lakes and streams, and generally to restore the use and enjoyment of the lands.[36]

None of these statutes has been held invalid[37] and if a court should find one unconstitutional it would seem to be a clear invasion of the legislative function, under the color of substantive due process.

CONSTITUTIONAL LAW

CONSIDERATION OF FACTS IN DUE PROCESS CASES

In *Department of Insurance v. Schoonover*, 72 N.E.2d 747 (Ind. 1947), a provision of the Indiana Insurance Law of 1935,[1] which restricted the selling of fire and casualty insurance in Indiana to agents employed on a commission basis only, was declared unconstitutional. Schoonover, an agent employed on salary, was refused a license to sell insurance by the Department of Insurance. He brought an action seeking to enjoin the Department from limiting the issuance of licenses for fire and casualty insurance to agents employed solely on a commission basis.[2] He contended that the statute deprived him of his right to work on such terms as he might freely secure; that the statute made a discriminatory classification between salaried and commission agents; and that it therefore violated the due process[3] and equal protection[4] provisions of the Indiana Constitution and the Fourteenth

36. Ind. Acts 1941, c. 68, Ind. Stat. Ann. (Burns, Supp. 1945) § 46-1501. Cf., Ops. Att'y Gen., Ind. (1943) p. 301: "The real purpose of the statute is not so much to encourage strip mining, but to make sure that on land where strip mining had already been done . . . the Conservation Commission would see to it that the land would be restored to usefulness again and reforested."

37. Neither the Indiana nor the West Virginia statutes have been challenged. The Ohio statute was not efective until 1948. The Pennsylvania statute was held constitutional as a valid classification and not a denial of due process, in Dufour v. Maize, —A.2d— (Pa. January 19, 1948).

1. Ind. Acts 1935, c. 162, § 209(a), Ind. Stat. Ann. (Burns, Repl. 1940) § 39-4501(a).

2. The Hardware Mutual Casualty Co., which had previously employed agents on salary in Indiana, was joined as party plaintiff. The Indiana Association of Insurance Agents, an association of agents on commission (comprising about 85 per cent of the insurance agents in the state), were joined as party defendants and for all practical purposes defended the action; the Attorney General joined in all motions, etc., for the purpose of getting a determination of the cause.

3. Ind. Const. Art. I, § 1.

4. Ind. Const. Art. I, § 23.

Amendment of the Constitution of the United States. The trial court admitted the testimony of experts, statistical data and similar evidence. On the part of plaintiffs this tended to show that salaried agents not only gave satisfactory service to their clients, but could offer cheaper premiums because of savings realized through that manner of payment. For defendants it tended to show that the legislature could reasonably have believed that commissioned agents gave fuller coverage and better service.[5] The trial court held that the statute violated all of the constitutional provisions pleaded and issued the injunction.

On appeal the Supreme Court was thus presented with a fairly complete record bearing on the reasonableness of the legislation. Reverting to an old line of cases,[6] the court declared that the evidence at the trial was not properly received.[7] The constitutionality of a statute involving an

5. The trial court refused, however, to allow a witness for defendant, who was Insurance Commissioner at the time of the enactment of the Insurance Code, to testify orally as to the legislative background of the Code, and this was assigned as error on appeal. This evidence might have been admitted and received judicial notice notice if it had been in documentary form. "For the purpose of passing upon the constitutionality of a statute the court may resort to public official documents, public records, both state and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith." Boshuizen v. Thompson and Taylor Co., 360 Ill. 160, 163, 195 N.E. 625,626 (1935). This points to the need in state legislatures of committee reports and records such as accompany Congressional action.

