THE UNITED STATES SUPREME COURT: 1946-47*

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By the fall of 1947, it has become possible to make tentative appraisal of the status of the present Court in relation to the cycle of liberal and conservative sentiment in the country in recent years. During this century, the country as a whole has alternately inclined toward a liberal or a conservative set of policies. Theodore Roosevelt was followed by Taft, Wilson by Normalcy, and now perhaps another Roosevelt is to be followed by another Taft.

We can now see that the peak of New Deal liberalism in Congress came in 1935 and 1936. There the recession set in immediately after the election of 1936 despite the landslide, and became a rout at the polls in 1938. In the White House the plateau of the liberal spirit ended after the years 1937 and 1938. After the Fair Labor Standards Act of the latter year, the President's attention drifted away from the domestic economy.

* This article purports to be as much a social survey as a legal analysis of the work of the Supreme Court at the last term. It is based on the fundamental belief that the Supreme Court of the United States is, and always has been, either consciously or unconsciously, a policy-making institution of the government. Any reader who has made up his mind that this proposition is unsound, or who has made up his mind that the Supreme Court is divided between "judicial activists" and "champions of self-restraint," will surely find what follows unrewarding. This is not to say that the Justices do not declare "law," but that there is large enough room at the interstices for predilection. A large portion of this article, though not all, is given to looking at those interstices.

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2 For a chronicle of these years see Morison and Commager, The Growth of the American Republic 586-617 (1942); Schlesinger, The New Deal In Action 1-32, 47-51 (1940).

Consider, for example, the struggles over the Supreme Court Bill and the Reorganization Plan. For a discussion of the election of 1938 see What the Election Means, 90 New Republic 57 (Nov. 23, 1938); Clapper, Return of the Two-Party System, 49 Current History 13 (Dec., 1938).

3 For an illustration of the drift of President Roosevelt's attention from domestic to foreign affairs, see Perkins, The Roosevelt I Knew 347-87 (1947).
In the Supreme Court, as always, there was a time lag. Lifetime appointments give some insulation against the course of the elections, and the accident of multiple appointments falling to one president may long affect the course of judicial events. But the drift has now been long enough for this hypothesis to emerge: the liberal movement of the New Deal, which reached its peak in Congress and the White House in the thirties, came to its climax in the Supreme Court in the October 1942 and 1943 terms. In those years, the Hope Natural Gas case was decided; the first flag-salute decision toppled; use of the streets for free speech received its maximum protection; the white primary was overthrown in Texas; the insurance business was held to be subject to the Sherman Act; and extorted confessions in state courts were freely disallowed.

Since the Hartford Empire decision in the 1944 term, the path of the Court, at first irregularly but now with apparent consistent direction, follows a new and distinctly conservative trend. The Court is still, fairly clearly, the most liberal branch of the federal government; but the lines of deep philosophic difference between the Taft Congress, the Truman White House, and the Vinson Court are becoming fairly hard to draw.

A president should be precluded by statute from appointing more than two, or perhaps three Supreme Court Justices in one four-year term. It would be better to have one or two vacancies for one or two years than to permit a president so heavy a hand in shaping the law of the future without requiring that president to be reappointed at the polls. There is weakness in a democracy when Presidents Taft and Harding, who together occupied the White House about six years between 1902 and 1923, appointed nine members of the Supreme Court, while Presidents Theodore Roosevelt and Woodrow Wilson, in office the remaining fifteen years of that period, appointed only six members. Taft was overwhelmingly defeated when he ran for re-election and the scandals probably would have defeated Harding had he lived. Roosevelt and Wilson were both re-elected. Yet Taft and Harding averaged 1.5 appointments a year while Roosevelt and Wilson averaged 0.4 appointments.

Though "liberalism" and "conservatism" are not easy to define when applied to political institutions, they are not devoid of meaning even when applied to courts and judges. Thus, we make understandable sense when we say that Mr. Justice Holmes was a liberal and Mr. Justice Brewer a conservative justice. The point perhaps can be made by example: in constitutional law, the decision in Munn v. Illinois, 94 U.S. 113 (1877), or the dissent in Abrams v. United States, 250 U.S. 616, 624 (1919), are liberal. In torts, McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and in labor law, Commonwealth v. Hunt, 4 Metc. (Mass.) 111 (1842), are liberal decisions. They have a common denominator of imaginative humanitarianism salted with artistry and self-restraint.

Hartford Empire Co. v. United States, 323 U.S. 386 (1945); 324 U.S. 570 (1945).
I. HIGH SPOTS OF THE YEAR

At the 1946 term there were perhaps eight cases which were of the highest social and legal importance. Of these, the most spectacular were the Lewis case and the California Tidelands case.

In more nearly conventional fields, the liberal view prevailed in only one of the eight major cases. A long step was taken toward equalization of southern and western freight rates in New York v. United States. In another segment of the economy, the taxing power of the states was seemingly more sharply limited than in any decision in twenty years, and the entire contribution of the late Chief Justice to this vital subject was menaced, if not largely washed away.

In the field of civil liberties, four cases of major importance arose. One dealt with search and seizure; two with various aspects of a fair trial; and one, the Hatch Act cases, with freedom of speech. In all four, the claimed civil right was denied. In the course of these cases, the basic relation of the Fourteenth Amendment to the Bill of Rights was reappraised—and left where it was found.

The term was also of note as the first for Mr. Chief Justice Vinson, and the first since the hostility of one member of the Court for another was sensationaly brought to the attention of the public in June 1946. The cases, and particularly these major decisions, the work of the individual Justices, and the alignments of the Court are discussed in detail in the sections which follow.

II. THE REGULATION OF LABOR AND BUSINESS

LABOR

At the time of the railway strike in May 1946, President Truman asked the Congress for, among other remedies, an amendment to the Norris-
LaGuardia Act to permit the government to obtain injunctions in such cases. His bill passed the House at once, but died in the Senate when the railroad strike ended.

As a result, when a coal strike was threatened in November 1946, the government had no effective way to break it. The mines were already in government "possession," but nominal "seizure" of property by posting a placard and running up a flag lost efficacy as a strike stopper with the end of the war. However, on November 18th, the Department of Justice convinced federal district Judge Goldsborough that the President's request for an amendment to the Norris–LaGuardia Act had been unnecessary; and that the Act did not preclude injunctions obtained by the government against strikes on properties the government had seized. Judge Goldsborough issued a temporary restraining order against Lewis and the United Mine Workers prohibiting the strike. The strike proceeded nonetheless, and on December 4th, Judge Goldsborough fined Lewis $10,000 and the United Mine Workers $3,500,000, the latter sum being the biggest fine in American history. On December 9th the Supreme Court granted certiorari, by-passing the District of Columbia Court of Appeals.

