

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. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . 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. . . . 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."<sup>96</sup>

Justice Holmes did not reject the basic concept of substantive due process, but rather the Court's presumption against economic regulation.<sup>97</sup> Thus, Justice Holmes whether consciously or not, was prepared to support, along with his opponents in the majority, a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the use of the doctrine of judicial notice by the former and the doctrine of presumed validity by the latter.

Holmes' dissent soon bore fruit in *Muller v. Oregon*<sup>98</sup> and *Bunting v. Oregon*,<sup>99</sup> which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of

<sup>96</sup> 198 U.S. at 75–76.

<sup>97</sup> Thus, Justice Holmes' criticism of his colleagues was unfair, as even a "rational and fair man" would be guided by some preferences or "economic predilections."

<sup>98</sup> 208 U.S. 412 (1908).

<sup>99</sup> 243 U.S. 426 (1917).