is reflected in several of England's notes to this government.[18] Sir Edward Grey has suggested that it is open to this country, if the decision is appealed and affirmed by the Judicial Committee of the Privy Council, to lay its claim before an international court of arbitration at the end of the war.[19] But the United States has wisely adopted the course of objecting immediately through diplomatic channels, in an effort to check in some degree this progressive enlargement of the field of belligerent interference with neutral trade.

JUDICIAL ACCEPTANCE OF WORKMEN'S COMPENSATION. — An interesting chapter in the history of workmen's compensation legislation in this country, and of its progress through the judicial mill, is brought to a happy conclusion by a late decision of the New York Court of Appeals holding the new compensation act not in violation of the federal Constitution. *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600. A recent case in California on a similar statute comes to the same conclusion. *Western Indemnity Co.* v. *Pillsbury*, 151 Pac. 398. This result is not surprising in view of what has come to be a settled public sentiment in favor of such legislation.

Consideration of the subject in the United States was not begun until after compensation laws had been in force for years in other countries and had proven generally beneficial. Hence the development of public opinion on the subject here was extremely rapid, and legislation was swift to follow. Beginning in 1909,[1] with legislation in Montana and the appointment of investigating commissions in New York, Minnesota, and Wisconsin, a majority of our states have come to enact workmen's compensation or industrial insurance laws, the variety of whose provisions must be pleasing to those who see in the number of our states a fortunate broadness of field for legislative experiment.

Not a small part of this experimenting has resulted from the attempt to avoid constitutional objections; and it has met with varying success. The first act to be questioned in a court of last resort was the statute of New York. That statute had been framed with some care to meet constitutional objections; it was believed that the fact that it applied only to certain industries, declared with reason to be extra-hazardous, would see it safely through. This belief proved to be unfounded, for the act was held to be a violation of the Fourteenth Amendment and of a similar provision of the constitution of New York.[2] The decision was greeted with

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[18] See, for instance, the Note of Oct. 11, 1915, N. Y. TIMES, Oct. 12, 1915, p. 3, col. 5.

[19] See BRIT. NOTE of July 31, 1915, clauses 6 and 7. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, Oct. 21, 1915, 182. He cites the Jay Treaty and the Treaty of Washington as instances where this mode of procedure was recognized by the two countries. For these treaties see TREATIES AND CONVENTIONS BETWEEN UNITED STATES AND OTHER POWERS (off.), Great Britain, 1794, Art. VII, p. 323; Great Britain, 1871, p. 413.

[1] Leaving out of account the short-lived Maryland act of 1902 and the federal act of 1908, which applied only to employees of the government.

[2] Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431.

a storm of disapproval, both from popular sources and from eminent legal authorities.[3] It threw something like dismay into the camp of those who favored the new legislation,[4] for it was recognized that, right or wrong, the decision was binding in New York, and might be followed in other jurisdictions. The search was therefore started for some device whereby a law could be enacted that would be effective and at the same time not unconstitutional. Naturally an optional or elective system was proposed, but in view of previous experience in Maryland and Massachusetts[5] it was pretty clear that a system genuinely optional would not prove satisfactory. In these circumstances legislative ingenuity in Kansas and New Jersey contrived the scheme which has since become so common, and which consists in juggling with the common-law defenses to the disadvantage of the employer or employee who refuses to come within the act. That the legislature may completely do away with these defenses is undoubted.[6] Whether they may classify employers according to whether they come within the act or not, denying to one class the defenses left available to the other, is another matter. So far as known, only one case has held the practice a violation of the Constitution.[7] But to object to an act with compulsory provisions and allow this sort of an "option" is to talk in terms of unrealities which do no credit to constitutional law.[8] The practical working of the "option" legislation is not here in question, though some difficulties have been suggested and others have developed.[9] Further legislation on this pattern should therefore not be encouraged, provided it is clear that compulsory legislation will not be held invalid.

That such legislation ought to be upheld has been tolerably clear ever since the decision in the Oklahoma Bank case.[10] That decision was brought to the attention of the court in the Ives case, and, but for the belief of the New York court that "due process" in the constitution of the state meant something different from what the Supreme Court of the United States declared it meant in the Constitution of the United States, must have been decisive in that case.[11] State legislatures which

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[3] See, for instance, the signed statement by teachers of law in fourteen law schools published in the Outlook of July 29, 1911 (98 OUTLOOK 709), and the careful article by Mr. Freund in 2 AMERICAN LABOR LEGISLATION REVIEW 43 (1912).

[4] See, for example, the discussion reported in 38 ANNALS OF THE AMERICAN ACAD. OF POL. & SOC. SC. (1911), especially at 147, 173, 277.

[5] See RUBINOW, SOCIAL INSURANCE, 169, 171; 1 AMERICAN LABOR LEGISLATION REVIEW 98 (1911).

[6] Second Employers' Liability Cases, 223 U. S. 1.