The largest issues in the case were jurisdictional. The Norris–LaGuardia Act excluded from federal jurisdiction the power to issue injunctions "in any case involving or growing out of any labor dispute," with exceptions and qualifications immaterial here. In addition, it was familiar equity doctrine that a void order need not be obeyed, and that a party could not be punished for ignoring it. A majority of the Court used two different jurisdictional theories to uphold the government. The first theory was that the Act did not cover strikes by government employees and that the coal miners were government employees by virtue of the seizure. This was buttressed by the hoary crypticism that statutes are not to be construed against the sovereign. Theory two was that the district court at least had that quantum of jurisdiction which would permit it to decide

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21 H.R. 6578, 79th Cong. 2d Sess. (1946); § 5 authorized the Attorney General to ask for injunctions against certain strikes and provided "upon the filing of such petition, the Court shall have all the power and jurisdiction of a court of equity" unlimited by the Norris–LaGuardia Act.


26 The majority relied on four 1873 to 1912 decisions. Ibid., at 685. The "rule" had since been very sharply limited. United States v. California, 297 U.S. 175 (1936); Nardone v. United States, 302 U.S. 357 (1937).
whether it had jurisdiction or not. The jurisdictional issue was said to be fairly arguable, and hence the parties could be required to obey the temporary restraining order while the federal courts reached a leisurely decision on the contested issue.

On the second point, the Court relied upon United States v. Shipp, which had held in contempt a sheriff partially responsible for the lynching of a prisoner whose case was pending on appeal in the Supreme Court and for whose protection a stay order had been issued. The sheriff argued that the Court could not punish for contempt since it had no jurisdiction to issue the stay. In the Shipp case, the Court held the sheriff punishable, using somewhat ambiguous language on the vital point. That case is open to the construction that jurisdiction to punish for contempt of a void order exists, but exists only where the contempt by itself completely moots the dispute. This is the likely limitation, for several times before and after the Shipp decision, the Court had repeated the usually accepted principle that violation of a void order was not punishable. In the Lewis case the Court reached its result by relying on the Shipp case and ignoring the decisions prior and subsequent to the Shipp decision: The Lewis decision thus presumably overrules subsilentio such one-time leading cases as In re Sawyer.

Mr. Chief Justice Vinson, who wrote the main opinion and gave the judgment of the Court, relied on both theories. Justices Frankfurter and Jackson dissented as to the Act, but came to the same result by using the Shipp doctrine. Justices Black and Douglas used the Act theory exclusively.

Justices Murphy and Rutledge, dissenting completely, gave the majority a hard battle. Mr. Justice Murphy put the central problem thus:

.... Some future government could easily utilize seizure as a subterfuge for breaking any or all strikes in private industries. Under some war-time or emergency power, it could seize private properties at the behest of the employers whenever a strike threatened or occurred .... on the specious theory that the government was acting in relation to its own employees. .... After the strike was broken, the properties would be handed back to the private employers. That essentially is what has happened in this case.

Mr. Justice Rutledge, in a brilliant opinion in which Mr. Justice Murphy joined, made the major attack. Mr. Justice Frankfurter had shown that the Norris-LaGuardia Act barred the suit. Rutledge agreed and add-

27 203 U.S. 563 (1906).
28 124 U.S. 200 (1888), and cases referred to by Mr. Justice Rutledge. See note 25 supra.
ed. He showed, with abundant citation, the error of the Court's use of the Shipp case and showed also why the procedure of the trial court in punishing for contempt had been unsound. Although the majority scaled down the fine by 80 per cent, the dissent declared that the fine was entirely inappropriate. Justices Black and Douglas joined with the dissent on this ruling, but on the ground that a conditional fine would have been sufficient.

As between the two devices of exception, the Norris-LaGuardia Act and the Shipp rule, the latter is the more undesirable. The statutory interpretation is ephemeral—indeed, Congress has already by the Taft-Hartley Act amended the Norris-LaGuardia Act in respect to important strikes, and the plant seizure power has lapsed; so that the decision on that point is of no further consequence. The Shipp rule, as revised and declared, will be less easily escaped, for it will enter into the fabric of equity jurisprudence. The majority attempted to limit its doctrine to cases in which the basic jurisdictional dispute was "substantial"; to which Mr. Justice Murphy replied that "the minds of lawyers and judges are boundless in their ability to raise serious jurisdictional objections," and the Norris-LaGuardia Act will give full scope to that legal ingenuity. The federal lower courts will probably, in sporadic instances, raise hob for years with labor relations before the Supreme Court clarifies what it means by "substantial."

In the Lewis case, the Court did two important things; in terms of economics it broke a strike which, without regard to the merits, had to stop in the nation's interest; and in terms of politics, it rescued an administration bankrupt of a labor policy. At least the first of these results had to be achieved by some instrumentality. Mr. Justice Murphy acknowledged as much. But he added:

... those factors do not permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment. That can have tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners.


32 State courts may quickly follow this lead with their "little Norris-LaGuardia Acts." In an unreported instance coming to the author's attention, a state trial court in Indiana issued a temporary restraining order against a strike despite the Indiana statute, Ind. Stat. Ann. (Burns, 1933) s. 40-501, on the ground of the Court's "doubts" concerning jurisdiction.

33 Lewis case, 67 S. Ct. 677, 717 (1947). This case suggests that it may be unfortunate for the Court to use its power to hear cases without letting them sift through the lower courts. The pressure to reach a particular result because of the emergency of circumstance is, as Mr.
In addition to the Lewis decision, there were several other important labor cases. In the United Brotherhood case, an antitrust action by the United States alleging a union-management conspiracy to restrain trade in lumber products in the San Francisco area, the Court held that by virtue of Section 6 of the Norris-LaGuardia Act, a union was not responsible for the wrongful acts of its officers in the absence of clear-cut proof of direct authorization by the union as a body. Mr. Justice Frankfurter dissented strongly, joined by the Chief Justice and Mr. Justice Burton, contending that under this interpretation "the Sherman Law will be sterilized, certainly so far as national labor unions are concerned." Mr. Justice Reed, for the majority, denied that his decision had any such effect. However the statutory language itself, which provides that unions shall not be liable for the acts of their officers, "except upon clear proof of actual participation in, or actual authorization of" those acts, may well come close to providing practical union immunity. Short of rewriting the statute, there appears to be little the Court can do about it.

Several constitutional issues were raised in the case of Petrillo, charged by the United States with criminal violation of the 1946 statute forbidding efforts to coerce a radio broadcasting company to employ "any person or persons in excess of the number of employees needed." The trial court found the statute void for indefiniteness, and also found that it violated the First and Thirteenth Amendments. The Supreme Court declined to pass on the latter defense prior to trial, but reversed on the asserted lack of definiteness. Mr. Justice Black, for the majority, held that the Constitution did not forbid anti-featherbedding legislation. He acknowledged that such legislation was difficult to word with precision, but held that so long as the government must prove that the loosely described offense had been "wilfully" committed, the statute was definite enough.

