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THE SUPREME COURT AND THE NEW DEAL— AN ANSWER TO TEXAS

KENNETH C. SEARS*

AT ITS 1944 meeting the State Bar Association of Texas, after a very heated debate on the subject, adopted the following resolution:¹

Resolved by the State Bar of Texas:

1. That the Supreme Court of the United States is losing, if it has not already lost, the high esteem in which it has been held by the people; an esteem created by their belief that it had always remained free of political, personal and unworthy motives and had interpreted and declared the law as it is written, according to tradition and precedent, and agreeable to the provisions of the Constitution and the Bill of Rights.

2. Lately it has repeatedly overruled decisions, precedents and landmarks of the law, of long standing, without assigning any valid reason therefor, dismissing the question with a wave of the hand, and contenting itself with the assertion that these precedents have been eroded by the processes of the years; or basing its decision on casuistry and sophistry rather than logic. An example of this is found in decisions of the Court by which jurisdiction is held under the Interstate Commerce Clause of the Constitution.

3. We do not believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of stare decisis. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common law process would become the most intolerable kind of ex post facto judicial law-making.

4. By plainly disregarding these principles and these processes, and by its vacillations and uncertainties, and the inconsistencies of its decisions, it has rendered it impossible for the practicing lawyer to advise his client as to what the law is today, or even to offer a guess as to what it will be tomorrow. And by this conduct and by controversies within its own personnel, it has subjected itself to the suspicion, widely held, that it speaks, or undertakes to speak, in the voice of the appointing power, rather than the voice of the law, as witness the following from a writer, well known and widely read:

Mr. Roosevelt's appointees to the Supreme Court have just ruled that all insurance is under federal control. To do so they have reversed previous decisions that had stood for a hundred years.

And this from the *Houston Post*, widely circulated and respected throughout the country:

* Professor of Law, University of Chicago. The substance of this article was originally given at an address delivered before the Lawyers Association of Kansas City, November 15, 1944.

¹ The resolution is quoted from the American Bar Association Journal of August, 1944, at p. 484.

When the United States Supreme Court doffs its black robes Monday, and leaves on a vacation, it will go with less popular admiration and respect than any previous Supreme Court has enjoyed within the memory of living men.

In this body of jurists the majesty and the dignity and the prestige of the nation's highest tribunal has hit an all-time low.

Such expressions are confined to no section of the country; they are general, and they represent a general sentiment. They show that the Court as an institution has suffered a serious injury at the hands of a majority of its members as presently constituted, and the protests of those members not concurring present an arraignment as strong as those quoted above, and scarcely less restrained.

5. The American Bar cannot ignore these conditions, or the causes which produce them, without failing in their own observations, as lawyers. It is their duty, frankly and courageously, to call them to the attention of the Court, and to demand a return to the application of known principles and previously disclosed courses of reasoning, so that the country may be delivered from the most intolerable kind of ex post facto judicial law-making. To that end we direct that a copy of this resolution be forwarded to the Clerk of the Supreme Court, with request that it be called to the attention of the Chief Justice.

Surely there is one thing about which all of us can agree. The resolution thus read is highly uncomplimentary, not to say insulting. Accordingly, it is appropriate to examine the record.²

The writer has made an examination of Volumes 55 to 64 inclusive of the *Supreme Court Reporter*. He turned to the index in each volume and examined all of the material listed under the title "constitutional law." He then referred to the opinions cited in this digest. Briefs were made of all the cases which seemed to him to be of any importance for the purpose of examining the accuracy of the resolution. Naturally, this required an element of judgment because those cases were discarded that seemed to him to be of no importance for this discussion. The reader will agree, it is believed, that there are many decisions in constitutional law which are not significant. There are others which are significant but which failed to bring forth a division in the court. For example, the decision in *Continental Illinois National Bank v. Chicago Rock Island Railway Co.* is an important one. It sustained the constitutionality of a statute extending the law of bankruptcy to railway companies. But the Court was unanimous, and the opinion seems only to be another milestone in the process of extending the concept of bankruptcy.

There were nine cases of great importance for our present purpose in Volume 55 of the *Supreme Court Reporter*. In every one of these nine cases the Court was sharply divided. The division followed a very uniform pat-

² No attempt was made to examine other than constitutional decisions. Therefore, reversals of, say, admiralty and patent decisions are not considered here.

tern. The four so-called conservatives, Justices McReynolds, Van Devanter, Sutherland and Butler, were always agreed in these cases. Likewise, the three so-called liberals, Justices Brandeis, Stone and Cardozo were agreed. Justices Hughes and Roberts were in the middle. The decisions primarily depended upon them. If one of them joined with the conservatives, that group had a majority. It was necessary for both of them to join with the liberals in order for the liberal group to be in the majority. Thus it was that the legislation which invalidated the gold clause was sustained in three cases.³ On the contrary, the Railroad Retirement Act was held to violate the commerce clause and the due process clause because Mr. Justice Roberts joined with the conservatives even though Mr. Chief Justice Hughes joined with the liberals.⁴ By the same division, it was decided that a federal court, requiring a defendant to agree to an increase in the amount of a verdict rendered in a personal injury action, as a condition to refusing the plaintiff's motion for a new trial, violated the Seventh Amendment, even though for more than one hundred years the federal courts had authorized the reverse action to be taken, viz., a remittitur of excessive damages.⁵ Roberts and Hughes joined with the conservatives in holding that a Kentucky statute violated the Fourteenth Amendment by imposing a graduated gross sales tax on retail merchants.⁶ But Hughes and Roberts by joining with the liberals sustained a West Virginia statute which imposed a license tax on chain stores, graduated according to the number of stores operated by the same management.⁷

In conclusion, then, the Court sitting during the October term of 1934 without any appointee of President Roosevelt, was a sharply divided court on most close constitutional questions. As far as I am aware the division of the Court at this time was the tightest and most predictable division in the history of the Court.

The decisions rendered during the October, 1935, term of the Court as found in 56 *Supreme Court Reporter* also conformed to the pattern which has just been set forth. There were ten of these cases. The most important were *United States v. Butler*,⁸ invalidating the Agricultural Adjustment

³ *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 55 S.Ct. 407 (1935); *Nortz v. United States*, 294 U.S. 317, 55 S.Ct. 428 (1935); *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432 (1935).

⁴ *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758 (1935).

⁵ *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296 (1935).

⁶ *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S.Ct. 525 (1935).

⁷ *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 55 S.Ct. 333 (1935).

⁸ 297 U.S. 1, 56 S.Ct. 312 (1936).

Act, *Carter v. Carter Coal Co.*,⁹ invalidating the Bituminous Coal Conservation Act, *Morehead v. New York*,¹⁰ invalidating the New York Minimum Wage Law for women and minors, and *Colgate v. Harvey*¹¹ invalidating one provision of a Vermont taxing statute because it violated the equal protection clause and also, marvelous to say, the privileges and immunities clause in section 1 of the Fourteenth Amendment.

Likewise the decisions rendered by the Court during the October, 1936, term in general conformed to the pattern. However, there was a vast difference in the results. The pattern remained the same, but Justices Hughes and Roberts in several important cases joined with the liberal wing. Thus the decisions rendered during this term were outstanding in sustaining several important acts passed during the New Deal administration. What had happened to cause Hughes and Roberts, and particularly Roberts, apparently to change their general attitude? Readers are probably familiar with the only answer that, to the writer's knowledge, has been given to this question. It was Roosevelt's overwhelming victory in 1936.

Despite the very close division of the Court, as manifested in seventeen cases, it sustained, among other statutes, the Alabama Unemployment Compensation Act,¹² after there had been an equal division of the Court over the New York Unemployment Insurance Law.¹³ At that time Mr. Justice Stone was absent, as he was during a considerable portion of the term. The divided Court also sustained title IX of the National Social Security Act,¹⁴ providing for unemployment compensation, the National Labor Relations Act in four cases,¹⁵ the Virginia Milk Commission Act,¹⁶ the Washington Minimum Wage Law¹⁷ for women and minors, and the Wisconsin Labor Code, legalizing peaceful picketing and patrolling.¹⁸

⁹ 298 U.S. 238, 56 S.Ct. 855 (1936). *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513, 56 S.Ct. 892 (1936) held the first Municipal Corporation Bankruptcy Act invalid, five to four.

¹⁰ 298 U.S. 587, 56 S.Ct. 918 (1936).

¹¹ 296 U.S. 404, 56 S.Ct. 252 (1935).

¹² *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868 (1937).

¹³ *W. H. H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515, 57 S.Ct. 122 (1936).

¹⁴ *Chas. C. Stewart Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883 (1937).

¹⁵ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 57 S.Ct. 645 (1937); *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 57 S.Ct. 650 (1937).

¹⁶ *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 57 S.Ct. 549 (1937).

¹⁷ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937). See *Helvering v. Griffiths*, 318 U.S. 371, 63 S.Ct. 636, 652, note 52 (1943).

¹⁸ *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 57 S.Ct. 857 (1937).

In sustaining the Social Security Act the majority made an attempt to reconcile its decision with the decision of the majority that invalidated the Agricultural Adjustment Act. The attempt, it is submitted, was not a successful one, although the two cases were not identical. In sustaining the National Labor Relations Act the majority attempted to distinguish the decision of a unanimous Court in the *Schechter* case, which invalidated the NIRA, and the decision of a sharply divided Court on the Bituminous Coal Conservation Act. This attempted reconciliation does not appear successful. In any event, the minority in the NLRA cases relied upon the *Schechter* and *Carter* cases and stated: "Six District Courts, on the authority of *Schechter's* and *Carter's* Cases have held that the Board has no authority to regulate relations between employers and employees engaged in local production. No decision or judicial opinion to the contrary has been cited, and we find none." The minority opinion also set out the three opinions of the three circuit courts of appeal which had held the National Labor Relations Act unconstitutional. All of them were very brief opinions and one was a per curiam opinion. All of them cited and relied on the *Carter* case. There were able judges who participated in the decision of these cases, including two who have been regarded as liberal, viz., Judges Hutchinson and A. N. Hand. Thus it seems clear that the *Carter* decision as to the scope of the commerce clause was overruled, even though the majority failed to admit as much.

In the minimum wage case the Court sustained the Washington Minimum Wage Act, even though the Court in the preceding term had invalidated the New York Minimum Wage Act. The Court expressly overruled the *Adkins* case, and it should have expressly overruled the *Morehead* case. If the Washington Minimum Wage Act was constitutional, the New York statute was also constitutional, because the New York statute, as it was written, was more tender of the employers than was the Washington statute. The minority of the Court dissented at length and relied upon both the *Adkins* and the *Morehead* cases.

In *Herndon v. Lowry*¹⁹ a Georgia statute penalizing the offense of attempting to incite insurrection was held to be unconstitutional as applied to the particular circumstances. It is doubtful whether the decision can be satisfactorily reconciled with *Gillow v. New York*, decided in 1925, even though the majority of the Court attempted to differentiate the *Gillow* case.

In *Senn v. Tile Layers Protective Union*²⁰ the majority of the Court differentiated *Truax v. Corrigan*, which had long been offensive to organized

¹⁹ *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732 (1937).

²⁰ *Supra*, note 18.

labor. And the minority relied upon *Truax v. Corrigan*, decided in 1921, as its main authority. Thus we observe a very significant shift in the Court, due largely to the voting of Mr. Justice Roberts and to a lesser extent that of Mr. Chief Justice Hughes. And it is to be remembered that no Roosevelt appointee was yet on the Supreme Court of the United States.

