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JUSTICE BRANDEIS AND SUBSTANTIVE DUE PROCESS

Barry Cushman

WHEN ONE THINKS OF JUSTICE BRANDEIS and substantive due process, one thinks of his famous dissents. Throughout his nearly twenty-three year tenure on the Supreme Court, Brandeis published a series of landmark, fact-saturated, and prophetic dissents against decisions invalidating state or federal regulation on the ground that they worked a deprivation of liberty or property without due process of law. The list of such dissents is a familiar one. Among the more celebrated are those in *Adams v. Tanner*,¹ which struck down a Washington State statute prohibiting employment agencies from taking fees from those seeking employment; in *Truax v. Corrigan*, where the majority vindicated a challenge to a statute restricting the power of state courts to issue injunctions in labor disputes;² in *Jay Burns Baking Co. v. Bryan*,³ which invalidated a Nebraska statute prescribing weight ranges for loaves of bread offered for sale; and in *New State Ice v. Liebmann*, where, dissenting from an opinion declaring unconstitutional an Oklahoma statute requiring those wishing to enter the business of manufacturing and selling ice to secure a certification of necessity from the State, Brandeis remarked: “There must be power in the States and the nation to remould,

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¹ 244 U.S. 590, 597 (1917) (Brandeis, J., dissenting).

² 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting).

³ 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting).

through experimentation, our economic practices and institutions to meet changing social and economic needs . . . 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.”⁴ In each of these dissents, Brandeis presented a rich description of the evils that the statutes in question sought to remedy, and an impressive defense of the challenged measures as reasonable and appropriate tonics for the evils documented. And though he was not yet on the Court when Holmes published his seminal dissents from major decisions invalidating labor regulations,⁵ Brandeis likewise often noted his dissents from opinions striking down statutes on the ground that they infringed the liberty of contract.⁶ Indeed, Brandeis reportedly would have preferred that the Fourteenth Amendment’s Due Process Clause never had been ratified, and maintained that the Clause should be repealed, or at the very least restricted in its application to procedural matters.⁷

⁴ 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

⁵ *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting); *Adair v. United States*, 208 U.S. 161, 190 (1908) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

⁶ See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 631, 636 (1936) (Brandeis joins Hughes and Stone dissents); *Fairmont Creamery v. Minnesota*, 274 U.S. 1, 11 (1927) (Brandeis, J., dissenting); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918) (Brandeis, J., dissenting). Brandeis did not participate in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), which invalidated as an infringement of liberty of contract a minimum wage law for women, and so did not join Holmes’s dissent there. However, he did expressly dissent from two subsequent per curiam opinions invalidating similar minimum wage laws on the authority of *Adkins*. See *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (Arkansas statute); *Murphy v. Sardell*, 269 U.S. 530 (1925) (Arizona statute).

⁷ MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 619 (2009); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* 188 (1994); Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 318, 325; ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 26 (1978).

There is a substantial literature emphasizing the aforementioned aspects of Brandeis’s views on due process. See, e.g., UROFSKY, *supra*, at 483-85, 596-98, 603-05, 678-83; STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* 259-61, 272, 302-05, 306-07 (1994); PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 303-05, 347-48 (1984); SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 99-102, 129-36, 150-51, 153-56, 177-80 (1956).

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Yet confining our field of vision to these familiar declarations would leave us with a misleading impression. First, as is well known, there were instances in which Brandeis joined opinions invalidating non-economic regulations on the ground that they violated the Due Process Clause. In 1923, for example, Brandeis joined two McReynolds opinions invalidating state laws prohibiting the teaching of modern foreign languages to primary school students.⁸ Similarly, in *Pierce v. Society of Sisters*,⁹ Brandeis signed on to McReynolds's opinion declaring that a state law prohibiting private education ran afoul of the Due Process Clause. Indeed, in these cases, Brandeis was more solicitous of substantive due process claims than was Holmes. Holmes dissented in the language cases, and Justice Butler's conference notes suggest that Holmes went along in *Pierce* largely if not solely because he regarded the question as governed by those decisions.¹⁰

More to the point, a narrow focus on Brandeis's celebrated dissents would overlook the numerous instances in which Brandeis joined or wrote opinions in which the Court held that an economic regulation deprived the regulated party of its liberty or property without due process of law. As Professor Michael Phillips has shown, Holmes was far from a dogmatic opponent of economic substantive due process. Though he persistently derided "the dogma, Liberty of Contract,"¹¹ in fact he joined opinions invoking that doctrine to invalidate regulatory legislation on more than one occasion,¹² and he wrote or joined numerous opinions striking down a variety of economic regulations on substantive due process grounds.¹³ The

⁸ *Bartels v. Iowa*, 262 U.S. 404 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹ 268 U.S. 510 (1925).