A lively political issue was presented in the case of Trailmobile Co. v. Justice Rutledge in the Lewis case reminded his brethren by quoting Mr. Justice Holmes, strong in "great cases"; and in "great cases," the vice is that "immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even settled principles of law will bend." Mr. Justice Holmes, dissenting, Northern Securities Co. v. United States, 193 U.S. 197, 400-1 (1904). For a careful analysis of the decision see Watt, The Divine Right of Government by the Judiciary, 14 Univ. Chi. L. Rev. 499 (1947).

35 Ibid., at 786.
36 47 Stat. 70 (1932), 29 U.S.C.A. § 106 (1932); cf. § 301 (e) of the Taft-Hartley Act for a carefully drawn provision intended to be quite different.
Ever since the end of the war, the law enforcement authorities of the government have nervously feared the possibility that they might have to take sides between labor and the veterans on the rights of returning veterans to their jobs. Section 8 of the Selective Service Act provides that veterans should be reinstated in their jobs for one year, with seniority. In the October 1945 term the Court held that the Act gave veterans that seniority which they would have had if they had never been in service, and no more. Hence a veteran could be laid off during the guaranteed year if there was no work for one of his seniority standing to do. In the *Whirls* case at the October 1946 term the Court held that the seniority right, like the employment right itself, expired at the end of the year granted by Congress.

In addition to the fairly spectacular labor cases just outlined, the term had the usual grist of Wagner Act and wage-hour litigation. Of the six Wagner Act cases, two dealt with the coverage of plant guards, one with the mechanics of holding elections, and one with a refusal to bargain. The other two involved the sharply debated issue of the coverage of foremen under the Act.

The seven Fair Labor Standards Act cases—5 per cent of all the cases heard on all subjects during the year—were on small points with one exception. In the *Halliburton Oil* case, the 1942 Belo rule, which had been

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38 67 S. Ct. 982 (1947).
43 Packard Motor Car Co. v. NLRB, 67 S. Ct. 789 (1947), held that foremen were "employees" of the concerns for which they worked and hence were covered by the Act in which "employees" is the key word of definition. Mr. Justice Jackson wrote the majority opinion and Mr. Justice Douglas wrote a dissent in which the Chief Justice and Justices Burton and Frankfurter largely joined. None doubted that foremen were entitled to organize; the question was merely whether employers were entitled to fight foremen organizations by refusal to bargain, threats of discharge, use of labor spies, and the other pre-Wagner Act practices. Congress has already amended the Act to undo the Jackson decision and restore these privileges to those employers who want them. Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 151 (Supp., 1947), amending § 2 of the National Labor Relations Act. The amendment nullifies the effect of a second decision that the federal Act precluded state regulation on the same subject. Bethlehem Steel Co. v. New York State Labor Rel. Bd., 67 S. Ct. 1026 (1947).
45 Walling v. A. H. Belo Corp., 316 U.S. 624 (1942). The Belo rule is the only substantial hole which the Court has found in the Act. Under it, for example, an employer who was paying an employee $27.50 a week at the time of the passage of the Act could enter into a contract with the employee providing that he should receive $0.50 an hour plus "not less than" time and one-half for overtime, "but not less than $27.50 a week." The employer was thus permitted, by use of the verbal formula, to work the employee fifty hours a week without paying any more for a fifty-hour week after the Act than he paid for a forty-hour week before.
confined narrowly to its facts in numerous subsequent decisions, was reaffirmed. The Belo case was decided 5 to 4 in 1942. In 1947 Mr. Justice Byrnes, the fifth justice of the Belo majority, had been replaced by Mr. Justice Rutledge who in the Halliburton case made it perfectly clear that he considered the Belo rule unsound. The primary issue this year thus was not whether the Belo rule should be approved, but rather whether in the intervening years employers had come to rely on it to such an extent that it could not fairly be changed except by prospective legislation. The majority held, in the circumstances, that "Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to part from it at this time." Justices Murphy and Black would have preferred to overrule it.

THE POWER TO TAX

Governments must have revenue sufficient to function, and as the duties and costs of government expand, it becomes progressively more difficult to find that revenue. Federal tax expansion drives the states to new sources of income. State social legislation, and indeed the whole process of decentralization of government, depends on adequate state incomes, and many state treasurers are scraping the bottom of their resources. And now, after years of vacillation, the Supreme Court has finally taken a stand sharply restricting state revenue.

It is of course not easy to decide exactly what effect the commerce clause should have on the state taxing power. It would be easy enough to say that it should have no effect; or, more moderately, that state taxes affecting commerce should usually be valid unless directly discriminating against interstate commerce. But only Justices Black, Douglas, and Murphy will take this stand; and the remaining judges are forced to work out some formula, if they can, for determining when state taxation excessively burdens commerce, and when it does not.

Walling v. Halliburton Oil Well Co., 67 S. Ct. 1056, 1060 (1947). The case raises the question of the weight to be given principles of stare decisis in statutory interpretation. This question was considered in some detail by Mr. Justice Rutledge, concurring, and Mr. Justice Murphy, dissenting, in Cleveland v. United States, 67 S. Ct. 13, 16, 18 (1946). For further discussion see Horack, Congressional Silence, A Tool of Judicial Supremacy, 25 Tex. L. Rev. 247 (1947); and Note, 59 Harv. L. Rev. 1277 (1946).

See Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Col. L. Rev. 211, 215-16 (1947).

Their dissenting positions in Nippert v. Richmond, 327 U.S. 416, 435 (1946) are some indications of this view. The entire subject of commerce clause restrictions on state action was recently reviewed by Professor Dowling, Interstate Commerce and State Power—Revised Version, 47 Col. L. Rev. 547 (1947). The American practice of state regulation prior to Marshall's earliest decision on the point is analyzed in a gigantic research job, Abel, Commerce Regulation before Gibbons v. Ogden, 25 N. C. L. Rev. 121 (1947).
The Court was again faced with this problem this year in *Freeman v. Hewit*, a case which had been on the docket for three years. In that case, an Indiana resident sold stock through a broker on the New York Stock Exchange. The transaction was subject to the New York stock transactions tax, which was not in question in this case. It was also subject to the Indiana gross income tax; which is to say that the seller was required by Indiana law to pay to the state of Indiana a tax of approximately 1 per cent on all of his gross income, of which the stock sale income was a part. The issue in the case was whether, in view of the interstate nature of the stock sale, the income could be taxed by Indiana. The court held that it could not.

The case and all the relevant decisions have been annotated ably by Professor Allison Dunham, and the authorities are too complicated for discussion here. Suffice it to say that the late Mr. Chief Justice Stone had devised a functional approach to the problem of state taxation affecting interstate commerce by which the states could get revenue while commerce remained reasonably unburdened. He had evolved the so-called "multiple burden test," validating taxes on commerce where the local interest is genuine and where the tax is unlikely to be so often repeated in different jurisdictions as to cripple the commerce.