A few cases present a small amount of unsatisfactory evidence of a break-up in the conservative group, which had long consisted of Justices Van Devanter, McReynolds, Sutherland, and Butler. For example, in *United States v. Wood*²¹ the majority included Van Devanter, Hughes, Roberts, Brandeis and Cardozo, with Stone taking no part in the decision. They sustained an act of Congress making employees and pensioners of the federal government and of the District of Columbia eligible for jury service in the district. In order to do so, however, the Court had to overrule in effect the *Crawford* case, decided in 1908.

In one of the social security cases, *Helvering v. Davis*,²² titles II and VIII of the Social Security Act providing for federal old age benefits were sustained by the Court with only Justices McReynolds and Butler dissenting. In two other cases Van Devanter and Sutherland joined with the majority, thus parting company with their old companions, McReynolds and Butler. In two other cases McReynolds alone dissented.

Time brought its changes. Mr. Justice Van Devanter retired from the Court on June 2, 1937. Mr. Justice Black succeeded him, having been appointed on August 17, 1937. Mr. Justice Sutherland retired from the Court on January 18, 1938, and he was succeeded by Mr. Justice Reed who was appointed January 25, 1938. Thus the October term of 1937 started with one new justice and another was added in the middle of the term.

This left only Mr. Justice McReynolds and Mr. Justice Butler of the ultra-conservative group. In ten cases these two dissented from the judgment of the Court.²³ The most striking of these cases was *Erie Railroad Co. v. Tompkins*.²⁴ This decision overruled the famous case of *Swift v. Tyson*, which had been decided in 1842 and had been followed, and even expanded, since that time. Thus *Swift v. Tyson* was overruled after it had been the law for ninety-six years. All of the Court concurred in the opinion

²¹ 299 U.S. 123, 57 S.Ct. 177 (1936).

²² 301 U.S. 619, 672, 57 S.Ct. 904 (1937).

²³ In two other cases McReynolds, Sutherland (before he retired), Butler, and Roberts dissented, *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208 (1937), and *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 58 S.Ct. 233 (1937). In one of the ten cases Sutherland joined with McReynolds and Butler.

²⁴ 304 U.S. 64, 58 S.Ct. 817 (1938).

written by Mr. Justice Brandeis except Justices Butler and McReynolds and except Mr. Justice Reed, who concurred in the conclusion of the majority on the basis of statutory construction. But he objected to stating that the course of judicial construction by the Supreme Court had been unconstitutional. It should be added that Justice Cardozo took no part in the decision. The significant thing about the division in the *Erie Railroad* case is that only one appointee of President Roosevelt, viz., Mr. Justice Black, was responsible for the sweeping opinion which held that the doctrine of *Swift v. Tyson* was unconstitutional.

Another significant case was *United States v. Bekins*,²⁵ which sustained the constitutionality of the Municipal Corporation Bankruptcy Act. Again Justices McReynolds and Butler dissented, and Justice Cardozo took no part. The *Ashton* case, which had decided that the first Municipal Corporation Bankruptcy Act was unconstitutional, was not overruled. Apparently the majority meant to differentiate the *Ashton* case on the basis of the report of the House Committee on Judiciary. In dissenting, Justices McReynolds and Butler stated that the *Ashton* case was controlling, and I believe that it is fair to say that it is generally regarded that the *Ashton* case was in effect overruled.²⁶ Again it is to be remembered that only two Roosevelt appointees were active in this decision.

Another significant case was *Railroad Commission v. Pacific Gas and Electric Co.*²⁷ The decree of the district court in this case had been affirmed on June 1, 1937, by an equally divided Court, with Mr. Justice Sutherland taking no part. Upon reargument, however, the decree was reversed on January 3, 1938. This was effected through the action of Justices Hughes, Brandeis, Roberts, Stone, Cardozo, and Black. Sutherland took no part, but Butler and McReynolds dissented. Their dissenting opinion stated:

I cannot refrain from protesting against the Court's refusal to deal with the case disclosed by the record and reasonably to adhere to principles that have been settled. Our decisions ought to be sufficiently definite and permanent to enable counsel usefully to advise clients. Generally speaking, at least, our decisions of yesterday ought to be the law of today.²⁸

²⁵ 304 U.S. 27, 58 S.Ct. 811 (1938).

²⁶ See note 9, *supra*. See a comment by Jackson in *Helvering v. Griffiths*, 318 U.S. 371, 63 S.Ct. 636, 651, note 51 (1943).

²⁷ 302 U.S. 388, 58 S.Ct. 334 (1938).

²⁸ In *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623 (1938) Hughes, Brandeis, Stone, Roberts, and Black joined in expressly overruling *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S.Ct. 171 (1922) and *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443 (1932). Butler and McReynolds dissented, saying that "no real reason for so sweeping a change of construction" had been stated and that "it threatens many business arrangements."

Be it remembered that this was a protest against the action of six justices, only one of whom had been appointed by President Roosevelt.

In three cases in the 1937 term Mr. Justice McReynolds alone dissented, and in one of them he objected to the decision that the Public Utility Holding Company Act, providing for the registration of holding companies with extensive operations in interstate commerce, was constitutional.²⁹ In one case Mr. Justice Butler alone dissented.³⁰

The October, 1937, term revealed in the person of Mr. Justice Black a justice who was, it seems fair to say, considerably left of the judicial center. He alone dissented in three cases, the most striking of which was *Connecticut General Life Insurance Co. v. Johnson*.³¹ In his dissenting opinion he advocated the view that the word "person" in the Fourteenth Amendment does not include corporations. He quoted from the opinion of Justices Stone and Cardozo in the *St. Joseph Stock Yards* case that the doctrine of stare decisis has only a limited application in the field of constitutional law. He also quoted from the dissenting opinion of Mr. Justice Brandeis in the *Burnet* case that the Supreme Court has many times changed its interpretations of the Constitution, when the conclusion was reached that an improper construction had been adopted.

Mr. Justice Cardozo died during the summer of 1938. Mr. Justice Frankfurter was appointed to succeed him on January 17, 1939. Mr. Justice Brandeis retired February 2, 1939. Mr. Justice Douglas was appointed as his successor on April 4, 1939. Justices Butler and McReynolds were the only two left of the original conservative group. In ten cases they alone dissented. One of the most important was *Graves v. New York*,³² which held that a New York nondiscriminatory income tax laid upon the salary of an employee of the Home Owners Loan Corporation was valid. The doctrine of implied immunity from taxation upon governmental agencies and agents had been buffeted about by the Supreme Court for some years. In order to arrive at the result in *New York v. Graves* the majority overruled *Collector v. Day* and *Rogers v. Graves*. In a separate concurring opinion Mr. Justice Frankfurter stated that he assumed that *Dobbins v. Commissioners* and its offspring were also overruled. Justices

²⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778 (1938); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 S.Ct. 913 (1938); *Electric Bond & Share Co. v. Securities and Exchange Com'n*, 303 U.S. 419, 58 S.Ct. 678 (1938).

³⁰ *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).

³¹ 303 U.S. 77, 58 S.Ct. 436 (1938).

³² 306 U.S. 466, 59 S.Ct. 595 (1939). In *O'Malley v. Woodrough* 307 U.S. 277, 59 S.Ct. 838 (1939), *Miles v. Graham* was expressly overruled. *Evans v. Gore* was overruled in effect. Butler dissented. McReynolds took no part.

Butler and McReynolds in dissenting stated that all of these cases and also the *Brush* case had been overruled. It was in his concurring opinion that Mr. Justice Frankfurter made a statement which became an irritant to many persons. It was: "But the old tradition [i.e., rendering individual opinions] still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court."

In *Coleman v. Miller*³³ and in *Chandler v. Wise*³⁴ the question was whether the Child Labor Amendment of 1926 had been ratified by Kansas and Kentucky. In both cases Justices McReynolds and Butler dissented because of the decision in *Dillon v. Gloss*. The other members of the Court either limited *Dillon v. Gloss* to its particular facts or desired to overrule the dicta in that case.

In *Curran v. Wallace*³⁵ the Tobacco Inspection Act of 1935 was held to be valid, McReynolds and Butler dissenting. This was the case forerunner of the more important case of *Mulford v. Smith*,³⁶ which held valid the Agricultural Adjustment Act of 1938, providing for the establishment and apportionment of marketing quotas for tobacco and penalizing tobacco auction warehousemen for exceeding the quotas. Mr. Justice Roberts wrote the majority opinion in this case, but he did not mention his much criticized opinion in *United States v. Butler*, which had invalidated the first Agricultural Adjustment Act. The act of 1938 was upheld as a regulation of commerce. I believe that it is generally considered that *Mulford v. Smith* effectively removed *United States v. Butler* from the category of controlling cases. Surely Congress can do as much through taxation in the way of regulating agricultural production as it can by the commerce clause.

In *Consolidated Edison Co. v. National Labor Relations Board*³⁷ the Court held that the board had jurisdiction over the Edison Company. This was a sympathetic interpretation of the National Labor Relations Act. Justices Butler and McReynolds dissented on this point and said that the case was not distinguishable from the *Schechter* (sick chicken) case or from the *Carter* case which invalidated the Bituminous Coal Conservation Act. Rather sarcastically, it would seem, the dissenting opinion contained this statement: "Asseveration of need to uphold our dual form of government and the safeguards set for the protection of the States and the liberties of the people against unauthorized exertion of federal power, does not assure adherence to, or conceal failure to discharge, duty to sup-

³³ 307 U.S. 433, 59 S.Ct. 972 (1939).

³⁴ 307 U.S. 474, 59 S.Ct. 992 (1939).

³⁵ 306 U.S. 1, 59 S.Ct. 379 (1939).

³⁶ 307 U.S. 38, 59 S.Ct. 648 (1939).

³⁷ 305 U.S. 197, 59 S.Ct. 206 (1938).

port the Constitution." It will be well to keep this utterance concerning the liberties of the people in mind as we consider the next two cases and also other cases which have since been decided.

In *Hague v. Committee for Industrial Organization*³⁸ the Court was much divided, but all of those sitting in the case except McReynolds and Butler favored a decision that strongly supported the privilege of persons to discuss the National Labor Relations Act and by fair inference to make reasonable use of streets and public places in municipalities for the purpose of making speeches and otherwise to disseminate information. The earlier case of *Davis v. Massachusetts*³⁹ was not overruled, but at least it seems fair to say that it was restricted very narrowly to its particular facts. Indeed, Mr. Justice Butler dissented because of this decision. Mr. Justice McReynolds dissented more broadly because the district court should not have interfered with the essential right of the municipality to control its own parks and streets.

*Missouri v. Canada*⁴⁰ held that Missouri, as long as it afforded legal education to white residents, was bound to furnish to resident Negroes substantially equal facilities within the state. Again McReynolds and Butler dissented, relying upon the idea that separate schools are a safeguard against the damnification of both races. I believe I am conservative in making the statement that this theory is a highly disputed one. In any event, the *Canada* case is another example of the modern attitude of the Supreme Court to be more and more critical of racial discrimination.

In *Driscoll v. Edison Light and Power Co.*⁴¹ the Court was unanimous concerning a rate order, but Justices Frankfurter and Black, while concurring, protested that "the court's opinion appears to give new vitality needlessly to the mischievous formula for fixing utility rates in *Smyth v. Ames*. . . ." This condemnation of the formula as a useless one should be remembered when we consider future decisions.