6. Pittsburgh, C. C. & St. L. R. R. v. Hartford City, 170 Ind. 674, 82 N.E. 787 (1907), rehearing denied, 85 N.E. 362 (1908); Vandalia R. R. v. Stilwell, 181 Ind. 267, 104 N.E. 289 (1914); Pittsburgh R. R. v. State, 180 Ind. 245, 102 N.E. 25 (1913); Pittsburgh R. R. v. State, 178 Ind. 498, 99 N.E. 801 (1912); State v. Barett, 172 Ind. 169, 87 N.E. 7 (1909); Hovey v. Foster, 118 Ind. 502, 21 N.E. 39 (1888). Contra: Weisenberger v. State, 202 Ind. 424, 175 N.E. 238 (1930) (dismissed by the court as not being exhaustively reasoned on the point).

7. The general admissibility of evidence had not been discussed by either party in the appeal briefs. In denying petition for rehearing the court said it was not its intention "to give the impression that the parties litigant were precluded from bringing to the attention of the trial court facts to establish the existence of those matters of which the court will take judicial notice." This clarified the situation little. The court cited 9 Wigmore, "Evidence" § 2568a. (3d ed. 1940). Wigmore points out that the judge may or may not rely on the materials offered by counsel. A footnote to the section reads: "The question of the method of informing the Court on facts relevant to the *constitutionality of a statute* is in need of special and frank consideration; . . ."

exercise of the police power[8] was held to be a question of law, "resort being had to extrinsic considerations only to the extent that the facts are, or may become, a matter of judicial knowledge." The court without apparent resort to the record found that the statute had no reasonable relation to the police power, and held it violated the due process clause of the Indiana Constitution.[9] The equal protection point was not passed on; and raising a federal question was carefully avoided by restricting the decision to the state constitution.[10]

A problem presented by the *Schoonover* case is the extent to which facts are admissible to determine the constitutionality of legislation in due process cases. The Indiana court has expounded a principle which applies generally to any litigation—that of judicial notice—and so in effect, has given narrow scope to an inquiry into the constitutionality of legislation. It is important to determine if such a narrow evidenciary rule for constitutional cases is valid.

In these cases courts are faced with two apparently conflicting concepts of our system of law: (1) Courts will not inquire into the wisdom of legislative policy-making;[11] and (2) Where a statute clearly violates constitutional rights, the courts will declare it invalid.[12] Yet an invocation of the

8. A problem closely akin to the consideration of facts in due process cases is that in relation to the Commerce Clause. Where a state statute enacted under the police power is challenged as violating the Commerce Clause; i.e., that it regulates some subject which admits only of a uniform federal regulation, the question is one of reasonableness, to the determination of which facts are material and admissible. Southern Pac. Co. v. Ariz. 325 U.S. 711 (1944).

9. Supra n. 3.

10. This presents a sharp dilemma for trial lawyers in Indiana courts. By this decision it is erroneous for a trial court to admit extrinsic evidence on the constitutionality of a statute, yet a case will be remanded for failure to present a complete record under U.S. Supreme Court decisions. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934). How a party could get a determination by the highest court in the land on the constitutionality of a statute, assuming a federal question is raised, without the necessity of two trials is a serious question. In Indiana courts counsel should not overlook the possibility of a Brandeis Brief in any case where material is available. See n. 7 supra. On the Brandeis Brief, see Muller v. Ore., 208 U.S. 412 (1908).

11. Olsen v. Neb., 313 U.S. 236,246 (1941); German Alliance Ins. Co. v. Lewis, 233 U.S. 389,414 (1913); Booth v. State, 179 Ind. 405,412, 100 N.E. 563,566 (1912); Jamison v. Ind. Natural Gas & Oil Co., 128 Ind. 555,561, 28 N.E. 76,78 (1891).

12. Powell v. Pa., 127 U.S. 678,686 (1887); Marbury v. Madison, 1 Cranch 137,176 (U.S. 1803); Ellingham v. Dye, 178 Ind. 336,385, 99 N.E. 1,19 (1912).

latter rule is not an encroachment on the former, for the court is deciding that the statute violates constitutional guarantees, the protection of which is paramount to the end which the legislature sought in passing the statute. The holding of the court is not that the legislature was unwise in its choice of policy, but rather, unwise in attempting to place the chosen policy above constitutional guarantees. Such an explanation goes to the roots of our system of government, and serves to show the distinction between judicial and legislative function which has persisted from the time of Chief Justice Marshall, though admittedly not without variance in degree and resultant confusion.

