

UNIVERSITY OF MICHIGAN
ANN ARBOR
LAW SCHOOL
OFFICE OF THE DEAN

December 11th, 1925.

Mr. Justice George Sutherland,
United States Supreme Court,
Washington, D. C.

Dear Mr. Justice Sutherland:

My study of Constitutional Law has given me, I believe, some sympathetic understanding of the difficulties under which judges labor in passing upon the validity of legislation, especially in relation to the Fifth and Fourteenth Amendments to the Constitution of the United States and corresponding provisions in the state constitutions. Decisions of such cases have subjected the courts to very great strain and have been followed by criticisms and attacks to which they ought not to be subjected and which, if continued, will (it seems to me) produce very great danger to the proper performance of the judicial function. I do not see how anyone can confidently prophesy that the future will not witness more energetic and perhaps successful movements, such as those involved in the recent furor about the recall of decisions and the recall of judges.

It will not be possible under any scheme, of course, to avoid all criticism and all danger. Unless we abandon judicial review altogether, cases involving questions that are, after all, largely political in nature, such as *Marbury v. Madison* and other cases involving the extent of the jurisdiction of the courts, must be decided from time to time, and the decisions will be followed by controversy. The cases involving the status of our so-called "insular possessions" are more modern instances of the type to which I refer.

But there is an increasing number of cases, and I suspect that the rate of increase will be accelerated, in which courts are obliged to pass upon the validity of social welfare measures of one kind or another, in which the chief factors upon which the decision must hinge are neither legal nor political, in the strict sense of those terms. Cases like *Lochner v. New York*, *Adkins v. the Children's Hospital*, *The Rent Cases*, and many others in which social, economic and even biological or medical problems appear, involve matters about

which courts cannot possibly be expected to have expert knowledge and concerning which they cannot be expected to derive much or safe help from the partisan attorneys on the two sides. It cannot be expected that many lawyers can or will supply briefs like that of Mr. Justice Brandeis in *Muller v. Oregon*, and much less is it to be assumed that courts could examine such briefs if they were filed in all pertinent cases. All of this you, of course, know better than I do.

I believe that courts have done amazingly well, considering the difficulties in such cases, but after a good many years of study of the decisions I cannot find that anything like a safe or definite guide has been evolved by which lawyers, clients or the public can prophesy what will happen to such legislation in the future.

The only method of supplying the courts with scientific and dependable information upon these numerous and complex problems, and thus at once aiding them in their work and relieving them from the kind of attacks which have been visited upon them lately for their social views, seems to me to lie in having some bureau of research available for the courts. Such a bureau should undoubtedly be under the direction of one or more lawyers; but it should employ experts in economics, especially in the field of taxation, railway operation and public utilities in general, accounting and other sub-topics. It should also have experts in sociology and be able to call upon medical, biological and other scholars.

Of course, in an ideal society the place to have such a bureau would be in connection with the legislature, with the hope that the legislature might not pass foolish laws; but no legislative drafting bureau that I know anything about has been markedly and continuously successful in achieving the results needed, partly because such bureaus usually are appointed and dominated by politicians and hence are not sound, and also because even when sound results are produced by such bureaus, legislatures are seldom seriously influenced by them in controversial matters.

I think that the place for such a bureau is in connection with the court, and of course such a bureau should be wholly subject to the court and its findings and recommendations would be advisory only; but I do not think that at present it is possible that legislatures (or perhaps even the Bar itself) would favor such a plan. Confidentially, I am trying to secure the funds for a bureau of legal research in connection with this Law School. It should be a permanent part of the equipment of a school as strong as we have now become; and it would greatly stimulate both the faculty and the students, and undoubtedly would produce very valuable studies for publication, without reference to existing legislation or litigation. The services of such a bureau should not be made available for private parties, except as such parties might make use of its publications; but it should not be employed directly or indirectly by any private interests. The bureau, however, could and ought to be made available for the legislature and the courts in this state, and for courts in other states if they were disposed to utilize our work.

Mr. Justice Sutherland---3.

I would appreciate it very much if you would give me the benefit of your opinion of such a project. I expect to broach the general plan, though not in relation to law schools, in a paper which I am due to read at the Nebraska Bar Association meeting on December 29th, but if you desire I shall, then and at all other times, refrain from making any mention of any suggestion which you may be good enough to give me in regard to the matter.

Cordially yours,

Henry M. Bates

HMB/HG