Mr. Justice Frankfurter's opinion for the Court in *Freeman v. Hewit* either sidestepped or scuttled the Stone approach. The precedents were disposed of airily: "Language alters, and there is a fashion in judicial writing as in other things." And with the changing fashions went the multiple burden approach which, if discussed at all, was scorned. For the current fashion, we get a new-old formula: this tax is forbidden because it is "a direct tax on interstate sales." This particular formula has not been popular since the *DiSanto* case which was overruled in an opinion by Mr. Chief Justice Stone in 1941. Of the argument that the state can scarcely afford to give up major sources of revenue, the Court cheerfully says, "Revenue serves as well no matter what its source." Or, as Professor Dunham paraphrases the majority, "Let them eat cake."

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49 67 S. Ct. 274 (1946).
50 Dunham, op. cit. supra note 47; see also articles cited in note 59 infra.
51 Magill, Stone on Taxation, 46 Col. L. Rev. 747, 753-57 (1946); Konefsky, Chief Justice Stone and the Supreme Court 48-97 (1945).
55 Dunham, op. cit. supra note 47, at 216.
It was surprising that Mr. Justice Burton, with his own experiences with inadequate local revenue and with his regard for precedent, and the Chief Justice, with his years of practical tax experience, should have joined the majority opinion. However, it was soon apparent that Mr. Chief Justice Vinson has a very restrictive notion of the states’ taxing power. He and Mr. Justice Jackson are apparently the members of the Court most hostile to state taxes affecting commerce, and they alone dissented in what appeared to be a clearly valid tax on coal at rest in New Jersey before being moved into New York.

In justice to Freeman v. Hewitt it must be acknowledged that the primary shock of the case comes not from its result but from its language and theory. The same result could have been reached with simple citation of Adams Mfg. Co. v. Storen, or, more happily, on the theory offered in Mr. Justice Rutledge’s concurrence. One cannot know with assurance whether the menacing tone of the case is more than an exuberant lesson in legislative draftsmanship. That it is only this may be indicated by the unanimous opinion in International Harvester Co. v. Evatt, which upheld an Ohio “franchise tax” based on a complex apportionment of the corpora-

Mr. Justice Jackson’s attitude on the basic problem of the negative commerce clause is very clearly expressed in his concurring opinion in Duckworth v. Arkansas, 314 U.S. 390, 397-402 (1941).

Independent Warehouses v. Scheele, 67 S. Ct. 1062 (1947). The problem of state revenue and the Constitution also arose in connection with a claim that a Rhode Island tax on a Rhode Island trustee of a New York estate, where the property consisted of intangibles in New York, violated the due process clause. The Court held 6 to 3, that constitutional principles permit a state to tax an interest in foreign intangibles, but not foreign tangibles, and that consequently, this, a tax on intangibles, was constitutional. Greenough v. Tax Assessors, 67 S. Ct. 1400 (1947). Mr. Justice Reed wrote the majority opinion and Justices Murphy, Jackson, Rutledge, and the Chief Justice dissented. For an attack on the rationality of the distinction for constitutional purposes between taxes on tangibles and taxes on intangibles, see Bittker, Taxation of Out-of-State Tangible Property, 56 Yale L.J. 640 (1947).

A third constitutional clause restricting the state taxing power in addition to the commerce clause and the due process clause was considered this year. In Richfield Oil Corp. v. State Board of Equalization, 67 S. Ct. 156 (1946), Mr. Justice Douglas wrote the opinion of the Court holding invalid a general California sales tax as applied to oil sold by pumping from taxpayers’ tanks into a purchaser’s tanker for immediate foreign delivery. The opinion rested on Art. 1, § 10, cl. 2 of the Constitution forbidding taxation of exports. Mr. Justice Black in a lone dissent (Mr. Justice Murphy not participating) showed very clearly that this was a misuse of Art. 1, § 10, cl. 2. Justices Douglas and Rutledge also thought the clause invalidated in part the gross receipts tax on New York stevedores. Joseph v. Carter & Weeks Stevedoring Co., 67 S. Ct. 815, 822, 827 (1947).

Professor Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 501, 710, 723 (1947), treats the Freeman case as a simple application of Adams Mfg. Co. principles and is not alarmed about it. A note, 56 Yale L. J. 898 (1947), treats the case as “A Change in Doctrine.” See also Recent Cases, 14 Univ. Chi. L. Rev. 503 (1947).
tion's intrastate and interstate business. Mr. Justice Black for the Court said, "A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege." So long as apportionment achieves no "unfair result," the "privilege of doing local Ohio business" may be taxed. This suggests that focus on apportionment and on the intrastate "privilege" must be the draftsman's objective.

In *Freeman v. Hewit*, Justices Black, Douglas, and Murphy dissented, and Mr. Justice Rutledge concurred specially to suggest his own formula for the multiple-burden test. In *Joseph v. Carter & Weekes*, involving a New York tax on the gross receipts of stevedoring companies engaged in loading and unloading vessels for commerce, the *Freeman v. Hewit* majority of five again invalidated the tax. This time, however, the opinion was written by Mr. Justice Reed, who exhibited a real concern for state revenue problems, and who stayed carefully within the boundaries of a precedent squarely in point on taxation and the stevedore industry. Justices Black, Douglas, Murphy, and Rutledge dissented on the commerce point. As Mr. Justice Douglas observed, there was no possibility of multiple burden in the situation. He sadly concluded that "The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman v. Hewit* marked the end of one cycle under the Commerce Clause and the beginning of another.

The new cycle, if new cycle it be, bodes ill for the economy. It not only jeopardizes state revenues, but may tend to force state taxation off fairly innocuous transaction taxes and on to a general sales tax payable directly by those elements in the community least able to bear it. The new "fashion" is discriminatory against intrastate transactions—if the Indiana stock seller need not contribute to the revenues of the state, someone in Indiana will have to make up his share. Finally, it is confusing in an area which more than almost any other area demands clarity and simplicity. As a practical matter, state taxes are levied by legislators who frequently can have very little comprehension of excessively complicated legal no-

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61 Ibid., at 447.
62 The concurrence is scorned, Powell, op. cit. supra note 59 at 739, and praised, Dunham, op. cit. supra note 47 at 218. The concurrence is the clearest and best thought-out statement of the multiple-burden theory.
63 67 S. Ct. 825 (1947).
tions; and they are drafted by underpaid assistants in state offices who are frequently hard put to keep pace with shifting "fashions."66

To solve this problem, Professors Sutherland and Vinciguerra of Cornell University this year made an elaborate proposal for congressional action to untangle the legal snarl.67 The proposal is worth pushing.