¹⁰ Butler OT 1924 Docket Book, Office of the Curator, Supreme Court of the United States (hereafter "OCSCOTUS") (Holmes: "As an original prop[osition] might be troublesome without Meyer").

¹¹ *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

¹² *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 267 U.S. 552 (1925) (hereafter "*Wolff Packing II*"); *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U.S. 522 (1923); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). See also *Dorchy v. Kansas*, 264 U.S. 286 (1924); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922).

¹³ See MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S* 60, 61, 89 n.243, 95 (2001); Michael J. Phillips, *The Substantive Due Process Decisions of Mr. Justice Holmes*, 36 AM. BUS. L.J. 437 (1999);

same was true of Brandeis's posture toward economic substantive due process. Though he was a frequent critic of certain of its strands – liberty of contract, limiting price regulation to businesses “affected with a public interest,”¹⁴ and a branch of the doctrine limiting the taxing jurisdiction of states and territories¹⁵ – his opposition to this dimension of the Court's jurisprudence was far less pervasive than one might surmise.

Consider first a trio of cases from the mid-1920s in which the Court unanimously struck down orders of the Kansas Industrial Court on the ground that they deprived a company of its liberty of contract and/or property without due process of law. The Industrial Court was established by the Kansas legislature in 1920 as part of a system of compulsory arbitration of labor disputes. The statute's purpose was to preserve industrial peace and secure continuity of operation in various vital industries, and to these ends the Industrial Court was authorized to prescribe wages and other terms of employment for companies engaged in such enterprises. In the 1923 decision of *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas* (“*Wolff Packing I*”), the Supreme Court unanimously held that the meatpacking business was not sufficiently public in character to be subject to state regulation designed to secure its continuity of operation, and that the Industrial Court's order fixing the wages paid by a meatpacking concern therefore deprived the company of liberty of contract and property without due process.¹⁶ The following year, Brandeis himself wrote the unanimous opinion extending the reasoning of *Wolff Packing* to the coal

Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1083-86 (1997).

¹⁴ See, e.g., *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹⁵ See, e.g., *Senior v. Braden*, 295 U.S. 422, 441 (1935) (Brandeis joins Stone dissent); *First National Bank of Boston v. Maine*, 284 U.S. 312, 334 (1932) (Brandeis joins Stone dissent); *Baldwin v. Missouri*, 281 U.S. 586, 596, 599 (1930) (Brandeis joins Holmes and Stone dissents); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 218 (1930) (Brandeis joins Holmes dissent); *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 467 (1929) (Brandeis, J., dissenting); *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 101 (1927) (Brandeis joins Holmes dissent); *Southern Ry. Co. v. Kentucky*, 274 U.S. 76, 86 (1927) (Brandeis, J., dissenting); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 220 (1925) (Brandeis, J., dissenting); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 287 (1919) (Brandeis joins Pitney dissent).

¹⁶ 262 U.S. 522 (1923).

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industry.¹⁷ And again in 1925, Brandeis joined the unanimous opinion invalidating the Industrial Court's maximum hours order to the Wolff Packing Company on the ground that it infringed liberty of contract and deprived the company of property without due process ("*Wolff Packing II*"). Brandeis returned Chief Justice Taft's draft opinion in *Wolff Packing I* with laudatory remarks,¹⁸ and Justice Butler's docket books show that Brandeis voted with the majority at conference in each of these cases.¹⁹ Brandeis's performance in the Kansas Industrial Court cases accurately reflected his substantive due process commitments.

Though Brandeis disparaged "[t]he notion of a distinct category of business 'affected with a public interest,'" as resting "upon historical error,"²⁰ he occasionally agreed with the results reached by colleagues reasoning within that analytic category. For instance, he agreed with Justice Holmes's 1921 opinion upholding a temporary rent control measure in the District of Columbia enacted in response to "emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business." Holmes opined that such circumstances had "clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law."²¹ Three years later, however, when a landlord challenged the regulation on the ground that the emergency that had justified the regulation no longer obtained and that it was now therefore unconstitutional, Brandeis joined the unanimous conference vote to remand the case to the lower court to make the relevant factual determination, as well as the unanimous opinion suggesting that changed conditions had deprived the measure of its constitutional foundation.²²

¹⁷ *Dorchy v. Kansas*, 264 U.S. 286 (1924).