The decisions rendered during the October, 1938, term of the Supreme Court afford a slight amount of evidence that the Supreme Court, as reconstituted, was moving too far to the judicial left for Mr. Justice Roberts and to a lesser extent for Mr. Chief Justice Hughes. In *United States v. Rock Royal Co-op Inc.*,⁴² the Agricultural Marketing Agreement Act was held not to be unconstitutional for delegating too much legislative power to the Secretary of Agriculture. In the main opinion the *Schechter* (sick chicken) case was differentiated. There is some opinion that the *Rock*

³⁸ 307 U.S. 496, 59 S.Ct. 954 (1939).

³⁹ 167 U.S. 43, 17 S.Ct. 731 (1897).

⁴⁰ 305 U.S. 337, 59 S.Ct. 232 (1938).

⁴¹ 307 U.S. 104, 59 S.Ct. 715 (1939).

⁴² 307 U.S. 533, 59 S.Ct. 993 (1939).

Royal case in effect overruled the *Schechter* and the *Ryan* (hot oil) cases with reference to the delegation of legislative power. It is submitted that it does not go quite that far, but it should be stated that in view of the main opinion in the *Rock Royal* case there appears to be no appreciable handicap on Congress, whenever it wishes to delegate legislative power. Apparently, this is primarily a matter of legislative draftsmanship, and it will be a careless job of draftsmanship that will cause the Supreme Court to invalidate an act because of delegation. In the *Rock Royal* case McReynolds and Butler dissented, but of more importance is the fact that Mr. Justice Roberts dissented because the order of the Secretary violated due process, and Mr. Chief Justice Hughes joined in Mr. Justice Roberts' opinion "on the ground stated."

In *H. P. Hood & Sons v. United States*,⁴³ a companion case under the same act, Mr. Chief Justice Hughes joined with the majority in upholding the act. Justices Roberts, McReynolds, and Butler dissented because of an unconstitutional delegation of legislative power, and relied upon the hot oil and the sick chicken cases.

In one other case Butler, Hughes, McReynolds, and Roberts dissented, and in two other cases Roberts, McReynolds, and Butler dissented.

It was the October term of 1939 that eventually resulted in a majority of the members of the Supreme Court being the appointees of President Roosevelt. Mr. Justice Butler died November 16, 1939, and therefore he participated very little in the activity of the Court during the term. Mr. Justice Murphy was appointed as his successor on January 18, 1940. Only Mr. Justice McReynolds of the ultra-conservative group was left. The fact that he was alone did not deter him in the least from adhering to his beliefs. In ten cases he alone dissented from the decision of the Court. One of these cases combined four distinct appeals. In four additional cases McReynolds joined with Roberts or with Roberts and Hughes in dissenting. In still another case it seems clear that he would have joined with Hughes and Roberts in dissenting, if he had taken any part in the decision. In one case (the flag-salute case) Mr. Justice Stone alone dissented, and in another case Roberts alone dissented.

In *Madden v. Kentucky*⁴⁴ a statute taxing deposits in Kentucky banks at one-fifth of the tax rate on bank deposits outside the state was held to be valid. In doing this, *Colgate v. Harvey*⁴⁵ was expressly overruled.

In *Tigner v. Texas*⁴⁶ a Texas anti-trust statute was held to be valid even though an exemption was granted to agricultural products and live stock

⁴³ 307 U.S. 588, 59 S.Ct. 1019 (1939).

⁴⁵ See note 11, supra.

⁴⁴ 309 U.S. 83, 60 S.Ct. 406 (1940).

⁴⁶ 310 U.S. 141, 60 S.Ct. 879 (1940).

in the possession of the producers. The opinion of the Court, written by Mr. Justice Frankfurter, in effect overruled *Connolly v. Union Sewer Pipe Co.*⁴⁷ He stated that the Texas Court of Criminal Appeals had "felt that time and circumstances had drained that case of vitality. . . ." Perhaps this remark was in the memories of those who drafted the resolution of the State Bar of Texas, even though the decision of the Supreme Court of the United States sustained the constitutionality of a Texas statute. As one who has taught constitutional law for a number of years, I am bound to say that the *Connolly* case, which in effect was overruled, has long seemed to me to be inconsistent with other decisions on the question of equal protection.

In *Sunshine Anthracite Coal Co. v. Adkins*⁴⁸ the Court sustained the constitutionality of the Bituminous Coal Act of 1937, with only Mr. Justice McReynolds dissenting. This act had extracted from the Bituminous Coal Conservation Act of 1935, held unconstitutional in the *Carter* case,⁴⁹ the price-fixing provisions, and, with the addition of unfair trade practice and marketing rules, the new act was sustained. The *Carter* case was not expressly overruled, but it is difficult, if not impossible, to make any satisfactory differentiation between the *Carter* case and the *Sunshine* case.

The most significant activity of the Supreme Court during the 1939 term had to do with seven cases concerning free speech and free press. In only one of them was the Court unanimous, but in six of them the Court reversed convictions which had been obtained in state courts for picketing, canvassing without a permit, distribution of handbills and circulars, and for the solicitation of funds for a religious purpose. The cases involved were *Thornhill v. Alabama*,⁵⁰ *Carlson v. California*,⁵¹ *Schneider v. New Jersey*, *Young v. California*, *Snyder v. Milwaukee*, *Nichols v. Massachusetts*,⁵² and *Cantwell v. Connecticut*.⁵³ In all of these cases, except the *Cantwell* case, Mr. Justice McReynolds dissented. Such results should be carefully considered, in view of the statement in the Texas resolution that the New Deal Court has lost the high esteem previously held by the Supreme Court of the United States in interpreting the law in a manner sympathetic to the Bill of Rights. The basis for this critical utterance seems to me to be wholly false. One of the most significant aspects of recent decisions by the Supreme Court of the United States has been that, while in general it has sustained acts of Congress which have extended the power and influ-

⁴⁷ 184 U.S. 540, 22 S.Ct. 431 (1902).

⁴⁸ 310 U.S. 381, 60 S.Ct. 907 (1940).

⁴⁹ See note 9, supra.

⁵⁰ 310 U.S. 88, 60 S.Ct. 736 (1940).

⁵¹ 310 U.S. 106, 60 S.Ct. 746 (1940).

⁵² 308 U.S. 147, 60 S.Ct. 146 (1939).

⁵³ 310 U.S. 296, 60 S.Ct. 900 (1940).

ence of the national government, still it has at the same time gone farther than in any other period in the history of the Supreme Court in upholding freedom of speech, press, and religion. It is significant, too, that the ultra-conservative member of the Court, Mr. Justice McReynolds, dissented; and there is some reason to believe that if his former companions of the ultra-conservative group had been on the Court during the 1939 term, they likewise would have dissented. The truth seems to be that while the liberal group, or, if you wish, the leftist group, has been strongly nationalistic in sustaining acts of Congress, it has also been very tolerant of most state legislation, which has been challenged under the Fourteenth Amendment. Its only intolerance, if it can be called such, has concerned state and municipal legislation which has placed barriers upon the liberties mentioned. Indeed, it has been observed for some years that the liberal and conservative groups have tended to a large extent to reverse their positions when statutes concerning freedom of speech, press, and religion have presented themselves. Thus, the liberal group, in sustaining national power, has been very strongly opposed, and, if you wish, intolerant, of legislative activity restricting freedom of expression. On the other hand the conservative group had been intolerant of the extension of national power through acts of Congress, and also of some state legislation challenged under the Fourteenth Amendment; and yet it was that group that voted to uphold state and municipal legislation restricting freedom of expression. So it would seem that in respect to the Bill of Rights the Texas resolution has made a false comment.

An exception to what has just been stated appears in the flag-salute case.⁵⁴ There Mr. Justice Stone was the only dissenter while Mr. Justice McReynolds concurred in the result of the opinion that permitted the Pennsylvania School Board to exclude children who refused to salute the flag. But this was a short-lived opinion, as will later appear. There are those who have explained the attitude of the Court in the flag salute case as having been unduly influenced by what was happening in France at the time when the opinion was written.

Mr. Justice McReynolds retired February 1, 1941, about the middle of the October, 1940, term. Thereafter the Court consisted of eight members, three of whom were not Roosevelt appointees, viz., Justices Hughes, Stone, and Roberts.

The most impressive aspect of the October, 1940, term was the decisions in the following five cases. In *United States v. Darby*,⁵⁵ the Fair Labor

⁵⁴ *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010 (1940).

⁵⁵ 312 U.S. 100, 657, 61 S.Ct. 451 (1941).

Standards Act was held to be valid within the commerce clause and despite the Tenth Amendment. The much criticized child labor case of *Hammer v. Dagenhart*⁵⁶ was overruled. The opinion stated: "The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had, has long since been exhausted." The Court also said, with reference to the *Carter* case, which held the Bituminous Coal Conservation Act invalid, that: "So far as *Carter v. Carter Coal Company* . . .⁵⁷ is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow." The Court was unanimous in *United States v. Darby*, and the opinion was written by Mr. Justice Stone. The Court was again unanimous in *Opp Cotton Mills v. Administrator*.⁵⁸ Other sections of the Fair Labor Standards Act were involved in this case. The decision in the *Darby* case was reaffirmed, and it was also held that there was no violation of the constitutional provision that all legislative powers granted shall be vested in Congress.

In *California v. Thompson*,⁵⁹ a California statute requiring transportation agents to procure licenses, file bonds, and pay license fees was held to be a valid state regulation and not a violation of the commerce clause. In so holding, the Court overruled the *Di Santo* case,⁶⁰ which was said to be a departure from the principle that had been recognized since *Cooley v. Board of Port Wardens*, which was decided in 1851.⁶¹ The opinion in the *Thompson* case was written by Mr. Justice Stone, and he again spoke for a unanimous Court.

In *Olsen v. Nebraska*⁶² a unanimous Court held valid a Nebraska statute which fixed the maximum compensation which a private employment agency could collect from an applicant. Again the Court was unanimous, and Mr. Justice Douglas in writing the opinion stated: "The drift away from *Ribnick v. McBride*, *Supra*,⁶³ has been so great that it can no longer be deemed a controlling authority." After citing many recent cases upholding price fixing the Court concluded: "They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnick* case. . . . The *Ribnick* case, freed from the test which it em-

⁵⁶ 247 U.S. 251, 38 S.Ct. 529 (1918).

⁵⁷ See note 49, *supra*.

⁵⁸ 312 U.S. 126, 657, 61 S.Ct. 524 (1941).

⁵⁹ 313 U.S. 109, 61 S.Ct. 930 (1941).

⁶⁰ 273 U.S. 34, 47 S.Ct. 267 (1927).

⁶¹ 12 How. (U.S.) 299 (1951).

⁶² 313 U.S. 236, 61 S.Ct. 862 (1941).

⁶³ 277 U.S. 350, 48 S.Ct. 545 (1928).

ployed, can no longer survive." In the opinion there are adverse comments concerning other opinions of the Supreme Court dealing with price fixing, including *Williams v. Standard Oil Co.*⁶⁴ and *Tyson and Bros. v. Banton*.⁶⁵

In *United States v. Classic*⁶⁶ the Court stated that sections 2 and 4 of Article I of the Constitution "require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it." This made clear what had long been assumed to be impossible for Congress to do. This assumption was based on *Newberry v. United States*,⁶⁷ but Mr. Justice Stone in speaking for himself, Justices Roberts, Reed, and Frankfurter, with Hughes taking no part, said that it was not necessary to overrule *Newberry v. United States*. After discussing the peculiar division of the Court in the *Newberry* case, Mr. Justice Stone said: "The question then has not been prejudged by any decision of this court." Justices Douglas, Black, and Murphy dissented from the decision in the *Classic* case, but they did not disagree with Stone's opinion as to the interpretation of the word "elections" in Article I of the Constitution. On the contrary, Douglas' opinion contains this language: "That is to say I disagree with *Newberry v. United States* . . . to the extent that it holds that Congress has no power to control primary elections." Thus the Court was again unanimous on this constitutional proposition.