Irrespective of the explainable harmony of these concepts, the difficult derivative question is how courts proceed when deciding the constitutionality of statutes.[13] Courts uniformly declare that a statute passed by the legislature under the guise of the police power is presumed to be valid,[14] and will not be struck down unless it has no substantial relation to the public health, safety, morals or general welfare.[15] To

13. The premise of this note is that courts will review legislation on the basis of its reasonableness, a policy to which Indiana and most courts seem committed. Another possible view, and a minority position on the U.S. Supreme Court, approaches "no review at all," at least not in a case where it appears the legislature gave the statute due consideration. See Mr. Justice Black (dissenting), Polk Co. v. Glover, 305 U.S. 5,10 (1938). The presumption of constitutionality and consideration of facts are problems inextricably interwoven. To couch Justice Black's position in terms of presumption, there is a "strong" presumption of constitutionality, or an "almost irrebuttable" presumption. Thus Indiana's position in not admitting evidence would be sound but for the consideration that they are reviewing the statute, and upon the basis of its reasonableness, and facts are an absolute necessity to that type of proceeding.

14. Mr. Warsoff in "The Weight of the Presumption of Constitutionality Under the Fourteenth Amendment" has outlined the periodically varying weight accorded to the presumption in the U.S. Supreme Court and concludes that it is "nothing more than a convenient device to be used to support a favored statute, or an empty phrase to be employed in passing deference before proceeding to recite facts which destroy the validity of the legislation in question." 18 B. U. L. Rev. 319 (1938). "The force of the presumption varies inversely with the extent of the court's knowledge in favor of the statute." Note, 36 Col. L. Rev. 283 (1936). See Note, "The Presentation of Facts Underlying the Constitutionality of Statutes," 49 Harv. L. Rev. 631 (1936); Note, 31 Col. L. Rev. 1136 (1931).

15. Liggett Co. v. Baldridge, 278 U.S. 105,111 (1928). This note does not consider equal protection cases where the existence of a reasonably conceivable state of facts sustaining a classification made by the legislature will be presumed. E.g., Baldwin v. State, 194 Ind. 303,307, 141 N.E. 343,345 (1923). There would seem

determine if a statute has a reasonable relation to the police power they "look to the character and reasonableness of the limitation."[16] If courts may look to the reasonableness of a limitation,[17] what better source is there than the facts which the legislature thought gave the measure a substantial relation to the police power?[18] Certainly the principle is well established that the legislature may regulate business for the economic welfare of the public.[19] The insurance business in particular is subject to a large degree of regulation[20] by the states,[21] as are insurance agents.[22] But judges, by their devotion to the law, are precluded from having extensive knowledge of practices and theories of every business which may be involved in litigation before them. The inadequacy of judicial notice to deal with such matters has been pointed out by numerous writers.[23] An enlightened re-

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to be little distinction in equal protection and due process cases, however, in the context here considered. A reasonableness question in either type case can best be answered by resort to the facts.

16. Department of Insurance v. Schoonover, 72 N.E.2d 747 (Ind. 1947); Weisenberger v. State, 202 Ind. 424, 175 N.E. 238 (1930); Weaver v. Palmer Bros., 270 U.S. 402 (1926).

17. The writer in Note, 30 Col. L. Rev. 360 (1930) suggests that there are four elements in the analysis of the reasonableness of a statute: "the conditions existing prior to the legislation, the effectiveness of the new rule to improve them, the deprivation resulting from the new rule, and the possibility of achieving the same benefits at a lower price. The legislature in effect reaches a conclusion as to all these matters of fact. All of them are pertinent to the judicial question whether that conclusion is so unreasonable that it must be set aside."

18. The court must be ". . . informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact." Bikle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6 (1924).

19. See discussion of Indiana cases, Twomley, "The Indiana Bill of Rights," 20 Ind. L. J. 211, 218, 220 (1945); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (valid under the 14th Amendment); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (under Commerce Clause); Nebbia v. New York, 291 U.S. 502,537 (1934).