¹⁸ See Justice Brandeis, Return of *Wolff Packing I*, William Howard Taft Papers, Manuscript Division, Library of Congress (hereafter "MDLC"), Reel 639 ("Yes. This will clarify thought and bury the ashes of a sometime presidential boom").

¹⁹ Butler OT 1922-1924 Docket Books, OCSCOTUS.

²⁰ *New State Ice v. Liebmann*, 285 U.S. at 302 (Brandeis, J., dissenting).

²¹ *Block v. Hirsch*, 256 U.S. 135, 154, 155 (1921).

²² *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49 (1924); Butler OT 1923 Docket Book, OCSCOTUS.

Similarly, when the Court invalidated price regulation of retail gasoline sales in Tennessee on the ground that the business was not “affected with a public interest,” Brandeis concurred in the result,²³ presumably, as one commentator surmised, because there was no showing “that the business was peculiarly subject to abuse in the matter of price.”²⁴ In *Michigan Pub. Util. Comm’n v. Duke*, Brandeis respected the public/private distinction by joining the Court’s unanimous condemnation of the state’s attempt “to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier” as a deprivation of property without due process.²⁵ Brandeis and his colleagues followed *Duke* in *Smith v. Cahoon*, which invalidated a statute regulating private carriers for hire in the same manner as common carriers.²⁶

Brandeis’s embrace of substantive due process was most prominently on display in the many cases in which he either joined in or concurred with opinions holding that a rate regulation deprived a common carrier or public utility of its property without due process by not affording the company a reasonable rate of return on its investment. Though Brandeis differed from many of his colleagues concerning how a reasonable return on investment should be computed²⁷ – and as a consequence he occasionally dissented from opinions finding that a rate regulation violated due process²⁸ – he joined or concurred in the vast majority of the decisions in

²³ *Williams v. Standard Oil Co.*, 278 U.S. 235, 245 (1928). Brandeis also voted to invalidate the statute in conference. Stone OT 1928 Docket Book, OCSCOTUS.

²⁴ Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 786 (1930).

²⁵ 266 U.S. 570, 571 (1925). Brandeis also voted with the majority at the conference. Butler OT 1924 Docket Book, OCSCOTUS.

²⁶ 283 U.S. 553 (1931). Brandeis again voted with the majority at conference. Stone OT 1930 Docket Book, OCSCOTUS. Compare *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 600 (1926) (Holmes & Brandeis, J.J., dissenting).

²⁷ See, e.g., *Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm’n*, 262 U.S. 276, 289 (1923) (Brandeis concurring in judgment holding telephone rates confiscatory, but dissenting as to rationale).

²⁸ *West v. Chesapeake & Potomac Tel. Co. of Baltimore*, 295 U.S. 662, 693 (1935) (Brandeis joins Stone dissent); *United Rys. & Elec. Co. of Balt. v. West*, 280 U.S. 234, 255 (1930) (Brandeis, J., dissenting); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 421 (1926) (Brandeis, J., dissenting); *Pac. Gas & Elec. Co. v. City of San Francisco*, 265 U.S. 403, 416 (1924) (Brandeis, J., dissenting); *Vandalia R.R. v. Schnull*, 255 U.S.

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which he participated where the Court invalidated such a regulation on due process grounds.²⁹ In fact, he authored two such opinions.³⁰ As he stated in his 1936 concurrence in *St. Joseph Stock Yards Co. v. United States*, a rate regulation order of the Secretary of Agriculture issued under the Packers and Stockyards Act of 1921 “may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory.”³¹

113, 123 (1921) (Brandeis, J., dissenting); *Detroit United Ry. v. City of Detroit*, 248 U.S. 429, 446 (1919) (Brandeis joins Clarke dissent); *City of Denver v. Denver Union Water Co.*, 246 U.S. 178, 198 (1918) (Brandeis joins Holmes dissent).