The broad conclusion to be drawn from these five cases, where the Court was unanimous and where previous decisions were either overruled or rendered innocuous, is that the Court thus got rid of a number of previous decisions which had become legal driftwood. In the judgment of the writer the decisions in these five cases are commendable, and they did much to make it possible to have reasonable harmony in the decisions on some important problems. The unanimity that the Court manifested in these five cases was also possible in his judgment because of the fact that they were all decided after Mr. Justice McReynolds had retired from the bench.

During the October, 1940, term of the Court there were three decisions by a divided court in labor cases of unusual importance. One was *Milk Wagon Drivers Union v. Meadowmoor Dairies*.⁶⁸ In this case Mr. Justice

⁶⁴ 278 U.S. 235, 49 S.Ct. 115 (1929).

⁶⁶ 313 U.S. 299, 61 S.Ct. 1031 (1941).

⁶⁵ 273, U.S. 418, 47 S.Ct. 426 (1927).

⁶⁷ 256 U.S. 232, 41 S.Ct. 469 (1921).

⁶⁸ 312 U.S. 287, 61 S.Ct. 552 (1941). In addition there is *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 61 S.Ct. 845 (1941). This case in effect overruled *Adair*

Frankfurter, writing for himself and Justices Stone, Hughes, Roberts, and Murphy, sustained an injunction against the union even though the union made a claim of freedom of speech as a part of its picketing. Its claim was denied because there had been violence on the part of the union. From this conclusion Justices Black and Douglas dissented in a long opinion by Black, and Mr. Justice Reed also dissented in an opinion. Thus it was proved that the appointees of President Roosevelt are no mere unit, but that among them are individuals of varying views, even though as a group they are strikingly different from the group which generally controlled the Supreme Court from the days of President Harding until the year 1937.

In other cases decided during the 1940 term there were dissenting opinions, but the Court no longer can be divided into a relatively exact pattern, such as prevailed prior to 1937.

Comment should be made concerning the decision in *United States v. Appalachian Electric Power Co.*⁶⁹ The decision of the majority in this case appears to have extended the concept of the navigability of streams. Previously the dogma had been that a stream was navigable in law if it was navigable in fact, and that it was navigable in fact when it had been used for commercial navigation or was susceptible of being used for that purpose in its ordinary condition. The *Appalachian* case extended the concept to include the idea that a stream is navigable if it can be made so by reasonable improvements. This decision overruled both the district court and the circuit court of appeals, and was rendered by Justices Reed, Stone, Black, Frankfurter, Douglas, and Murphy. Mr. Chief Justice Hughes took no part, but Roberts and McReynolds dissented in a vigorous opinion. It seems to the writer that the minority was right in asserting that the decision extended the concept of navigability, but it is submitted that the decision will be a useful one and that the people in the United States generally will never regret it. As a people we have been very wasteful of natural resources, and we have also permitted much corruption and exploitation by some of our captains of industry. Therefore the *Appalachian* case may well be considered a statesmanlike decision.

Mr. Justice Byrnes was appointed to the Court on June 25, 1941, and Mr. Justice Jackson on July 11, 1941. They succeeded Justices McRey-

v. *United States*, 208 U.S. 161, 28 S.Ct. 277 (1908) and *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240 (1915), which had invalidated legislation making "yellow-dog" contracts invalid. While the court in the *Phelps Dodge* case was divided, it was unanimous on this point, except that Mr. Justice Roberts took no part in the disposition of the case.

⁶⁹ 311 U.S. 377, 61 S.Ct. 291 (1940).

nolds and Hughes. Accordingly, during the October, 1941, term the Court consisted of Stone, Chief Justice, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson.

During the term a large number of opinions were delivered. For our purposes the chief activity of the Court concerned itself with the Bill of Rights. Perhaps the most impressive decision was that in *Bridges v. California*,⁷⁰ and the question was whether the managing editor of a Los Angeles newspaper and the well-known Harry Bridges had been deprived of the right of free discussion. The newspaper editorial and the Bridges' telegram had been held by California courts to be contempt of court because they had a tendency to interfere with the orderly administration of justice in cases then pending before the courts. Justices Black, Reed, Douglas, Murphy, and Jackson joined in holding that there was no contempt. In doing so they not only protected the editor and Bridges, but they extended the concept of freedom of speech beyond what is known as the clear and present danger test to a "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished." Justices Frankfurter, Stone, Roberts, and Byrnes dissented at length, and perhaps the key sentence of their opinion is this: "Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him." This decision extends freedom of speech to the utmost limit that can be imagined. I do not hesitate to say that I favor the minority point of view, but who is there who can fairly say that, in view of the *Bridges* decision, the Supreme Court of the United States as presently constituted is not upholding the Bill of Rights? And yet such a charge reasonably can be inferred from the resolution of the State Bar of Texas.

Another case was *Jones v. City of Opelika*⁷¹ and two other cases considered along with it. In these cases three city ordinances which imposed license taxes on the sale of printed matter were held to be valid. But the tax was not a discriminatory one, and there was no claim that it was a burdensome tax. The majority of the Court in this case consisted of Justices Reed, Roberts, Frankfurter, Byrnes, and Jackson. But Justices Stone, Black, Douglas, and Murphy joined in a dissenting opinion which condemned even this modest tax as a prior restraint on publication. Black, Douglas, and Murphy in a separate statement repudiated their votes

⁷⁰ 314 U.S. 252, 62 S.Ct. 190 (1941).

⁷¹ 316 U.S. 584, 62 S.Ct. 1231 (1942).

which upheld the restraint in the *Gobitis* (flag-salute) case.⁷² They stated: "We now believe that it was also wrongly decided."

In *Edwards v. California*⁷³ a California statute making it a misdemeanor to bring into the state an indigent nonresident was held to be invalid as an unconstitutional burden upon interstate commerce. Justices Byrnes, Stone, Roberts, Reed, and Frankfurter joined in this opinion. Justices Douglas, Black, and Murphy concurred in the result, but based their conclusion upon the privileges and immunities clause of the Fourteenth Amendment. Mr. Justice Jackson concurred in a separate opinion. Thus, in this case the Court was unanimous in sustaining the freedom of a person in traveling from state to state.

In *Betts v. Brady*,⁷⁴ the Court sustained a conviction for robbery by a Maryland court, even though it refused to appoint counsel for the defendant. It was not denied that if the trial had been in a federal court this refusal would have been a violation of the Sixth Amendment. But the Court refused to hold that under the Fourteenth Amendment counsel for an accused person is an inexorable command. The case depended upon its particular facts, and I do not think that it can be fairly said that under it our states are free to run accused persons through a kangaroo court. However, Black, Douglas, and Murphy dissented from the decision. Yet they did not argue that counsel is always necessary. Their conclusion was that this particular prisoner was denied his right to counsel in view of the nature of the offense and the circumstances of his trial and conviction. It would seem fair to say that the majority opinion was based upon the confidence that the Court had in the method by which Maryland tries its criminal cases.

In *Glasser v. United States*⁷⁵ the majority of the Court made a strict ruling in applying the Sixth Amendment, which provides for the assistance of counsel. Glasser's attorney by a trial-court order was required also to represent a co-defendant. Under the particular circumstances this was held to be a fatal error. The circumstances were rather unusual, but in general the decision means that the Court will be very careful to avoid frittering away this part of the Bill of Rights.

In the *Ritter's Café* case,⁷⁶ which arose in Texas, the Court divided five to four. The majority held that the owner of a restaurant, who had engaged a contractor to construct a building wholly unconnected with the restaurant, which was one and one-half miles removed from it, was en-

⁷² See note 54, *supra*.

⁷⁴ 316 U.S. 455, 62 S.Ct. 1252 (1942).

⁷³ 314 U.S. 160, 62 S.Ct. 164 (1941).

⁷⁵ 315 U.S. 60, 62 S.Ct. 457 (1942).

⁷⁶ *Carpenters and Joiners Union v. Ritter's Café*, 315 U.S. 722, 62 S.Ct. 807 (1942).

titled to an injunction under a Texas statute to restrain the carpenters and painters unions from picketing his restaurant. The members of the unions were not employees of the restaurant business, and were only concerned with the controversy that had arisen over the construction of the building. Thus, a limit was placed upon picketing, even though the unions claimed the right of free speech under the Fourteenth Amendment. Justices Black, Douglas, and Murphy dissented in an opinion, and Mr. Justice Reed also dissented in another opinion. They would have permitted the picketing.

The Court, except for Mr. Justice Roberts who took no part, was unanimous in another labor case⁷⁷ which permitted peaceful and orderly picketing of bakers and of retail establishments, which sold the bakery goods, where the controversy was one between independent peddlers and the truck drivers' union, which the peddlers refused to join. The peddlers bought their goods from the bakers and sold them to the retailers. In two opinions the Court agreed that an injunction issued under a New York statute to prohibit this picketing would violate the right of free speech.

In two cases, viz., *Hill v. Texas*⁷⁸ and *Ward v. Texas*,⁷⁹ Texas courts were held to have violated the rights of Negroes. In the first case there was a denial of equal protection because Negroes had been systematically excluded from grand juries. In the second case, a confession had been improperly obtained and admitted as evidence.

In a similar case, *Hysler v. Florida*⁸⁰ the Court divided; the majority held that an independent examination of the facts left no doubt that the decision of the Florida court was justified. To this conclusion Justices Black, Douglas, and Murphy dissented, believing that Hysler's allegations were not so patently incredible as not to require another hearing by the trial court.

In *Lisenba v. California*,⁸¹ the majority sustained the conduct of a California court in admitting the confessions of the defendant. Justices Black and Douglas dissented, arguing that the confession was the result of coercion and compulsion.

The use of a detectaphone to hear conversations of the defendants among themselves and over a telephone while the defendants were in their office was held to be permissible despite the Fourth Amendment.⁸² In so holding the Court adhered to the precedent established by the sharply

⁷⁷ *Bakery and Pastry Drivers v. Wohl*, 315 U.S. 769, 62 S.Ct. 816 (1942).

⁷⁸ 316 U.S. 400, 62 S.Ct. 1159 (1942).

⁷⁹ 316 U.S. 547, 62 S.Ct. 1139 (1942).

⁸⁰ 315 U.S. 411, 316 U.S. 642, 62 S.Ct. 688 (1942).

⁸¹ 314 U.S. 219, 62 S.Ct. 280 (1941).

⁸² 316 U.S. 129, 62 S.Ct. 993 (1942).

divided Court in *Olmstead v. United States*,⁸³ which sustained the admission of conversations over telephones where the telephone wires had been tapped. From the decision in the detectaphone case, *Goldman v. United States*, Justices Stone, Frankfurter, and Murphy dissented. The first two admitted that the case was indistinguishable in principle from the *Olmstead* case, which they wished to overrule. Mr. Justice Murphy thought that the *Olmstead* case was wrong, but sought to distinguish it from the *Goldman* case.

These decisions on the Bill of Rights, together with other decisions previously reviewed and still other decisions which have been since delivered, justify the statement, it would seem, that never in the history of the Supreme Court of the United States has the Bill of Rights been more frequently or more ardently supported, and never have the privileges of the poor and the weak and of the minorities of race, color, and religion been more clearly asserted.