**MONOPOLY AND FREE ENTERPRISE**

Case of the year in business regulation was the railway rate decision upholding an Interstate Commerce Commission order raising class rates in Official Territory and lowering them elsewhere.68 The case was an aftermath of the years of southern effort, particularly by Governor Arnall, to equalize the position of the South in the national economy.69 Spurred, perhaps, by the indication in the *State of Georgia* case70 that if the Commission did not move toward rate equalization, the Court would intervene with its equity power, the Commission finally acted. The majority, through an opinion by Mr. Justice Douglas, upheld the Commission. Justices Jackson and Frankfurter dissented.

There were questions in the case of power and of evidence. The majority justices, accustomed as they were to being somewhat critical of Interstate Commerce Commission findings where the Commission ruling served monopolistic interests, were required here to find the evidence sufficient; the minority, accustomed to upholding the Commission's findings in other cases, here had to find them inadequate. But the largest issue was one of theory. The opinion further establishes the fundamental proposition that in regulating railroad rates, there is a public interest to be considered above and beyond the interests of particular shippers and particular carriers. Railroad rates are to be adjusted from the standpoint of the entire national good, and this includes regional welfare. The majority held that just as rates may be adjusted to keep a competitive balance among types of carriers, so they may be adjusted to keep a competitive balance among the regions of America even though this resulted in an increased revenue for northern roads beyond their immediate needs. It was to this proposition that the dissent was aimed.

66 The devices by which Indiana will try to continue to collect as large a gross receipts tax as possible after Freeman v. Hewit are described in Note, 22 Ind. L. J. 252 (1947).
67 Sutherland and Vinciguerra, The Octroi and the Airplane, 32 Corn. L. Q. 16x (1946).
69 For discussion, see Arnall, The Shore Dimly Seen 165-85 (1946).
There were two antitrust cases during the term, the *National Lead*\(^7\) and the *Yellow Cab*\(^2\) cases. In the *National Lead* case, written by Mr. Justice Burton, the major issue concerned the decree. In 1920 National Lead had entered into a cartel with foreign interests to pool patents, divide the world market, and abstain from competition in titanium pigments, used in the manufacture of paints, rubber glass, paper, and many other products. By 1933 the Du Pont Company, also a defendant in the *National Lead* case, had entered the field and become a somewhat qualified member of the cartel. This condition continued until 1943, when by the extensive use of patents practically immunized from challenge by the agreement, the American defendants, National Lead and Du Pont, controlled well over 90 per cent of the basic types of titanium trade. Two other concerns were in the field.

The principal issue in the Supreme Court was a provision of the decree requiring the defendants to license the use of their patents at a reasonable royalty to whoever desired them. The government and National Lead sought royalty-free licenses instead. The Court approved the decree as written as within the sound discretion of the district judge. Mr. Justice Douglas in dissent with Justices Murphy and Rutledge argued that royalty continuance gave the offenders practical advantage of their long conspiracy; and that the price situation was such that allowance of any royalty would give the licensor, who of course would be free of payments, an undue advantage over possible competitors. Justices Black and Jackson disqualified.

A small incident may move men deeply who feel nothing when the same phenomenon is expanded to the point of the incomprehensible. One death in a traffic accident may cause more concern than Hiroshima. So here. Two terms ago, in the *Hazel Atlas* case,\(^3\) a patentee in obtaining his patent used an obvious fraud, long undiscovered. The fraud may not have been essential to the patent. Long after, solely because of the fraud and without considering its merits, the Supreme Court invalidated the patent. One simple fraud in one patent involving one lie skilfully told, when discovered, brought an end to the patent. Yet in the *National Lead* case, where a twenty-five year conspiracy against the population of the world involved many patents and the total production of an important industrial prod-


\(^2\) United States v. Yellow Cab Co., 67 S. Ct. 1560 (1947). The Yellow Cab case held that the Sherman Act forbids a conspiracy to monopolize the sale of cabs in Chicago, and a conspiracy to monopolize contracts for transportation of passengers between railroad terminals in Chicago, but does not reach the remainder of Chicago taxi traffic.

uct, it was held that the offenders might keep their patents and stay in business with the competitive advantages thus accruing.

Nonetheless, in this case the Court bears only partial responsibility. Not only the Court, but the government itself has failed to exhibit as yet full realization of the basic principle of modern antitrust litigation. In 1947 the real issue in antitrust cases is no longer guilt or innocence; the issue has become the decree. Monopolies have become sufficiently sophisticated not to mind the epithet "sinner" if nothing is done about it. Hence the argument over guilt is really ferocious shadow boxing. Yet the government still utilizes its primary energies to prove the facts of violation, and the decree is settled on oral argument and briefing rather than on good factual proof. Thus in this case Du Pont could and did emphasize that the government had not laid a factual foundation for the relief requested.\(^4\)

In this case the principal practical result of royalty-free licensing would have been to give one defendant, National Lead, a substantial benefit over the other defendant, Du Pont.\(^5\) National Lead founded the cartel, and its position was not emotionally appealing. In another case on a different record, before the whole Court, an opposite result on royalty-free patents may be reached.

The use of the simple patent monopoly for extension of the monopoly control of the holder into related fields was limited in one case and left untouched by another. In the Katsinger–MacGregor cases,\(^6\) the issue was the extent to which a patent licensee is estopped in various situations from

\(^4\) In its brief in the Supreme Court, the Du Pont Company asserted the absence of evidence to show the effect of divestiture of the patents on (a) cost of manufacture; (b) capacity to manufacture; (c) quality of products; (d) efficiency of operations; (e) consumer interests. Du Pont also asserted that there was no evidence of any desire of other concerns to enter the field. Du Pont brief at 54, United States v. National Lead Co., 67 S. Ct. 1634 (1947).

\(^5\) Du Pont has by now developed its technology to the point of being substantially free of National Lead patents, while National Lead must still use the Du Pont patents. Hence Du Pont in its brief said: "National Lead now finds itself faced with energetic competition of the smaller manufacturers and with constantly increasing competition of Du Pont which broke off from technical exchange with National Lead in 1940. For commercial reasons it now desires a 'free ride.' Certainly this Court should proceed with particular caution before it permits National Lead to utilize this litigation, in which it is the principal offender, for its own private purposes." Ibid., brief at, 34-45.


challenging the validity of the patent. In the *Sola Electric* case, the late Mr. Chief Justice Stone had written for the Court that despite a general principle that licensees cannot challenge the validity of a patent, a licensee might do so in an equitable action to enforce a price-fixing agreement in the license. This was considered appropriate since if the patent were invalid, the licensor would have no right whatsoever to control the prices of the product emerging from the licensee's use of the license. The principle is an important one because it serves to limit price-fixing agreements to the minimum contemplated by the patent system. If licensees are estopped from challenging validity in such a case, the licensor is as a practical matter free of any challenge to what may be an invalid patent if only he can license an entire industry.