²⁹ *West Ohio Gas Co. v. Pub. Utils. Comm’n*, 294 U.S. 79 (1935); *West Ohio Gas Co. v. Pub. Utils. Comm’n*, 294 U.S. 63 (1935); *Columbus Gas & Fuel Co. v. Pub. Utils. Comm’n of Ohio*, 292 U.S. 398 (1934); *Cent. Ky. Natural Gas Co. v. R.R. Comm’n*, 290 U.S. 264 (1933); *R.R. Comm’n v. Maxcy*, 282 U.S. 249 (1931); *Denney v. Pac. Tel. & Tel. Co.*, 276 U.S. 97 (1928); *Chi., Milwaukee & St. Paul Ry. v. Public Utils. Comm’n*, 274 U.S. 344 (1927); *Ottinger v. Brooklyn Union Gas Co.*, 272 U.S. 579, 581 (1926) (Brandeis, J., concurring in the result); *Patterson v. Mobile Gas Co.*, 271 U.S. 131 (1926); *Bd. of Pub. Util. Comm’rs v. N.Y. Tel. Co.*, 271 U.S. 23 (1926); *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587 (1926); *Banton v. Belt Line Ry.*, 268 U.S. 413 (1925); *Ohio Util. Co. v. Pub. Util. Comm’n of Ohio*, 267 U.S. 359 (1925); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 690 (1923) (Brandeis, J., concurring in the judgment); *Prendergast v. N.Y. Tel. Co.*, 262 U.S. 43 (1923); *City of Paducah v. Paducah Ry.*, 261 U.S. 267 (1923); *Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm’n*, 262 U.S. 276, 289 (1923) (Brandeis, J., concurring in the judgment); *Newton v. Consol. Gas Co.*, 258 U.S. 165 (1922); *City of San Antonio v. San Antonio Pub. Serv. Co.*, 255 U.S. 547 (1921); *S. Iowa Elec. Co. v. City of Chariton*, 255 U.S. 539 (1921); *Rowland v. Boyle*, 244 U.S. 106 (1917). *See also* *Miss. R.R. Comm’n v. Mobile & Ohio R.R. Co.*, 244 U.S. 388 (1917). Brandeis passed at the conference vote in the two *West Ohio Gas* cases, expressed jurisdictional reservations at the *Central Kentucky* conference, dissented at the *Ohio Utilities* conference, and is recorded ambiguously at the *Bluefield* conference. For the last seven cases cited, there are no docket book records of the conference votes. Brandeis voted with the conference majority in each of the remaining ten cases. *Butler OT 1922, 1924, & 1933 Docket Books*; *Stone 1924-1927, 1930, & 1934 Docket Books*, OCSCOTUS.

³⁰ *N. Pac. Ry. v. Department of Pub. Works*, 268 U.S. 39 (1925); *Groesbeck v. Duluth, S. Shore & Atl. Ry. Co.*, 250 U.S. 607 (1919).

³¹ 298 U.S. 38, 74-75 (1936) (Brandeis, J., concurring). The fact that Brandeis invoked the Due Process Clause, rather than the Takings Clause of the Fifth Amendment, in considering the constitutionality of a federal rate regulation, counsels against viewing the state cases invalidating “confiscatory” rate or other regulations as resting upon the incorporation of the Takings Clause into the Fourteenth Amendment. In fact, the Court consistently

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Brandeis also joined several opinions invalidating various land use restrictions as inconsistent with the Due Process Clause. To be sure, he joined Justice Sutherland's majority opinion upholding comprehensive residential real estate zoning in *Village of Euclid v. Ambler Realty Co.*³² At the same time, however, he joined Justice Day's unanimous opinion in *Buchanan v. Warley* holding that a racially restrictive zoning ordinance deprived homeowners of property without due process;³³ he joined the decision in *Nectow v. City of Cambridge*, which unanimously held that a zoning ordinance, as applied, deprived a landowner of property without due process;³⁴ and he joined the unanimous decision in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, which invalidated as repugnant to the Due Process Clause a zoning ordinance conditioning permission to construct a home for the aged poor on the written consent of the owners of two-thirds of the property within 400 feet of the proposed building.³⁵

As many of the foregoing cases suggest, Brandeis, like many of his colleagues who were even more fully invested in substantive due process, was especially skeptical of regulations that did not appear to confer a benefit on the public generally, but instead upon a favored group or class. Several decisions bring this feature of Brandeis's jurisprudence into sharper relief. In *Brooks-Scanlon Co. v. R.R. Comm'n of La.*, Brandeis joined Holmes's unanimous opinion invalidating on due process grounds an order requiring a lumber company owning a narrow gauge railroad to operate its railroad at a loss. The opinion insisted that

maintained that such regulations, where they effectively "took" from A and gave to B, for a private purpose and without just compensation, violated the respective Amendments' prohibitions on deprivations of property without due process. For a list of such instances in the federal context, see Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 911-12 n.141 (2005).