In *Federal Power Com'n v. Natural Gas Pipe Line Co.*,⁸⁴ the Supreme Court sustained the action of the Federal Power Commission in a rate case against the claim that the rate was confiscatory. The majority of the Court made a significant declaration that the Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas in arriving at their rates. On the contrary, the courts are to restrain themselves from interfering with the activities of such commission as long as their conduct does not produce an arbitrary result. Justices Black, Douglas, and Murphy, while concurring in the result, wrote a most interesting opinion in which they stated, among other things: "While the opinion of the Court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of *Smyth v. Ames* . . . which has haunted utility regulation since 1898." These three judges also stated: "Irrespective of what the return may be on 'fair value,' if the rate permits the company to operate successfully and to attract capital, all questions as to 'just and reasonable' are at an end so far as the investor interest is concerned."

Thus the attempt expressly to overrule *Smyth v. Ames*⁸⁵ was unsuccessful. But in view of the majority opinion, it seems fair to say that *Smyth v. Ames* was laid on a shelf to gather dust. It is submitted that *Smyth v. Ames* may well be forgotten. It is difficult to recall any case that has been

⁸³ 277 U.S. 438, 48 S.Ct. 564 (1928).

⁸⁴ 315 U.S. 575, 62 S.Ct. 736 (1942). See also *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 592, 64 S.Ct. 281 (1944).

⁸⁵ 169 U.S. 466, 18 S.Ct. 418 (1898).

more futile, that has caused more labor in an attempt to apply it, and that has caused so much division in the Court.

Another interesting case, though difficult to understand, is *Gray v. Powell*.⁸⁶ The decision rendered by Justices Reed, Black, Frankfurter, Douglas, and Murphy sustained the action of the director who was administering the price-fixing provisions of the Bituminous Coal Act. The majority opinion seems to come close to, and yet in an elusive sort of way not entirely to embrace, the proposition that the order of the director was final, not only on its facts, but as to the meaning of a statute. Justices Roberts, Stone, and Byrnes dissented, holding that the order of the director, where there was not a single disputed fact, was subject to court review. The dissent seems preferable.

In *State Tax Commission of Utah v. Aldrich*⁸⁷ the troublesome question of taxation of intangibles again presented itself. The majority of the Court sustained the power of the State of Utah to subject the transfer of shares of stock of the deceased owner to the state inheritance tax. In doing this, it was necessary to overrule *First National Bank of Boston v. Maine*.⁸⁸ The story of this conflict is a long one. No attempt will be made to state it except to say that the majority of the Court returned to, and reinstated *Blackstone v. Miller*.⁸⁹ *Blackstone v. Miller* had been overruled in the 1920's, while the conservative group was in control of the Court. Mr. Justice McReynolds wrote the opinions in three cases, particularly *Farmers Loan and Trust Co. v. Minnesota*⁹⁰ and *Baldwin v. Missouri*,⁹¹ which overruled *Blackstone v. Miller*. There were other cases involved, and the subject matter is a highly confused one; but it is safe to say that in the *Aldrich* case decided in 1942, the Court returned to *Blackstone v. Miller*, and in turn overruled not only the *First National Bank* case, but the *Farmers Loan and Trust Co.* and the *Baldwin* cases. On this occasion all of the Court agreed except Justices Jackson and Roberts, who dissented.

In *Graves v. Schmidlapp*⁹² the Court again advanced its present notion of being very careful not to deprive the states of their powers to tax intangibles. The opinion, written by Mr. Chief Justice Stone, stated: "It is plain that if appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the Wachovia case⁹³ must be overruled." By this time the Chief Justice may have

⁸⁶ 314 U.S. 402, 62 S.Ct. 326 (1941).

⁸⁷ 316 U.S. 174, 62 S.Ct. 1008 (1942).

⁸⁸ 284 U.S. 312, 52 S.Ct. 174 (1932).

⁸⁹ 188 U.S. 189, 23 S.Ct. 277 (1903).

⁹⁰ 280 U.S. 204, 50 S.Ct. 98 (1930).

⁹¹ 281 U.S. 586, 50 S.Ct. 436 (1930).

⁹² 315 U.S. 657, 62 S.Ct. 870 (1942).

⁹³ Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567, 47 S.Ct. 202 (1926).

become a bit sensitive to the criticism of the Court for overruling so many precedents, because he also stated: "No interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." The Court in the *Graves* case was unanimous, except that Mr. Justice Roberts concurred in the result only because he considered himself bound by two recent decisions. If the Supreme Court of the present day is to be criticized for its present decisions, overruling previous decisions in the matter of the taxation of intangibles, one must remember that the conservative group in the 1920's did its share of the same thing.

Another taxation case involved the principle of implied immunity of the national government from taxes assessed by state governments. But in *Alabama v. King & Boozer*⁹⁴ it was held by a unanimous court (except that Mr. Justice Jackson took no part) that contractors with the national government were liable to Alabama for a sales tax upon lumber purchased in order to execute a contract with the national government for the construction of an army camp. The unusual feature in this case was that the national government had entered into a contract with King & Boozer on the basis of cost plus a fixed fee. The contract also explicitly provided that the national government would reimburse the contractors for all actual expenditures in the performance of the work. Thus it was clear that the Alabama sales tax would be paid, except in a formal way, by the national government. But this fact did not deter the Court from holding that Alabama could collect its sales tax from the contractors. Previous decisions in *Panhandle Oil Co. v. State ex rel. Knox*⁹⁵ and *Graves v. Texas Co.*⁹⁶ were cited. The Court met these decisions by stating: "So far as a different view has prevailed . . . we think it no longer tenable." While it is possible to distinguish these two cases from the King & Boozer case, still it seems that the general legal philosophy of the two sets of cases is different. Accordingly, it seems fair to infer that the *Panhandle Oil Co.* and the *Graves* cases were overruled in effect.

*United States v. Wrightwood Dairy Co.*⁹⁷ presented the problem whether an order of the Secretary of Agriculture under the Agriculture Marketing Agreement Act of June 3, 1937, should be enforced. The Wrightwood Dairy Company had refused to comply with the order, because it claimed not to be doing business in interstate commerce and therefore not to be within the regulatory power of the Congressional Act. The company purchased its milk in Illinois from Illinois producers, and processed and sold

⁹⁴ 314 U.S. 1, 62 S.Ct. 43 (1941).

⁹⁶ 298 U.S. 393, 56 S.Ct. 818 (1936).

⁹⁵ 277 U.S. 218, 48 S.Ct. 451 (1928).

⁹⁷ 315 U.S. 110, 62 S.Ct. 523 (1942).

its milk wholly within the State of Illinois. But the Court held that the company was subject to the order of the Secretary of Agriculture because it sold its milk in competition with the milk of other milk-handlers in the Chicago area, where approximately 40 per cent of the milk handled and sold came from states other than Illinois. The Court was unanimous in so holding, except that Mr. Justice Roberts took no part. The Court relied upon the *Rock Royal* case,⁹⁸ and attempted to differentiate the *Schechter* (sick chicken) case.⁹⁹ The attempted distinction of the *Schechter* case is not impressive.

Mr. Justice Byrnes resigned on October 3, 1942. Mr. Justice Rutledge was appointed to fill the vacancy on February 11, 1943.

In the October, 1942, term the Supreme Court in *Wickard v. Filburn*¹⁰⁰ refused to enjoin the enforcement of the marketing penalty provided by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938. A penalty had been imposed upon Filburn upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. This opinion seems very important, perhaps the most important opinion under the commerce clause since Mr. Chief Justice Marshall delivered his memorable opinion in *Gibbons v. Ogden*.¹⁰¹ In the *Wickard* case, Mr. Justice Jackson, speaking for a unanimous Court of eight members, sustained an act which unquestionably compelled Filburn to adhere to a precise regulation. It was not a matter about which Filburn had any choice after a referendum had been taken of the wheat growers and they had decided by a two-thirds vote to place a limitation on the amount of wheat that was to be raised. Nor was Filburn permitted to avoid the penalty because he planned to use his wheat on his own farm in feeding stock and would not market his wheat as grain. Thus, it appears even more clear than in *Mulford v. Smith*¹⁰² that Congress can regulate agricultural production. Likewise, it is clear that the arguments of the majority of the Court in *United States v. Butler*¹⁰³ that agricultural production is "a purely local activity," and that the regulation of it violates the Tenth Amendment, have been forgotten. Mr. Justice Roberts, who wrote the majority opinion in the *Butler* case, did not dissent from the *Filburn* decision but joined in it. But it is impossible to understand how the two cases can be reconciled satisfactorily. In any event, one may well contemplate some of the language in the *Filburn* opinion:

⁹⁸ See note 42, *supra*.

⁹⁹ *Schechter Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

¹⁰⁰ 317 U.S. 111, 63 S.Ct. 82 (1942).

¹⁰² See note 36, *supra*.

¹⁰¹ 9 Wheat. (U.S.) 1, 6 L. Ed. 23 (1824).

¹⁰³ See note 8, *supra*.

This Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. . . . Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. . . . But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Another opinion of importance with reference to agricultural production is *Parker v. Brown*.¹⁰⁴ The decision in this case upheld the California Agricultural Prorate Act as it applied to a California raisin crop which was eventually sold and shipped in interstate commerce to the extent of 95 per cent. Accordingly, this case may seem to be just the reverse of *Wickard v. Filburn*.¹⁰⁵ Thus, the question arises how could both acts be sustained under the Constitution. The answer is that it is not the rule that Congress alone can regulate interstate commerce. States can also regulate it, with the limitation that state regulations must not impair national control of interstate commerce in a manner or to a degree forbidden by the Constitution as interpreted by decisions of the Supreme Court. This is the most satisfactory basis on which the decision in *Parker v. Brown* was placed. The Court, which was again unanimous, also stated that it could apply what it chose to call the "mechanical test," and that, applying that test, the California act applied to wholly intrastate transactions before the raisins were ready for shipment in interstate commerce. It is not believed that much can be said for this mechanical test. It is the test that has caused so much disagreement in the past, and there is reason to believe that the Court has now advanced beyond this mechanical test, and that the standards for the application of the commerce clause are now better understood than ever before in the history of the Supreme Court. In addition they seem to be much more rational and realistic.

One of the most exciting decisions during the 1942 term was *Williams v. North Carolina*.¹⁰⁶ Williams and Lillie Shaver were convicted of a bigamous cohabitation in North Carolina, to which they returned from Nevada, where they had obtained divorces from their respective spouses, and then married. Apparently, they were gone from North Carolina not exceeding six months. Their convictions were reversed and remanded, and the famous case of *Haddock v. Haddock*¹⁰⁷ was expressly overruled. The *Wil-*

¹⁰⁴ 317 U.S. 341, 63 S.Ct. 307 (1943).

¹⁰⁵ See note 100, supra.

¹⁰⁶ 317 U.S. 287, 63 S.Ct. 207 (1942). See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S.Ct. 208 (1943).