In the *Katzinger* case the Court applied the *Sola* principle where the licensor sued not for an injunction but for royalties under a terminated patent which had included a price-fixing clause. The licensor asked for no relief under that clause. The Court, in a 5 to 4 opinion written by Mr. Justice Black, held that the *Sola* principle applied in any case, legal or equitable, in which reliance was placed on a license which contained price-fixing clauses, even if those clauses were not involved in the particular case. Mr. Justice Frankfurter dissented for himself and Justices Reed, Jackson, and Burton, reaffirming his faith in the principle that a licensee should not be able to challenge a patent's validity.

In the *Transwrap* case the Court held 5 to 4 that a patentee could include as a condition of a patent license a requirement that the licensee should transfer to the licensor any improvement patents he might acquire. The decision appears to put some limitation on the doctrine of the *Mercoid* case of two years ago, and the dissenting Justices so viewed it.

The persistent matter of *Bruce's Juices* gave the Court a new Robinson-Patman Act problem. The issue which drew the primary attention of the Court was whether, in an action on a note for goods sold, the buyer can plead as a defense that over a period of years the seller had been exacting discriminatory prices in violation of the Robinson-Patman Act; and that the amount of the injury suffered by the buyer because of the discrimination is equal to the amount still owing on the notes. The defendant

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contended that the seller had given quantity discounts to others which were illegal under the Act. As the dissent put it, "The issue in this case is whether sellers of goods should be allowed to use the courts to collect price differentials which have been made illegal by Congress in the Robinson-Patman Act." Since the defense had not been considered by the court below, it was unnecessary to decide at this stage whether the buyer could prove the alleged violation.

With two former heads of the Antitrust Division as opposing counsel, John Lord O'Brian for the seller and Thurman Arnold for the buyer, the case was dramatically argued. Mr. Justice Jackson for the majority in a 5 to 4 decision held the defense was not permitted by the Act; nor was the common-law defense of illegality of a contract available, since this was not an instance in which "in order to prove his own case, a plaintiff proves his violation of the law...." In another phrase the Court indicated that the illegality was separable from the note on which the suit was brought. The Court refused to go outside the particular transaction and focused its attention not on injury done the buyer, but on the benefit given to someone else.

The dissenting opinion by Mr. Justice Murphy for Justices Black, Douglas, and Rutledge moved from a wholly different philosophic starting point. In this view, the power to control the enforceability of contracts is one which the courts should use to the hilt to spread the effect of the antitrust and fair trade laws. The defense of illegality may be used under the Sherman Act; it may be used in the patent field as in the licensee estoppel cases previously discussed; and it should also be used in the commercial relations covered by the Robinson-Patman Act.

The Jackson view, held perfectly consistently by him and by Mr. Justice Frankfurter, appears repeatedly in the cases discussed in the foregoing section and can be summarized thus: In a given case the government through its controlling agency (commission or court) must focus exclusively on injury directly done the complaining person rather than on injury done the public. The competing principle of the minority is: When a person alleges injury from benefits given another, the court or commission may relieve the individual even though the public rather than the individual has been the principal sufferer.

Thus in the class freight-rate adjustment case, the Jackson-Frankfurter view was that the Commission was not free to raise the northern rates because no party was immediately injured by the northern rates.

82 Ibid., at 1021.
Only the public will benefit by regional equalization. In the patent licensing cases, this philosophy concentrates on the sanctity of the contract of license, excluding from consideration the effect on the public of a possibly illegal price exploitation which under our peculiar patent system is, as a practical matter, likely to be attacked only in an infringement suit. In the Robinson-Patman case the buyer is left to his statutory remedy because the particular discrimination is not apparent on the face of the contract in suit, and the benefits are given to others than the parties. Here, too, the real injury, if to anyone, is largely to the public which is the prime sufferer from fettered trade.

The problem emerging from all these cases is then, to what extent is the public to be considered an impleaded party in every trade regulation case, able to make a silent plea and receive the benefit of judgment? Must the pervasive issue of monopoly versus free enterprise be fought out strictly in terms of joined parties and present beneficiaries?83

FURTHER REGULATIONS OF BUSINESS AND LABOR

There were a few other instances of the direct regulation of business by government. The Public Utility Holding Company Act was held valid in an opinion which dealt primarily with due process questions, but which also gave the broadest known definition of the commerce power. Mr. Justice Murphy for the Court said, "The federal commerce power is as broad as the economic needs of the nation."84 Not long ago, Mr. Justice Sutherland spoke for a Court which had another view of the matter.85

In a 5 to 4 opinion, Mr. Justice Black wrote for the Court that the equal protection clause did not prevent the state of Louisiana and the New Orleans harbor pilots from permitting piloting in the harbor to be a family monopoly handed down from father to son, excluding all others.86 The Court held that the pilots were "state officers," that the practice was nepotism, and that whatever else may be said about it, nepotism is not unconstitutional. This, like the Lewis case, illustrates the astonishing results which can be achieved when private workmen are turned into "government employees" by gesture of law. Mr. Justice Rutledge was more persuasive in dissent with Justices Reed, Douglas, and Murphy when he

83 This basic problem is comprehensively considered in Lockhart, Violation of the Anti-Trust Laws as a Defense in Civil Actions, 32 Minn. L. Rev. 507 (1947), which includes a discussion of the principal cases referred to in this text.


86 Kotch v. Board of River Port Com'r's, 67 S. Ct. 910 (1947).
declared that *Yick Wo v. Hopkins*\(^7\) forbids states either in law or in practice to discriminate by blood in controlling employment.

Other cases were concerned with the operation of administrative machinery.\(^8\)

A decision with an enormous potential for the regulation of business was the California ocean-waters case.\(^9\) There the ultimate social problem presented was this: Should the enormous mineral reserves off the coast of the United States be exploited solely for the benefit of those states which happened to be located next to them or should these minerals be exploited for the benefit of all the people of the United States, wherever they happen to reside? The legal problem was worded differently: The states without question have dominion over underwater lands within their boundaries, so long of course as use of the navigable water itself does not interfere with congressional desire. Should the same rule be extended to waters outside the littoral boundaries of a state? The Court held that it should not, with the principal practical result that control over some very important oil lands passes from Sacramento and Austin to Washington, D.C. Whether national officials will remain sufficiently impervious to oil company pressures for this change of situs to make a difference remains to be seen. Mr. Justice Black wrote the majority opinion; Mr. Justice Reed dissented on the merits; Mr. Justice Frankfurter thought the suit of the United States should be dismissed without prejudice; and Justice Jackson disqualified.

### III. CIVIL RIGHTS

There have been eras of repression in American history, and we are seemingly diving into another. The first Adams administration, the events culminating in the Haymarket trial travesty in the 1880's, the First World War and the black years that followed—each produced its heroes and

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\(^7\) 187 U.S. 356 (1886).