³² 272 U.S. 365 (1926).

³³ 245 U.S. 60 (1917).

³⁴ 277 U.S. 183 (1928). Here, however, Brandeis had dissented from the conference majority, but acquiesced in the final vote on the merits. Stone OT 1927 Docket Book, OCSCOTUS.

³⁵ 278 U.S. 116, 122-23 (1928). Brandeis also voted with the majority at the conference. Stone OT 1928 Docket Book, OCSCOTUS.

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[a] carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. . . . The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.³⁶

Similarly, in *Great Northern Ry. Co. v. Cahill*, Brandeis joined the unanimous opinion holding that the order of a state railroad commission requiring a railroad company to install and maintain weighing scales at its stations as a convenience to traders in livestock was “arbitrary and unreasonable,” and therefore a deprivation of its property without due process of law.³⁷ *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg* involved an order of the Nebraska state railway commission requiring the company to install, partly at its expense, an underground cattle-pass across its right of way. The commission ordered the construction of the underground pass not as a safety measure, but instead merely to spare the farmer owning land on either side of the railway the inconvenience of driving his cattle across an otherwise adequate existing grade crossing. Here again, Brandeis joined the unanimous opinion holding that the order “deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment.”³⁸ Brandeis similarly joined opinions invalidating on due process grounds special tax assessments that disproportionately advantaged some members of the taxing district at the expense of others.³⁹

Late in his career, Brandeis resoundingly affirmed this principle. The case of *Thompson v. Consolidated Gas Utilities Corp.* involved two Texas gas companies seeking to enjoin enforcement of a proration order of the Texas

³⁶ 251 U.S. 396, 399 (1920).

³⁷ 253 U.S. 71, 72 (1920).

³⁸ 282 U.S. 162, 167 (1930). Brandeis voted with the majority at conference, Stone OT 1930 Docket Book, OCSCOTUS, and wrote “Yes” or “Yes sir” on each of Stone’s four circulated draft opinions. Harlan Fiske Stone Papers, MDLC, Box 57.

³⁹ *Road Improvement Dist. No. 1 v. Missouri Pacific R.R. Co.*, 274 U.S. 188 (1927); *Standard Pipe Line Co. v. Miller County Highway & Bridge Dist.*, 277 U.S. 160 (1928). Brandeis voted with the conference majority in each of these cases. Stone OT 1925 & 1927 Docket Books, OCSCOTUS.

Railroad Commission. The companies had invested significantly in the creation of markets for their gas in distant states through the acquisition and development of gas reserves, the drilling of wells, and the construction of compressor plants and pipelines. These investments had enabled the companies to perform their contractual obligations without the need to purchase gas from other wells. The challenged order limited production of sweet gas from the companies' wells to a quantity beneath their marketing requirements under existing contracts, below their capacity and current production levels, and below the capacity of their transportation and marketing facilities. The order thus prevented the companies from fulfilling their contractual obligations unless they purchased gas from other producers. The companies alleged that both the purpose and the effect of such limitations on their production was not to prevent waste, nor to prevent invasion of the legal rights of co-owners in a common reservoir, but instead simply to compel them and others similarly situated to purchase gas that they did not need from other well owners who had not made the investments in marketing facilities, such as pipelines, that would have provided them with a market for their gas and the capacity to deliver it. Under existing law, such well owners without pipelines would have been required to cease production unless they secured some marketing outlet.⁴⁰

Brandeis's opinion for a unanimous Court discerned that "the sole purpose of the limitation which the order imposes upon the plaintiffs' production is to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product." Accordingly, "[t]he use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of gas which there is no wish to buy." This was not "for the public benefit." The companies' pipelines were private property, built on private lands. They were not common carriers. The Court had "many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose." The requirement that the companies

⁴⁰ 300 U.S. 55, 58, 60-61, 67-68 (1937).