¹⁰⁷ 201 U.S. 562, 26 S.Ct. 525 (1906).

liams decision is not very satisfactory because the North Carolina court had jumbled two distinct issues. The Supreme Court of the United States stated that the judgment could not be sustained if either one of these issues was incorrectly decided. The first issue was whether the Nevada divorce decrees, based on substituted service, with the defendants making no personal appearance, must be recognized in North Carolina. The second issue was whether the divorcees had established bona fide residences in Nevada or whether the residences were established merely for the purpose of obtaining divorces through fraud upon the Nevada court. Accordingly, the *Williams* case does not appear to control the situation where the state of the previous matrimonial domicile holds that a Nevada divorce was secured through fraud or the lack of a good faith residence. The *Williams* case is also unsatisfactory on its facts, because the facts seem to make it clear that Williams and Lillie Shaver had no intention of living in Nevada except to obtain a divorce. Furthermore, it seems extremely naïve to believe that Nevada cares much, if at all, about anybody's good faith in obtaining divorces in that state. Divorce in Nevada seems to be a "racket." Mr. Justice Frankfurter wisely hinted in his concurring opinion that the solution is for the national government to assume control over marriage and divorce, as in Canada and Australia. Presumably this will require a constitutional amendment, unless there is a very drastic change of ideas with reference to the present Constitution. Of the Court of eight members only two dissented from the decision, viz., Justices Murphy and Jackson. Mr. Justice Jackson in dissenting uttered the following language, which gives support, as far as it goes, to one of the complaints of the State Bar of Texas:

This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of stare decisis. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy. We, therefore, search a judicial pronouncement that ushers in a new order of matrimonial confusion and irresponsibility for some hint of the countervailing public good that is believed to be served by the change. Little justification is offered. And it is difficult to believe that what is offered is intended seriously.

But Mr. Justice Jackson has used his gifts to secure the destruction of precedents.¹⁰⁸ Thus arises the question how sacred is a precedent in the

¹⁰⁸ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944). Cf. *The Struggle for Judicial Supremacy*, by Robert H. Jackson. Will there reappear in the future the question that he propounded:

realm of constitutional law. Can anything more be said than that a precedent should not be overruled unless those who overrule it are strongly convinced that the precedent is harmful and that the new ruling is not only wise, but one likely to be adhered to for at least a respectable number of years? To be sure, the justices should be wise, objective, and free from unworthy motives. But who is to be the judge of the existence of these qualities? And what of consequence can be done with justices, if these qualities are missing?

In passing, it should be mentioned that in *Helvering v. Griffiths*¹⁰⁹ the Court refused to overrule the decision in *Eisner v. Macomber* which held that stock dividends were not income within the meaning of the Income Tax Amendment. From this decision Mr. Justice Douglas, with Justices Black and Murphy concurring, dissented, saying: "Eisner v. Macomber dies a slow death. It now has a new reprieve granted under circumstances which compel my dissent . . . I think Eisner v. Macomber should be overruled."

In *Penn Dairies, Inc. v. Milk Control Com'n of Pennsylvania*¹¹⁰ it was held that the minimum-price regulations under the Pennsylvania Milk Control Law applied to sales of milk to the United States Army for army use at a military encampment located on land belonging to Pennsylvania but leased to the United States. Nothing could be implied from the Constitution alone which prohibited Pennsylvania from enforcing these prices. From this decision, Justices Douglas, Black, and Jackson dissented because the War Department regulations required competitive bidding despite state price fixing, and because these regulations, by reason of the supremacy clause in the Constitution, excluded the exercise of a conflicting state power.

In a similar case, except for one important factor, it was held that the State of California was not authorized to enforce minimum price regulations under its milk-control act with respect to milk sold to the War Department at Moffett Field.¹¹¹ The difference was that Moffett Field was under the exclusive jurisdiction of the national government, having been ceded to the United States by California. In differentiating the *Penn Dairies* case the Court in the *California* case seems to have been a little apologetic, stating: "The conclusions may seem contradictory; but in pre-

"Why is it that the Court influences appointees more consistently than appointees influence the Court?" (p. vii).

¹⁰⁹ 318 U.S. 371, 63 S.Ct. 636 (1943).

¹¹⁰ 318 U.S. 261, 63 S.Ct. 617 (1943).

¹¹¹ *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285, 63 S.Ct. 628 (1943).

serving the balance between national and state power, seemingly inconsequential differences often require diverse results." Justices Roberts, Stone, and Reed participated in the majority opinion. Justices Black, Douglas, and Jackson joined in the opinion, but they also relied upon the reasons set forth in their opinion in the *Penn Dairies* case, where they dissented. Justices Frankfurter and Murphy, who were a part of the majority in the *Penn Dairies* case, dissented in the *California* case, and each delivered a dissenting opinion. Their common idea was that, under the exclusive legislation clause, states could make and enforce regulations as they do under the commerce clause with limitations. As far as the writer is aware, this is the first expression of this idea concerning the exclusive legislation clause.

In *Davis v. Department of Labor and Industries*¹¹² the Court found itself in a curious predicament. The question was whether the widow of a worker killed while working on a barge to which steel from a bridge over a navigable river was being lowered, could obtain a contribution from the Workmen's Compensation Fund of the State of Washington. It was held that she could where the state compensation law expressly covered all employees engaged in maritime occupation for whom no right or obligation existed under maritime laws. This solution was announced to be a practical one. The lawyer for the widow did not want the well-known *Jensen* case,¹¹³ and others which have followed it, overruled for fear that this would result in a confusion of precedents worse than the present confusion, wherein it is necessary to distinguish between cases within the maritime jurisdiction of the United States and cases which are not. Mr. Chief Justice Stone alone dissented from the decision. His dissenting opinion seems to be logical; and he wished "to overrule the *Jensen* case in its constitutional aspects." Thus, while the State Bar of Texas is complaining about so much overruling of precedents, the Court is convinced that it should overrule another line of decisions, were it not for the fear of a worse confusion.

The main activity of the Supreme Court during the October, 1942, term in the field of constitutional law concerned the Bill of Rights. Despite much disagreement, it is clear that the Court again advanced the coverage of the Bill of Rights. The only criticism that can be suggested is that perhaps the majority has gone too far in applying the Bill of Rights.

*Largent v. Texas*¹¹⁴ held a Paris, Texas, ordinance invalid because it

¹¹² 317 U.S. 249, 63 S.Ct. 225 (1942).

¹¹³ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917).

¹¹⁴ 318 U.S. 418, 63 S.Ct. 667 (1943).

abridged freedom of religion, press, and speech. This ordinance required a permit from the mayor in order to solicit orders for, or to sell, books, wares, or merchandise within the residence portion of the city. The mayor was under no duty to issue the permit unless he deemed it proper or advisable. The defendant was a Jehovah's Witness, who distributed religious books without making application for a permit. The Court unanimously held that this ordinance was "administrative censorship in an extreme form." There was no appearance for the state of Texas or for the city of Paris. Apparently it was regarded as hopeless to sustain such an ordinance.

In *Jamison v. Texas*¹¹⁵ another Jehovah's Witness was convicted for distributing handbills on the streets of Dallas, Texas. The handbills contained an invitation to hear an address in a Dallas park, and described two religious books which would be mailed "postage prepaid on your contribution of 25¢." Counsel for Dallas relied primarily on *Davis v. Commonwealth*,¹¹⁶ but the Court answered his argument by saying that it was the same argument that was made and rejected in the *Hague* case.¹¹⁷ The Court also held that the mere presence of an advertisement of religious books on the handbill did not alter the case. It is the fact that it was religious books that were being advertised that distinguished the case from the previous decision in *Valentine v. Chrestensen*.¹¹⁸ Again the Court was unanimous, except that Mr. Justice Frankfurter expressed a qualification on a jurisdictional point.

Are Jehovah's Witnesses under the Bill of Rights entitled to go to a home, ring the bell, sound the door knocker, or otherwise summon the inmate for the purpose of receiving leaflets advertising a religious meeting? In *Martin v. City of Struthers*,¹¹⁹ a city ordinance forbade such conduct by punishing it. This ordinance was held to be invalid in an opinion by Mr. Justice Black, who was joined by Justices Stone, Douglas, Rutledge, and Murphy. Murphy also wrote a concurring opinion in which Douglas and Rutledge joined. Justices Reed, Roberts, Frankfurter, and Jackson dissented. They believed that the ordinance was a fair adjustment of the privilege of the distributors of such leaflets and the rights of householders to be undisturbed.

In *Murdock v. Pennsylvania*¹²⁰ there were eight cases where Jehovah's Witnesses went from door to door in the city of Jeannette, distributing literature and soliciting people to purchase religious books and pamphlets. They also carried phonographs, on which they played records expounding

¹¹⁵ 318 U.S. 413, 63 S.Ct. 669 (1943).

¹¹⁸ 316 U.S. 52, 62 S.Ct. 920 (1942).

¹¹⁶ See note 39, *supra*.

¹¹⁹ 319 U.S. 141, 63 S.Ct. 862 (1943).

¹¹⁷ See note 38, *supra*.

¹²⁰ 319 U.S. 105, 63 S.Ct. 870 (1943).

some of their views on religion. Under the ordinance of Jeannette they were subject to a tax for this activity, but a bare majority of the Court held that this tax ordinance was unconstitutional as a violation of the First Amendment, the provisions of which have been held to be part of the Fourteenth Amendment. Mr. Justice Douglas wrote the opinion for the Court, and it seems fair to say that he became lyrical. To him the Jehovah's Witnesses in the city of Jeannette were pursuing a purpose "as evangelical as the revival meeting." Their "religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." One may appreciate how far removed these utterances seem to be from reality, if he will read the opinion of Mr. Justice Jackson in *Douglas v. City of Jeannette*.¹²¹

In view of the five-to-four decisions in the cases arising out of the activity in the city of Jeannette, it is not at all surprising that the Court overruled its decision during the previous term in *Jones v. City of Opelika*.¹²² The division was the same as in the *Jeannette* cases. The simple explanation of the change of position is that Mr. Justice Byrnes had resigned at the beginning of the 1942 term and was succeeded by Mr. Justice Rutledge, who voted with Justices Stone, Black, Douglas, and Murphy, and thus held that the sale of the religious publications of the Jehovah's Witnesses could not be taxed, even though the tax was nondiscriminatory and even though it was not argued that the tax was unreasonable in amount. From the point of view of the expense to the community in supervising such sales, Mr. Justice Frankfurter of the minority stated that the *Jones* case as finally decided meant that the sale of such literature must be subsidized. That does not appear to be an unrealistic statement.

In view of the decisions just considered, it is not surprising that the Supreme Court in *West Virginia State Board of Education v. Barnette*¹²³ overruled the *Gobitis* case¹²⁴ and held that the Board of Education was without power to compel children of Jehovah's Witnesses to salute the flag of the United States and to give the pledge of allegiance as a condition to attendance in public schools. Mr. Justice Jackson joined with the majority in the *Jeannette* and *Opelika* cases, and thus the division of the Court was six to three. The dissenting opinion of Mr. Justice Frankfurter in the *Barnette* case seems somewhat nostalgic. He stated in effect that the First Amendment did not occupy any preferred status, that while he appreciated the objections to the flag-salute law, still compulsory salute

¹²¹ 319 U.S. 157, 63 S.Ct. 882 (1943).

¹²² 319 U.S. 103, 105, 63 S.Ct. 890, 891 (1943). See note 71, *supra*.

¹²³ 319 U.S. 624, 63 S.Ct. 1178 (1943).