\(^8\) The Court clarified the use of the contempt decree for the enforcement of administrative subpoenas in *Penfield Co. v. SEC*, 67 S. Ct. 928 (1947). In *FCC v. WOKO, Inc.*, 67 S. Ct. 213 (1946), it gave full support to a requirement that a person seeking a federal license must honestly fill out the required forms. In *R. R. Donnelley & Sons Co. v. NLRB*, 67 S. Ct. 624 (1947) and *SEC v. Chenery Corp.* 67 S. Ct. 1575 (1947), the Court dealt with the problem presented when a case is remanded to an administrative agency for failure to consider a certain matter, and the agency thereupon considers and comes to the same result. The Chenery case also involved more difficult problems, particularly the capacity of the Commission to make in effect a rule for the future, not by promulgation of a general rule, but by a decision necessarily retroactive in a particular case. The Court held that there is "a very definite place for the case-by-case evolution of statutory standards." Ibid., at 1580. The case was rendered difficult by the conceded absence of deliberate wrongdoing by the management of the corporation. On the central issue see *Note, Retroactive Operation of Administrative Regulations*, 60 Harv. L. Rev. 627 (1947).

eventually its reaction. But before the spirit of Jefferson, Altgeld, and Hughes could triumph, there were years of injustice, anguish, and despair. The reinvigoration of the House of Representatives Committee on Un-Americanism; the pursuit of teachers by state politicians; the beginning of mass government discharges for "subversive activity" either with no hearing or with a mere mockery of hearing, and legislative restrictions on the right of labor unions even to inform their members of the voting records of Congressmen—these were only a few of the events highlighting 1946–47. If prophecy may be permitted, the trend will gain strength in the foreseeable future.

In the past, it has been political action rather than Supreme Court majority decisions which brought the country out of its repressions. The victory of Jefferson and not the accession of John Marshall ended the Alien and Sedition laws. Theodore Roosevelt and Woodrow Wilson brought the spirit of tolerance to the country in the twentieth century. The philosophy of the Holmes dissents, coupled with a wearing out of the furies, helped bring the country to its post-Klan senses. The Supreme Court has seldom been in the civil rights vanguard when the tensions were strong; indeed it was Supreme Court decisions that sent the Negro part-way back to bondage after the Civil War.

From the present indications, some such inglorious role seems in store for the Supreme Court majority in the forthcoming years. The zeal of the Hughes-Stone Courts languishes. Indeed the great "red hunt" among government clerks was waved on by the Court this year when, by denial of certiorari, it refused even to consider the rights of the employees. Only Justices Black and Douglas indicated a desire to hear the case.

"Civil rights" is a somewhat ambiguous phrase. The Court had at least fifteen civil rights cases during the term, and of those cases, three were


91 A good discussion of some of the problems connected with this Committee can be found in Note, Constitutional Limitations on the Un-American Activities Committee, 47 Col. L. Rev. 476 (1947) and Note, Congressional Contempt Power in Investigations into the Area of Civil Liberties, 14 Univ. Chi. L. Rev. 256 (1947). On political tests for government employment, see Note, 60 Harv. L. Rev. 779 (1947).

92 Ex Parte Milligan, 4 Wall. (U.S.) 2 (1866) is one noteworthy exception.

93 Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

unanimously decided. The distribution of votes in behalf of or in opposition to the claimed rights in the nonunanimous cases is shown in the table below. Strong emphasis must be placed on the fact that the presentation of this table does not represent a judgment that the vote in any one or two hard cases represents a justice's basic philosophy of civil rights. Nonetheless, judgment in one direction in a sizable group of hard cases may reflect a cast of mind.

Table 1 shows for 1946 what would have been expected of the senior members of the Court: that in disputed cases, Justices Murphy and Rutledge almost always uphold claimed civil rights; that Justices Black and Douglas do so appreciably more often than not; and that Justices Jackson, Frankfurter, and Reed seldom do. Of the new Justices, Mr. Justice Burton

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\begin{array}{|c|c|c|}
\hline
\text{Justice} & \text{In Support of the Claimed Right} & \text{In Denial of the Claimed Right} \\
\hline
\text{Vinson} & 0 & 12 \\
\text{Black} & 8 & 4 \\
\text{Reed} & 2 & 10 \\
\text{Frankfurter} & 2 & 10 \\
\text{Douglas} & 8 & 4 \\
\text{Murphy} & 10 & 1 \\
\text{Jackson} & 2 & 9 \\
\text{Rutledge} & 11 & 7 \\
\text{Burton} & 3 & 9 \\
\hline
\end{array}
\]

Pritchett, The Coming of the New Dissent, 11 Univ. Chi. L. Rev. 49, 57 (1943), divided civil liberty cases of the October Term 1942 by votes for "the individual" and for "the government." Of thirty-six votes cast by Justices Black, Douglas, Murphy, and Rutledge in ten cases,
ton is apparently far more likely to find that a civil right has been denied
than Mr. Chief Justice Vinson. The primary difference made by the sub-
stitution of the new for the old Chief Justice is that it tilts the majority
of the Court in a new direction, away from a vigorous defense of civil
rights. On the other hand, a dozen cases, many of which were peculiar,
are an insufficient base for more than a hunch as to Mr. Chief Justice Vin-
son’s predilections.

Most civil rights came under the Fourteenth Amendment after the ex-
pansion of substantive due process of law. It had been early held that the
Amendment gave the Court no roving commission to scent out and con-
demn those state laws which were in the judicial mind “unreasonable.”
But about 1890 this view was abandoned, and the Court held first that
rate regulation and later social legislation must run a gauntlet of judicial
scrutiny before its substance could be allowed. This conception expanded
so quickly that by the time Mr. Justice Holmes faced the issue in 1905, he
accepted without question the major premise that the Court might review
the merit of legislation and disagreed only on the standard of judicial tol-
erance to be applied. Mr. Justice Holmes would not have exercised the
reviewing power as lightly as did his brethren, but he acknowledged that
he had it.

Hence the Bill of Rights, by this course of interpretation, did not lead,
it followed property rights into the protection of the Fourteenth Amend-
ment. It followed on the same theory, that the Court might reject un-
reasonable restraints on civil rights or, as Mr. Justice Cardozo put it, re-
straints inimical to “the very essence of a scheme of ordered liberty.”
Under this theory, as expressed by Mr. Justice Moody in Twining v. New

the distribution was two for the government, thirty-four for the individual. Of twenty-eight
votes cast in the same cases by Justices Reed, Frankfurter, and Jackson, twenty were for the
government and eight for the individual.

Pritchett, ibid., shows that in the same ten cases, Mr. Chief Justice Stone cast three
votes for the Government and seven for the individual.

Slaughterhouse Cases, 10 Wall. (U.S.) 273 (1870); Munn v. Illinois, 94 U.S. 113 (1877).