[7] Kentucky State Journal Co. *v.* Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 1166. *Contra*, Borgnis *v.* Falk Co., 147 Wis. 327, 133 N. W. 209; State *v.* Creamer, 85 Oh. St. 349, 97 N. E. 602; Opinions of the Justices, 209 Mass. 607, 96 N. E. 308; Deibeikis *v.* Link-Belt Co., 261 Ill. 454, 104 N. E. 211; Mathison *v.* Minneapolis Street Ry. Co., 126 Minn. 286, 148 N. W. 71; Sexton *v.* Newark District Telegraph Co., 84 N. J. L. 85, 86 Atl. 451, *affd.* 86 N. J. L. 701, 91 Atl. 1070; Hawkins *v.* Bleakly, 220 Fed. 378 (Iowa act); Shade *v.* Ash Grove Lime and Portland Cement Co., 93 Kan. 257, 144 Pac. 249; Mackin *v.* Detroit-Timkin Axle Co., 153 N. W. 49 (Mich.).

[8] See Ernst Freund, "Constitutional Status of Workmen's Compensation," in 2 AMERICAN LABOR LEGISLATION REVIEW 43, 53.

[9] See RUBINOW, SOCIAL INSURANCE, 178 *et seq.*

[10] Noble State Bank *v.* Haskell, 219 U. S. 104.

[11] Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271, 317, 94 N. E. 431, 448. This particular absurdity gives strength to the position of those who contend that the "due

have enacted compulsory workmen's compensation acts have been rewarded by having their acts upheld.[12] Some states have amended their state constitutions to permit legislation of this sort.[13] The Arizona constitution goes so far as to direct the legislature to enact it.[14] It is not explained in just what manner these provisions remove the objections under the Fourteenth Amendment; [15] this is more evidence that those objections are really non-existent. So it seems probable that compulsory legislation would now be held good in most jurisdictions.

The present outlook shows, therefore, the great change that has occurred since the decision in the Ives case. The reason for this is found in the nature of the thing decided. As has been often said, decisions on the limits of due process and the propriety of what is claimed to be an exercise of the police power are decisions mainly of fact and public policy.[16] Results are different as facts change or are more clearly brought to the attention of the court.[17] Courts appreciate more fully the strength of settled public convictions. So legislation that once seemed an unreasonable interference with the liberty and property of citizens is seen, though the court may still be a disbeliever in its wisdom, to embody a sufficient public sentiment and to be calculated to effect a sufficient public purpose to make it not an unreasonable exercise of power.[18] These decisions have met with general favor, evincing as they do a decent respect for the opinion of the legislature, and leaving to that body the large room for experiment which the wisest critics of our institution have always held desirable.[19]

TENANCY BY THE ENTIRETY AND THE NEW YORK TRANSFER TAX. — The members of the New York Court of Appeals have just expressed three

process" clauses should be removed from our state constitutions, and the whole matter left to be governed by the Fifth and the Fourteenth Amendments.

[12] State *v.* Claussen, 65 Wash. 156, 117 Pac. 1101; Stoll *v.* Pacific Coast Steamship Co., 205 Fed. 169 (Washington act); State *v.* Creamer, 85 Oh. St. 349, 97 N. E. 602 (where the act was compulsory on the employee after his employer had elected); and the two principal cases. *Contra*, Cunningham *v.* Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554, on an unfortunate detail of the Montana law. The court considers the other provisions of the act and declares that they are not repugnant to the constitution.

[13] Ohio (CONST., Art. II, § 35, adopted Sept. 3, 1912); California (CONST., Art. XX, § 21); New York (CONST., Art. I, § 19, adopted Nov. 4, 1913); Wyoming (adopted 1913); Vermont (adopted April 8, 1913).

[14] ARIZ. CONST., Art. XVIII, § 8.

[15] Hence a judge of the New York Supreme Court, before the decision in the principal case, expressed the opinion that the new act was unconstitutional. Herkey *v.* Agar Mfg. Co., 90 N. Y. Misc. 457.

[16] See A. A. Bruce, in 20 GREEN BAG 546, 552; Prof. Frankfurter, in 28 HARV. L. REV. 790; FREUND, POLICE POWER, §§ 21, 63.

[17] Compare, for instance, the discussion in Lochner *v.* New York, 198 U. S. 45, 59, and in People *v.* Williams, 189 N. Y. 131, 81 N. E. 778, with that in the dissenting opinion of Harlan, White, and Day, JJ., in Lochner *v.* New York, 198 U. S. 45, 70, and with Muller *v.* Oregon, 208 U. S. 412, 419, and with McLean *v.* Arkansas, 211 U. S. 539, 549, and with People *v.* Schweinler Press, 214 N. Y. 395, 108 N. E. 639.

[18] See Holden *v.* Hardy, 169 U. S. 366, 386; Otis *v.* Parker, 187 U. S. 606; Noble State Bank *v.* Haskell, 219 U. S. 104; Borgnis *v.* Falk Co., 147 Wis. 327, 349, 372, 133 N. W. 209, 215, 223.

[19] See THAYER, LEGAL ESSAYS, 16 *et seq.*; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 253.