20. German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914); Attorney General v. Prudential Life Ins. Co., 310 Mass. 762,765, 39 N.E. 2d 664,667 (1942).

21. See "Indiana Legislation—1947, Insurance," 22 Ind. L. J. 364 (1947).

22. O'Gorman & Young v. Hartford F. Ins. Co., 282 U.S. 251 (1930).

23. E.g., Bikle, supra n. 18, at 21; Barnett, "External Evidence of the Constitutionality of Statutes," 3 Ore. L. Rev. 195,205 (1924). The U. S. Supreme Court's procedure of calling for facts in

view is impossible in many cases without an examination of the evidence;[24] and the court's judgment in such cases should be based on a complete record in order to command the public support.[25].

That the validity of a statute may be based on facts established by the evidence[26] is now thoroughly settled in the United States Supreme Court,[27] but is a point on which state courts differ.[28] In *Weisenberger v. State*[29] Indiana seemed to be following the lead of the Supreme Court. The court there decided that a statute forbidding the use of "shoddy" in renovating mattresses was a valid exercise of the police power if it applied only to the use of unsanitary "shoddy." The evidence failed to establish that "shoddy" could not safely be used if properly cleansed. It might be argued that the court was only considering evidence for the purpose of finding the legislative intent.[30] However, the rule admitting evidence was quoted from the Supreme Court case of *Weaver v. Palmer Bros. Co.*,[31] a direct holding that facts are admissible to determine a statute's constitutional-

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constitutional cases "recognizes the truth that what a particular court may judicially know does not necessarily comprehend all facts pertinent to the issue." Judicial notice should be used "only where the matter clearly falls within the domain of the indisputable." Morgan, "Judicial Notice," 57 Harv. L. Rev. 269,291,292 (1944).

24. Barnett, supra n. 23; Note, 9 N. Y. U. L. Q. Rev. 82,86,87 (1931).
25. Bikle, supra n. 18, at 27.
26. In the U.S. Supreme Court at least, facts are brought to the attention of the Court by the presentation of competent legal proof in conformity with the rules of evidence, in the form of the Brandeis Brief (matters of general knowledge and belief), by a legislative declaration of public conditions, by committee reports, and by a finding of fact by the highest state court, in addition to those accorded judicial notice. Warsoff, supra n. 14, at 322.
27. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); U.S. v. Carolene Products Co., 304 U.S. 144 (1937); see note on this point, 82 L. Ed. 1244 (1937). A recent case going deep into the underlying fact situation of a statute is Kotch v. Board of River Port Comm'rs, 330 U.S. 552 (1946).
28. Note, supra n. 27; Wilson, "Consideration of Facts in Constitutional Cases," 17 So. Calif. L. Rev. 335,338,339 (1944).
29. 202 Ind. 424, 175 N.E. 238 (1930), 6 Ind. L. J. 564 (1931).
30. The court's duty is to avoid a construction of a statute which would make it unconstitutional if that construction can reasonably be given it. See, e.g., Miles v. Department of Treasury, 209 Ind. 172,184, 199 N.E. 372,377 (1935); Peabody Coal Co. v. Lambermont, 220 Ind. 525,529, 44 N.E.2d 827,828 (1942). This is a matter not within the scope of this note.
31. 270 U.S. 402 (1926).

ity.[32] That indicates the Indiana court intended a like application and scope for the rule.[33] But it appears that phase of the *Weisenberger* case is now overruled.[34]

If the law is to remain as declared in the principal case it would seem that the court validly excepted rate cases.[35] The questions presented in the instant case are questions of the power of the legislature to act at all, while in rate cases, the power being conceded, the question is whether the party is in *fact* unreasonably deprived of property or due process by the rate established. Even admitting this distinction, the facts on which the power to regulate depends are no less material than the facts on which the reasonableness of a given rate is predicated, and no reason is seen why courts should consider them in the one case and not in the other. A rational conclusion is impossible in either situation without adequate factual support.[36]