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purchase the gas necessary to fulfill existing contracts from other producers, Brandeis concluded, “results in depriving the plaintiffs of property.” “Our law reports present no more glaring instance of the taking of one man’s property and giving it to another.”⁴¹

Three years later, after Brandeis had retired, the Court effectively overruled *Thompson* when it upheld a Texas oil production proration order against a due process challenge. Dissenting for himself, Chief Justice Hughes, and Justice McReynolds, Justice Roberts invoked the authority of Brandeis in protest:

The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established. A recent exposition of the applicable principles is found in the opinion of Mr. Justice Brandeis, written for a unanimous court, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue. I think that adherence to the principles there stated requires the affirmance of the [lower court’s] decree [enjoining the Commission from enforcing its order].⁴²

⁴¹ *Id.* at 77-80.

⁴² *R.R. Comm’n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 585 (1940) (Roberts, J., dissenting). For other instances in which Brandeis voted to strike down state or local laws as deprivations of liberty and/or property without due process, see, e.g., *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 280 U.S. 83 (1929); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Missouri, Kansas, & Texas Ry. Co. v. Oklahoma*, 271 U.S. 303 (1926); *Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69 (1926); *Lee v. Osceola & Little River Road Improvement Dist. No. 1 of Mississippi County*, 268 U.S. 643 (1925); *Frick v. Pennsylvania*, 268 U.S. 473 (1925); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); *Wallace v. Hines*, 253 U.S. 66 (1920); *International Paper Co. v. Massachusetts*, 246 U.S. 135 (1918); *Looney v. Crane*, 245 U.S. 178 (1917). Brandeis was in the conference majority in the first five of these cases. For the last three cases, there are no docket book records. In *Frick*, Brandeis dissented at conference. Butler OT 1923-1924 Docket Books, Stone OT 1924, 1925, 1927, & 1929 Docket Books, OCSCOTUS.

It is doubtful that in due process cases Brandeis was simply adhering to the dictates of *stare decisis* rather than voting his principles, for two reasons. First, a number of these decisions presented questions for which there was no clearly governing authority. Second, Brandeis famously argued in *Burnet v. Coronado Oil & Gas Co.* that the Court “should refuse to follow an earlier constitutional decision which it deems erroneous.” 285 U.S. 393,

Brandeis's former law clerk, Paul Freund, reported that Brandeis always considered himself a conservative,⁴³ and compared with many of the justices who would succeed him, he was. Justice Hugo Black, for example, maintained that it was never appropriate for the Court to review the substance of economic regulations under the Due Process Clauses. As a result, he refused to follow Brandeis, Hughes, and Roberts in joining the portion of Stone's majority opinion in *United States v. Carolene Products Co.* announcing a very deferential standard of review, on the ground that it did not go far enough in extricating the Court from that enterprise.⁴⁴ But the explicit premise of Brandeis's classic critique of the investment banking industry, entitled *Other People's Money*,⁴⁵ was that there is such a thing. And Brandeis believed, along with contemporary colleagues with whom he otherwise frequently differed, that the Court had an important role to play, under the Due Process Clauses, in preventing its deprivation by the government.



406-10 (1932) (Brandeis, J., dissenting). As his persistent dissents from a variety of established doctrinal propositions indicate, *see, e.g.*, the cases collected in notes 6, 14, 15, 28, and 29, *supra*, he acted on this conviction throughout his judicial career. Equally implausible is the possible conjecture that Brandeis did not actually embrace economic substantive due process, but instead opportunistically invoked it (or agreed to such invocations by his colleagues) when it served to invalidate a policy of which he disapproved. Such a cynical assessment would be difficult to square with the depth of conviction one senses in his *Thompson* opinion, and neither would it easily square with well-known instances in which Brandeis voted to uphold economic regulations that he regarded as unwise or even morally abhorrent. For example, Brandeis disapproved of the Agricultural Adjustment Act of 1933 as a policy matter, *see* UROFSKY at 706; LEWIS PAPER, BRANDEIS 345-47 (1983), yet he dissented when the Court invalidated the statute in *United States v. Butler*, 297 U.S. 1 (1936). *See id.* at 88 (Brandeis joins Stone dissent). Brandeis also deplored the Roosevelt Administration's gold policy, *see* UROFSKY at 697, 698, PAPER at 346, yet he joined the majority to sustain the policy in the *Gold Clause Cases*: *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); and *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935).

⁴³ Paul Freund, *Mr. Justice Brandeis*, in ALLISON DUNHAM & PHILIP KURLAND, eds., MR. JUSTICE 185 (1964).

⁴⁴ *See* Cushman, 85 B.U. L. REV. at 992-95.

⁴⁵ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).