¹²⁴ See note 54, *supra*.

of the flag was a question on which men might reasonably differ, and that it was intolerant for the Court to deny school bodies the right to impose a flag salute as a condition to attendance. It would seem, however, by several decisions that the Supreme Court, even with the help of Mr. Justice Frankfurter, does not view laws which are challenged under the First Amendment, as embraced within the Fourteenth Amendment, with the same tolerance as it does many other types of laws challenged under the Fourteenth Amendment.¹²⁵ In view of the decision in the *Barnette* case, it was decided by a unanimous court in *Taylor v. Mississippi*¹²⁶ that Mississippi could not punish Jehovah's Witnesses for refusing to honor the flag of the United States. It was also held that the criminal convictions of the Witnesses could not be sustained on the theory that they disseminated printed matter that was designed to encourage disloyalty to the state and national governments. There was no evil purpose shown, and there was no clear or present danger. It is interesting that the Court reverted to the clear-and-present-danger test rather than to the more expanded test that was asserted by the majority in the *Bridges* case.¹²⁷

In *Adams v. United States*¹²⁸ the majority held that a defendant in a federal court who deliberately insisted, contrary to the advice of the district court, upon being his own lawyer, and in writing waived a jury, without, however, the advice of counsel, could not complain after the verdict had gone against him. The defendant had had experience in one complicated law suit, which he had previously instituted and tried without success. Nevertheless Justices Douglas, Black, and Murphy dissented, saying that it could not be assumed, in the absence of legal advice, that a waiver of a jury trial was intelligent conduct in such a case as the one before the Court. Of more interest is the separate dissenting opinion of Mr. Justice Murphy, who stated: "I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts." But in *Patton v. United States*,¹²⁹ decided in 1930, it was held that the defendant could waive the right to have his trial completed by a jury of twelve and accept a jury of eleven. And the Court in the *Patton* case based its holding on the premise that a trial by a jury of eleven is not different from a jury-waived case.

In *Schneiderman v. United States*¹³⁰ it was held that Schneiderman's naturalization could not be properly set aside twelve years after it was granted, even though at the time of naturalization Schneiderman was a member

¹²⁵ See notes 50, 51, 52, 53, and 77, *supra*.

¹²⁸ 317 U.S. 269, 605, 63 S.Ct. 236 (1943).

¹²⁶ 319 U.S. 583, 63 S.Ct. 1200 (1943).

¹²⁹ 281 U.S. 276, 50 S.Ct. 253 (1930).

¹²⁷ See note 70, *supra*.

¹³⁰ 320 U.S. 118, 63 S.Ct. 1333 (1943).

of the Communist party. Four members of the Court held that it was the duty of the government to prove its case by evidence that was clear, unequivocal, and convincing; and that it could not succeed upon a bare preponderance of evidence which left the issue in doubt. After announcing this so-called "exacting" standard, the majority of the Court concluded that the government had not shown that Schneiderman believed in or advocated force and violence as a means of obtaining political ends. The four members who asserted this point of view were Justices Murphy, Black, Reed, and Jackson. Mr. Justice Douglas in a concurring opinion took a more extreme position, viz., that a judgment of naturalization is final except for fraud. As there was no claim of fraud committed by Schneiderman, there could be only one result under this rule. Mr. Justice Rutledge also concurred in a separate opinion. Justices Stone, Roberts, and Frankfurter dissented. They disagreed with the standard by which the evidence must be tested, and asserted that the standard of the majority was one that had been derived from land-fraud cases which involved personal moral obliquity. In any event, in their view the evidence was clear that Schneiderman during the five years preceding his petition for naturalization had not behaved as a man attached to the principles of the Constitution.

In two cases¹³¹ the Supreme Court upheld curfew regulations which had been imposed upon all persons of Japanese ancestry in military areas created under the authority of a presidential order. Six members of the Court held that the curfew regulations did not violate the Fifth Amendment because of racial discrimination nor did they violate the dogma against the delegation of legislative power. Mr. Justice Douglas, concurring in the result, stated that the Court could not judge of the military requirement, where the regulations had some relation to espionage and sabotage. Mr. Justice Murphy concurred reluctantly, saying that for the first time the Court was sustaining a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Mr. Justice Rutledge concurred in the decision of the Court, except for the possible suggestion in the Court's opinion that courts have no power to review the action of a military officer against a civilian citizen in a military area under emergency conditions. His point of view seems to be sharply in opposition to that expressed by Mr. Justice Douglas.

Finally, in *Ex parte Quirin*,¹³² the Court, with Mr. Justice Murphy tak-

¹³¹ *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943); *Minoru Yasui v. United States*, 320 U.S. 115, 63 S.Ct. 1392 (1943).

¹³² 317 U.S. 1, 63 S.Ct. 1 (1942).

ing no part, was unanimous in holding that the saboteurs who were landed in this country by German submarines for the purpose of destroying war materials and utilities, could be properly tried by a military commission set up by the President and without a jury. The famous *Milligan* case¹³³ was differentiated.

The case of greatest interest during the October, 1943, term was *United States v. South-Eastern Underwriters Ass'n*.¹³⁴ The majority opinion by Justices Black, Douglas, Murphy, and Rutledge held that fire insurance business as manifested in the particular case was commerce among the several states. In arriving at this result the Court did not overrule the previous decisions of *Paul v. Virginia*, *Hooper v. California*, and *New York Life Insurance Co. v. Deer Lodge County*.¹³⁵ But it disapproved the Court's previous attitude that insurance is not commerce. Inevitably, the decision caused much criticism, because the insurance business is a vested interest of vast proportions. While only four judges concurred in the majority opinion, it is difficult to understand how insurance companies can obtain much general satisfaction from the other two opinions. Particularly, Mr. Justice Jackson stated that, if he were considering the matter for the first time, insurance business conducted across state lines would clearly be interstate commerce. His dissent, therefore, was based upon his desire to adhere to the fiction that insurance is not commerce and to maintain the judicial status quo. The dissenting opinion of Mr. Chief Justice Stone, joined in by Mr. Justice Frankfurter, rests upon a distinction which appears to be of academic nicety. Thus, they held that the "business" of insurance is not commerce among the several states; but they would not prohibit Congress from regulating the incidental use of the facilities of interstate commerce in the conduct of insurance business. This would leave the matter in an uncertain status, but one may doubt whether in the long run there would be any great difference between this point of view and that of the majority, despite the statement by Stone and Frankfurter that the majority was "overturning the precedents of seventy-five years." It is not wholly fair to state that the decision of the Supreme Court as to the scope of the commerce clause was rendered by a minority of the Court. For, with two members taking no part, the result was that five members concluded that, logically, insurance business conducted across state lines is within the commerce clause. The other two, as demonstrated by the

¹³³ *Ex parte Milligan*, 4 Wall. (U.S.) 2, 18 L.Ed. 281 (1866).

¹³⁴ 322 U.S. 533, 64 S.Ct. 1162 (1944).

¹³⁵ 8 Wall. (U.S.) 168, 19 L.Ed. 357 (1869); 155 U.S. 648, 15 S.Ct. 207 (1895); 231 U.S. 495, 34 S.Ct. 167 (1913).

succeeding case of *Polish National Alliance v. National Labor Relations Board*¹³⁶ would apparently deny to Congress very little power to regulate the insurance business, if Congress should undertake to regulate the "many aspects" of that business as it is ordinarily conducted in this country.

In three cases, viz., *Bowles v. Willingham*,¹³⁷ *Yakus v. United States*¹³⁸ and *Stewart & Bros. v. Bowles*,¹³⁹ the Emergency Price Control Act and the Second War Powers Act were held to be within the power of Congress. Mr. Justice Roberts was the only dissenter in both the cases. In the *Yakus* case Justices Rutledge and Murphy also dissented, but they objected only to the criminal procedure aspect of the Emergency Price Control Act.

Aside from these cases the main activity of the Supreme Court during the 1943 term concerned the Bill of Rights. The most important case was *Smith v. Allwright*,¹⁴⁰ which expressly overruled *Grovey v. Townsend*¹⁴¹ and held that the primary election conducted in Texas by the Democratic party under the existing Texas statutes was state action. Since the Texas Democratic party had adopted a resolution forbidding Negroes from participating in its primary, this state action was held to be in violation of the Fifteenth Amendment. Strictly speaking, the Fifteenth Amendment is not regarded as a part of the Bill of Rights, but the same result could have been reached, apparently, under the Fourteenth Amendment. The case is one that advances the fundamental privilege of individuals to vote. Mr. Justice Roberts was the only justice to dissent in *Smith v. Allwright*. He asserted, with considerable vigor in this case and in another case¹⁴² concerning admiralty law, that the present Court was making a spectacle of itself in showing very little tolerance for previous decisions of the Court, and in general was making the case-law extremely unpredictable.

¹³⁶ 322 U.S. 643, 64 S.Ct. 1196 (1944).

¹³⁸ 321 U.S. 414, 64 S.Ct. 660 (1944).

¹³⁷ 321 U.S. 503, 64 S.Ct. 641 (1944).

¹³⁹ 322 U.S. 398, 64 S.Ct. 1097 (1944).

¹⁴⁰ 321 U.S. 649, 64 S.Ct. 757 (1944). Cf. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, (1944).

¹⁴¹ 295 U.S. 45, 55 S.Ct. 622 (1935).

¹⁴² *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S.Ct. 455 (1944). But observe that Mr. Justice Roberts has frequently participated in decisions where other decisions were overruled, expressly or otherwise: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937); *United States v. Wood*, 299 U.S. 123, 57 S.Ct. 177 (1936); *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S.Ct. 623 (1938); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *United States v. Bekins*, 304 U.S. 27, 58 S.Ct. 811 (1938); *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595 (1939); *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838 (1939); *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879 (1940); *United States v. Darby*, 312 U.S. 100, 657, 61 S.Ct. 451 (1941); *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930 (1941); *Olsen v. Nebraska*, 313 U.S. 236, 61 S.Ct. 862 (1941); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43 (1941); *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207 (1942).

It is interesting to observe that in another election case, viz., *United States v. Saylor*,¹⁴³ six justices sustained an indictment charging Saylor and others with conspiracies to stuff a ballot box with fictitious ballots at the November, 1942, election, wherein a senator of the United States from Kentucky was being elected. These two election cases, whatever else may be said of them, should advance the cause of honest and democratic political action; and that seems to be the consideration of greatest importance.

Jehovah's Witnesses, as usual in late years, were before the Court. *Follett v. Town of McCormick*¹⁴⁴ held that a Jehovah's Witness could make his living by peddling religious publications in the town without the payment of a license fee. This decision was arrived at by the same division of the Court that appeared previously in *Jones v. Opelika* except that Mr. Justice Reed, who dissented in the *Opelika* and *Murdock* cases,¹⁴⁵ concurred in the conclusion reached by the majority in the *Follett* case because "these opinions are now the law of the land." But Justices Roberts, Frankfurter, and Jackson believed that the *Follett* case extended the rule of those cases.

Jehovah's Witnesses lost the case of *Prince v. Massachusetts*.¹⁴⁶ It was held that Massachusetts was entitled to enforce a statute prohibiting girls under eighteen from selling magazines on the streets, even though the particular girl was a Jehovah's Witness, who sold religious publications of that sect and testified that she did so as a result of her religious convictions. This result produced an unusual division of the Court. The majority opinion was written by Mr. Justice Rutledge and concurred in by Justices Stone, Black, Reed, and Douglas. Justices Jackson, Roberts, and Frankfurter concurred in the result, but dissented as to the reasoning in the opinion by Rutledge. The only justice who wished to hold that the Massachusetts statute utterly deprived the girl of her constitutional right to religious freedom was Mr. Justice Murphy. He stated what has long been implicit in recent decisions concerning freedom of speech, press, and religion, viz., that there is not only no strong presumption of the constitutionality of such legislation as Massachusetts had passed concerning child labor as applied to the facts in the *Prince* case, but that "on the contrary the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid." That is a very strong statement that in respect to the presumption of constitution-

¹⁴³ 322 U.S. 385, 64 S.Ct. 1101 (1944).