Two reasons are urged by some courts against the examination of evidence in these cases: (1) It is claimed that the legislature is in a better position to deal with such evidence than the courts—that courts cannot review facts on which the legislature is presumed to have passed;[37] and (2) That it would result in an instability of the law because the fate of a statute would depend on the character of the case first presented to the court.[38] It is submitted that the first objection grows out of confusion of the two "apparently conflicting concepts" mentioned earlier. Granting that the legislature is in a better position to deal with such evidence as they do deal with it, "the scope of a judicial inquiry in deciding the question of power is not to be confused with

32. "The answer depends on the facts of the case . . . . Invalidity may be shown by things which will be judicially noticed . . . or by facts established by evidence." Weaver v. Palmer Bros. Co., 270 U.S. 402,410 (1926).

33. The then Chief Justice of the Indiana Supreme Court considered the Weisenberger case a landmark case. Address to the Bar, 7 Ind. L. J. 31 (1931).

34. It is noted in passing that the principal case quotes another passage from the Weisenberger case with approval: ". . . courts may look to the character and reasonableness of the limitation . . . ," and in *looking* to the reasonableness the court there *admitted evidence.*

35. Cf. Barnett, supra n. 23, at 204.

36. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194,210 (1934).

37. Hovey v. Foster, 118 Ind. 502,508, 21 N.E. 39,41 (1889).

38. Pittsburgh R.R. v. State, 180 Ind. 245,252, 102 N.E. 25,28 (1913); see Barnett, supra n. 23, at 203.

the scope of legislative considerations in dealing with the matter of policy."[39] In considering evidence in constitutional cases courts are not reviewing facts in the same sense that the legislature passed upon them. They are not debating conflicting theories as did the legislature, but are directing their inquiry to whether the legislature had a reasonable theory to support the regulation. The second objection arises from a misconception of the nature of the facts admitted under the Supreme Court rule.[40] Those facts admitted bearing on the reasonableness of the limitation are not directed, as in the rate cases, merely to a showing that its application to a particular party is invalid, but to the existence or nonexistence of a rational theory sustaining the legislation as to all parties affected by it.[41]

The weight of the presumption of constitutionality in Indiana after the *Schoonover* case is uncertain. In cases cited by the court in the principal case[42] the presumption was employed to uphold statutes in the face of *invalidating evidence* which the court refused to consider. Here the court tips its hat to the presumption in passing, and refuses *evidence supporting* the statute. The tenor of the decision suggests *Lochner v. New York*[43] and the "side-by-side" test where the constitution and the statute are laid together and the judge decides which should prevail.[44] No recent authorities have been found favoring the view adopted by the court in the *Schoonover* case;[45] critics and authors favor the Supreme Court rule.[46] It is believed that business interests and increased regulation have become too complex for an outmoded judicial notice to give legislation a fair trial, and that frank adoption of the factual evidence rule in constitutional cases will lead to less confusion in the law and procedure than the happenstance of judicial notice.[47]

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39. Chicago R.R. v. McGuire, 219 U.S. 549,569 (1911).
40. Compare Carolene Products Co. v. U.S., 323 U.S. 18 (1944), with U.S. v. Carolene Products Co., 304 U.S. 144 (1937).
41. See cases cited in Note, supra n. 27.
42. Cases cited n. 6 supra.
43. 198 U.S. 45 (1905).
44. See Carter v. Carter Coal, 298 U.S. 238 (1936).
45. Cf. at earlier dates Notes, 14 L.R.A. 459 (1891); L.R.A. 1915D 458; 6 R.C.L. 112-5 (1915).
46. Articles and Notes cited supra notes 14, 17, 18, 23, 28.
47. See Morris, "Law and Fact," 55 Harv. L. Rev. 1303,1321,1325 (1942). See also a recent state decision well reasoned on the point, Ritholz v. Johnson, 244 Wis. 494, 12 N.W.2d 738 (1944).