiation from each point extends infinitely.

Opinion in *Leland Shipping Co.* v. *Norwich Fire Ins. Society,* L.R. 1918 A.C. 350, 369 (1918).

SMITH, JEREMIAH

There are phrases, solemn and imposing in form, which seldom or never render any real assistance in the solution of a legal puzzle; but on the contrary actually retard that solution. They are mere truisms; or mere identical propositions; or moral precepts; or principles of legislation; but not working rules of law. "Such sentences are not a solution of a difficulty; they are stereotyped forms for gliding over a difficulty without explaining it." And yet, being mistaken for solutions of the practical legal problem, their use has the effect of preventing a thorough investigation. Prominent in this class is the familiar maxim, *Sic utere tuo ut alienum non laedas,* and its companion phrase, *Qui jure suo utitur neminem laedit.* Perhaps no legal phrase is cited more frequently than *Sic utere, &c.* It is not uncommon for judges to decide important cases without practically giving any reason save the quotation of this maxim, which is evidently regarded by the court as affording, by its very terms, a satisfactory ratio decidendi. Yet in the vast majority of cases this use of the phrase is utterly fallacious.

The Use of Maxims in Jurisprudence, 9 Harvard Law Review 13, 14 (1895).

STONE, HARLAN FISKE

The phrase "business affected with a public interest" seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences, and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

Dissenting opinion in *Tyson and Brother* v. *Banton*, 273 U.S. 418, 451 (1927).

SUTHERLAND, GEORGE

The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Opinion in *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Freedom is not a mere intellectual abstraction; and it is not merely a word to adorn an oration upon occasions of patriotic rejoicing. It is an intensely practical reality, capable of concrete enjoyment in a multitude of ways day by day.

Dissenting opinion in *Associated Press* v. *National Labor Relations Board,* 301 U.S. 103, 137 (1937).

Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

Ibid., p. 141.

VOLTAIRE, FRANCOIS MARIE AROUET

I do not believe in a word that you say, but I will defend to the death your right to say it.

Quoted in Benjamin Nathan Cardozo, *The Paradoxes of Legal Science,* p. 115.

WATSON, LORD

A series of decisions based upon grounds of public policy,

however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community.

Opinion in *Nordenfeldt* v. *Maxim, Nordenfeldt Guns & Ammunition Co.*, L.R. 1894 App. Cas. 535, 553 (1894).

WHEELER, GEORGE W.

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance

upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the Legislature.

Separate opinion in *Dwy* v. *Connecticut Co.*, 92 Atl. 883, 891 (1915).

WIGMORE, JOHN H.

Most practitioners, to-day, are *unskilled* in *the rules of Evidence*. This is a hard saying; but those who ought to know report it so unanimously. The trial judges know the rules better, but still imperfectly. Is it not startling to reflect on the meaning of this? It means, in the first place, that the rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict. Neither lawyer knew them well enough to avoid numerous violations of them at the trial; but afterwards the defeated lawyer (having duly emitted a machine-gun fire of objections) studied a few of them for the purpose of pointing out on appeal his opponent's errors. If the new trial is needed because neither the successful lawyer nor the trial judge knew the niceties well enough, then by hypothesis the system of Evidence failed, after all, for that trial, to accomplish its purpose. And, in the second place, it means that there are thousands of trials in which neither attorney knew enough either to observe the rules' niceties or even to point out his opponent's errors, and yet a verdict was reached which satisfied the judge. In other words, owing to the ignorance of the

rules, they were not enforced, and yet justice (presumably) was as well done as if they had been enforced. How far this is the fact, no one can know. But the widespread ignorance of the rules shows that it *must* be a large fact. And the moral is that we can probably get along just as well without enforcing many of the niceties of the rules. . . . Our *judges* and our *practitioners* must *improve in spirit,* as a prerequisite for any hope of real gain to be got from better rules. In the end, the man is more important than the rule. Better rules will avail little, if the spirit of using them does not also improve. Counsel must become less viciously contentious, more skillful, more intent on substance than on skirmishing for a position. The whole condition of below-par, now noticeable, is here involved. It has many symptoms and many causes.

A Treatise on the Anglo-American System of Evidence (Second Ed.) Vol. I, pp. 124-127.

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