¹⁴⁵ See supra, notes 120 and 122.

¹⁴⁴ 321 U.S. 573, 64 S.Ct. 717 (1944).

¹⁴⁶ 321 U.S. 158, 64 S.Ct. 438 (1944).

ality a marked difference exists between the First Amendment and other parts of the national Constitution.

Accordingly, in *United States v. Ballard*,¹⁴⁷ where the defendants were indicted for using the mails to defraud by representing that they were divine messengers on earth to communicate to mankind the words of the ascended masters of the "I Am" movement, it was held that the jury could not be permitted to pass upon the truth of their claims. The only issue before the jury was the good faith of the defendants. Only Mr. Justice Jackson wholly disapproved of the prosecution.

There were two cases of unusual interest concerning the privilege of self-incrimination. One of them, *United States v. White*,¹⁴⁸ held that an assistant supervisor of a labor union in possession of union and not private documents, which had been demanded upon a subpoena duces tecum, was under the duty to produce the documents. The problem before the Court was whether the unincorporated labor union would be regarded as an entity similar to a corporation, which is not entitled to the privilege, or whether the union would be regarded as similar to a human being, who is entitled to the privilege. The Court unanimously held that the respondent White was not entitled to the privilege, even though he claimed that the documents might incriminate him. Three of the justices, however, concurred only in the result of the opinion delivered by Mr. Justice Murphy.

In the other case, *Feldman v. United States*,¹⁴⁹ the Court divided, with Justices Murphy and Jackson taking no part. Justices Frankfurter, Stone, Roberts, and Reed held that in a trial in a federal court for a violation of a federal statute the United States may introduce in evidence testimony which had been obtained from the defendant while he was a defendant in a New York State court for the discovery of his assets and was compelled to testify under a New York immunity statute. Justices Black, Douglas, and Rutledge dissented.

In *Hartzel v. United States*¹⁵⁰ a bare majority of the Court reversed the conviction of Hartzel under the Espionage Act. It would appear that this decision is in sharp contrast to some of the decisions following the last World War. It appears reasonably clear that the present Court is much more tolerant of criticism of our participation in the war effort than was the Court in 1919 and 1920.

*Baumgartner v. United States*¹⁵¹ seems to have put an end to most of the efforts to revoke the naturalization secured by aliens who were later as-

¹⁴⁷ 322 U.S. 78, 64 S.Ct. 882 (1944).

¹⁴⁸ 322 U.S. 694, 64 S.Ct. 1248 (1944).

¹⁴⁹ 322 U.S. 487, 64 S.Ct. 1082 (1944).

¹⁵⁰ 322 U.S. 680, 64 S.Ct. 1233 (1944).

¹⁵¹ 322 U.S. 665, 64 S.Ct. 1240 (1944).

served to have secured them by fraudulently representing that they had abandoned their allegiance to Germany and Italy and had in good faith assumed allegiance to the United States. The standard of proof set forth in the *Baumgartner* case as well as in the *Schneiderman* case is so strict that it is believed that it can be met only in relatively few instances. So, again, the Supreme Court, as presently constituted, is protecting civil liberties. The only question that can fairly be raised is whether the Court or a majority of it has announced extreme ideas in its desire to uphold the Bill of Rights.

While in *Lyons v. Oklahoma*¹⁵² by a vote of six to three the Court sustained the admission of a later confession in a murder trial, even though an earlier confession was admittedly involuntary, yet in *Ashcraft v. Tennessee*¹⁵³ six members of the Court reversed a conviction of murder where the confession had been gained by a thirty-six hour period of questioning, without sleep or rest. Ashcraft was not a Negro; nor was he poor or helpless. He was not threatened or subjected to physical violence, and he was not detained in custody until a week after his wife was killed. The *Ashcraft* case, therefore, seems to have carried the Court to the most advanced position yet announced, in the protection of individuals against confessions in state trials.

In *Pollock v. Williams*,¹⁵⁴ with Justices Reed and Stone dissenting, a Florida statute was held to violate the Thirteenth Amendment and the federal Antipeonage Act. The Florida statute penalized one who with intent to defraud obtains an advance payment upon a contract to perform labor. The Florida statute also provided that the failure to perform the contract or to return the advance payment would be prima facie evidence of the intent to defraud. Florida argued that this statutory presumption was unimportant in the particular case because Pollock had pleaded guilty. But the Court replied that the presumption provision had a coercive effect in producing the plea of guilty.

In *Cafeteria Employees Union v. Angelos*¹⁵⁵ it was held that a New York State court had improperly granted an injunction under a New York statute to the owners of a cafeteria, who had no employees, where the injunction was granted against pickets who were trying to unionize the cafeteria. The injunction violated the right to free speech by the pickets, where there was no violence, even though there were isolated instances of insults to customers and some untruthful statements by the pickets. How

¹⁵² 322 U.S. 596, 64 S.Ct. 1208 (1944).

¹⁵⁴ 322 U.S. 4, 64 S.Ct. 792 (1944).

¹⁵³ 322 U.S. 143, 64 S.Ct. 921 (1944).

¹⁵⁵ 320 U.S. 293, 64 S.Ct. 126 (1943).

far pickets may indulge in untruthful utterances does not appear to have been answered.

CONCLUSIONS

In view of the record, what shall we conclude concerning the charges made by the State Bar of Texas?

(1) By innuendo the Court is accused of having been motivated by "political, personal and unworthy motives," and of subjecting itself, by its course of conduct, to the suspicion that it has perverted the law in order to render decisions pleasing to President Roosevelt. The writer knows of no evidence that justifies these charges. As far as he knows, the members of the Supreme Court who have been appointed by President Roosevelt are conscientious men. He assumes that they were chosen because the President was convinced that they had a political and judicial philosophy different from that exhibited by Justices Van Devanter, McReynolds, Sutherland, and Butler. The fact that President Roosevelt's appointees have been so frequently supported by the appointees of other presidents tends to refute these charges. In any event it seems that the State Bar of Texas, having made its charges, has the burden of proof. That it has failed to submit such proof seems obvious. One wonders whether those who voted for the resolution are still happy about these nasty insinuations.

(2) It is asserted that the Court "is losing, if it has not already lost, the high esteem in which it has been held by the people." No doubt this is true of some people. But who are the people? Obviously, the lawyers of Texas, as well as all the lawyers in the United States, are a very small percentage of the people. It seems possible, at least, that a majority of the people still have faith in the Supreme Court of the United States. Indeed, it is possible that most of the people think that the Supreme Court as now constituted is entitled to a higher esteem than was the Court as it was constituted during the 1920's. It must be remembered that many lawyers, perhaps most of them, are not only conservative, but represent most of the time vested interests. They are in a doubtful position to speak objectively. Probably we shall have to wait at least twenty-five years, before it can be determined whether the Supreme Court of the year 1945 should be highly regarded or whether it was below average. It seems at least possible that the Supreme Court, as constituted from 1937 to 1945, will be regarded as one of the greatest in the history of the Court.

(3) That the Court during the period just mentioned has overruled many precedents is freely admitted. As far as known, there has been no

period of equal length in the history of the Court which has been so revolutionary in its nature. But there are good revolutions as well as bad revolutions. This is another determination that must be left to the future. Perhaps the State Bar of Texas has some prophetic vision, but I doubt it.

(4) The inferential charge that the Court since 1937 has failed to uphold the Bill of Rights seems utterly ridiculous. And the ridiculous nature of this charge should not be forgotten when other assertions of the State Bar of Texas are considered.

(5) It seems ridiculous to assert that the Court has overruled precedents "without assigning any valid reason therefor." Reasons have been given. It is a matter of opinion whether the reasons are valid or whether the Court has based its decisions on "casuistry and sophistry rather than logic." As for the writer, he would have agreed with most of the decisions and opinions which have overruled precedents. He would have disagreed with some of them. That is to be expected. The Supreme Court since 1937 has not been dealing with run-of-the-mine cases that are easy of decision. In the main it has dealt with very tough legal problems. A charge that some of the members of the Court, for example, Justices Black, Douglas, and Murphy, are zealots who tend to take extreme positions would be understandable. Even this suggestion is offered with diffidence, because it is recognized that it is entirely possible that twenty-five years from now they will be regarded as the members of the Court who had the greatest vision. The lawyers of Texas should not forget the career of Mr. Justice Brandeis; how his appointment was deplored and opposed by so many leaders of the American Bar. And yet is it not fair to state that today Mr. Justice Brandeis is regarded as having been one of the ablest and one of the most useful members of the Court?

(6) What does the State Bar of Texas mean by stating that the rule of stare decisis should not be substantially impaired? It is believed that no member of the Court in the last forty or fifty years, who has been on the Court for a substantial length of time, has failed to participate in at least one decision that overruled a precedent. How can this expression of conviction be limited? The problem is one of great magnitude. After all, decisions interpreting constitutional provisions are not entirely comparable with decisions in private law. The courts of the United States have exercised the power of judicial review and judicial supremacy to a greater extent than have the courts in any other country. This power has its dangers. We can hardly expect the people to be forever ruled by decisions which seem to them unjust, merely to uphold the rule of stare decisis and there-

by to make it possible for lawyers to advise their clients with greater accuracy. Such a rigid conception of a judge's duty in constitutional law could cause revolutions. It is no complete answer to say that the Constitution can be amended. It is well recognized that it is very difficult to amend the United States Constitution. That is one of its defects. Why, then, is it not desirable to recognize that the rule of stare decisis should not be rigidly applied in constitutional law? This point of view has been expressed by the Supreme Court. As far as I am concerned, I much prefer it to the point of view expressed by angry and emotional lawyers in Texas.¹⁵⁶

(7) The most amazing assertion in the Texas resolution is the demand for "a return to the application of known principles and previously disclosed courses of reason." Does the State Bar of Texas seriously advocate that all the decisions which have been overruled since 1937 shall be reinstated? In order to do so, the highly praised rule of stare decisis will have to be flouted. An evil complained of will have to be indulged many times. And to what end will all of this be? Does the State Bar of Texas seriously desire to have a constitutional principle that will prohibit Congress from passing laws forbidding the shipment of goods in interstate commerce, where the goods have been made by child labor? Prohibiting the states and the nation from enacting minimum wage laws? From enacting legislation now embodied in the Fair Labor Standards Act? The Agricultural Adjustment Act? The Municipal Corporation Bankruptcy Act? Does it desire to have it impossible for Texas and other states to prosecute trusts, where producers of agricultural products are exempted? For a state to fix the maximum compensation of a private employment agency? Presumably, Texas is strong for a return to the principle that prohibits Negroes from participating in the Democratic primary. Is that the desire that caused the Texas explosion?

¹⁵⁶ It would seem to be desirable for the Supreme Court of the United States to apply on proper occasions the principle stated by the Supreme Court of Montana in *Montana etc. Co. v. Great Northern Ry. Co.*, 91 Mont. 194, 7 P. 2d 919 (1932), and in *Sunburst Oil & Refining Co. v. Great Northern Ry. Co.*, 91 Mont. 216, 7 P. 2d 927 (1932), and by the Court of Appeals of Kentucky in *Payne v. City of Covington*, 276 Ky. 380, 123 S.W. 2d 1045 (1938). In these cases the courts overruled previous decisions, but they held that the reversal would be effective as to future, but not past, transactions. For comment see 27 Jour. Am. Jud. Society 183 (1944).