Justices Black and Douglas date the beginning of substantive due process from Chicago,
Milwaukee & St. P. R. Co. v. Minnesota (the Minnesota Milk case), 134 U.S. 418 (1890). See
their discussion in Adamson v. California, 67 S. Ct. 1672, 1690 (1947). Mr. Justice Bradley,
dissenting in the Minnesota Milk case took the same view. Yet while Mr. Justice Blatchford’s
majority opinion in that case is ambiguous, it seems probable from his later opinion in Budd v.
New York, 143 U.S. 517 (1892) that he meant the Milk case to exemplify procedural due proc-
ess only. In this view, substantive due process in the field of rate regulation begins with Reagan

in his first term on the Court but has evidently reconsidered the matter.
and Mr. Justice Cardozo, not all of the Bill of Rights limits state power, but only those rights which the Court thinks are sufficiently important to warrant inclusion.

This year saw battles over two aspects of that conclusion. First, assuming the Moody-Cardozo theory, is the right to counsel, guaranteed by the Sixth Amendment, of such importance that the Court should require the states to protect it? Second, should the whole theory of substantive due process and judicial review of reasonableness of legislation be put aside in favor of a counter theory that the Fourteenth Amendment encompasses the Bill of Rights in its entirety, and no more?

The Court reexamined the latter question in the case of Adamson, who had been convicted in a state court in California. Under California law, the prosecuting attorney and the judge were permitted to comment to the jury on the fact that Adamson had not chosen to take the stand. Under the federal Constitution, a federal prosecutor did not have such a privilege, because of the clause in the Fifth Amendment forbidding compulsion of testimony in criminal cases against oneself. The majority opinion, written by Mr. Justice Reed, held again that the Fourteenth Amendment did not encompass all of the Bill of Rights, that no substantial injustice was done by the California law, and that the conviction must be affirmed. In so doing, the opinion necessarily reaffirmed the basic theory of due process.

A minority of four challenged the whole structure. Justices Black, Douglas, and Murphy, before Justice Rutledge came to the bench, had declared their belief that the Fourteenth Amendment was never meant to give the Court power to review the reasonableness of rates or the wisdom of social legislation. They went behind the Holmes view that the Fourteenth Amendment gave the Court power to review the substance of legislation, but that the power should be used sparingly. Instead they took the original position of Mr. Chief Justice Waite that courts had no power to review such legislation for substance at all.

In the Adamson case Mr. Justice Black, joined by Mr. Justice Douglas, gave full elaboration to the remainder of their theory: The Fourteenth

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202 211 U.S. 78 (1908).
204 Such comment is precluded by statute, 20 Stat. 30 (1878), 28 U.S.C.A. § 632 (1878); but Mr. Justice Frankfurter in his concurring opinion conceded that the statute was unnecessary. Adamson v. California, 67 S. Ct. 1672, 1680 (1947).
206 Munn v. Illinois, 94 U.S. 113 (1877).
Amendment did not give the Court power to review the desirability of legislation. It made the Bill of Rights, apparently all of it, a restriction on the states. The Court was to have no discretion whatsoever to pick and choose among the clauses or parts of clauses of the Bill of Rights which it would enforce against state action—in a democracy an appointive court had no business making such decisions.\textsuperscript{107}

The basic controversy is not new. Mr. Justice Harlan in the nineteenth century had held the Black-Douglas view on civil rights, but with little support.\textsuperscript{108} Mr. Justice Frankfurter referred to him in a concurring opinion in the \textit{Adamson} case as "an eccentric exception." However, the underlying thesis challenging the entire conception of substantive due process without special reference to civil rights had the most respectable of antecedents in \textit{Munn v. Illinois}\textsuperscript{109} and the \textit{Slaughterhouse Cases}.\textsuperscript{110}

Hence the striking aspect of the minority thesis here is not its novelty but the extent of its support. One more vote, and the Bill of Rights \textit{will} be a limitation on the states.

Serious blows were struck at civil liberties this year in the search and seizeure case and the right to counsel cases. In \textit{Harris v. United States},\textsuperscript{111} the petitioner was arrested in his apartment by Federal Bureau of Investigation agents who had arrest warrants charging offenses relating to forgery. They had no search warrants. The agents spent five hours completely ransacking the premises looking for two canceled checks. They never found the checks, but in a bedroom drawer they found a sealed envelope which,

\textsuperscript{107} The dissent is supported by an elaborate historical appendix tracing the history of the Fourteenth Amendment in Congress and before the people. It records repeated statements of supporters of the Amendment that they intended it to make the Bill of Rights a restriction on the states. For example, Senator Howard, who offered the Amendment in the Senate, detailed the Bill of Rights and said, "The great object of the first section of this Amendment is, therefore, to restrain the power of the States and compel them at all times to respect these fundamental guarantees." \textit{Adamson v. California}, 67 S. Ct. 1672, 1703 (1947). This writer can subscribe to neither the majority nor the minority view. The minority view, if followed literally, would result in a requirement for grand jury procedure in every state criminal action, and for a civil jury in every case over $50.00. The majority view denies the constitutional guaranties of a fair trial with counsel and without self-incrimination to all defendants without regard to financial condition in state courts. Granting for the sake of argument that the minority view may have been originally intended, it seems too late now to make so radical a change in current minor state procedure, particularly when there would be no apparent good, for example, in inflicting grand jury procedures on those states which do not happen to use it. If, as the majority contends, due process protects "the essence of a scheme of ordered liberty," the problem would be largely solved if the majority would recognize that the right of trial with counsel, to pick an example, is part of "the essence of a scheme of ordered liberty."


\textsuperscript{109} \texttt{94 U.S. 113 (1877).}

\textsuperscript{110} \texttt{10 Wall. (U.S.) 273 (1870).}

\textsuperscript{111} \texttt{67 S. Ct. 1098 (1947).}
when torn open, revealed a number of selective service notices and cards. Harris was charged with having these in his possession in violation of the Selective Service and Training Act.

The Fourth Amendment forbids “unreasonable searches and seizures” and provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” In this case there was no search warrant. The theory of the government was that the arrest warrant permitted the search of the premises where the arrest was made. The arrest warrant of course did not describe either “the place to be searched” or “things to be seized.”

If an arrest warrant gives the right to search the premises of the arrest, then a man’s home is his castle only so long as he stays outside of it. In a series of three cases, the latter two clarifying and perhaps modifying the first, the Supreme Court had explored the extent to which a search could be made in connection with an arrest, and those cases declared the governing principle to be that upon arrest, only visible and accessible evidence could be taken. In the last of the three cases, it was held to be a constitutional violation to search a desk, towel cabinet, and wastebasket upon an arrest in the accused’s office. These cases have generally decried “rummaging” and “ransacking” without a warrant.

In the Harris case, a five-judge majority upheld a conviction based on evidence found by “rummaging” and “ransacking.” If the majority opinion gives general approval to the practice employed, then, realistically speaking, the power to control searches passes from federal district judges, operating in the calm of the court, to federal police acting in the excitement of the arrest. It is not, however, at all certain that the Chief Justice in writing the majority opinion meant to go so far. The Court stressed that the objects actually discovered were not merely evidence of a crime, but that their possession was in itself a crime. Since the government was entitled to possession of the draft cards, “A crime was thus being conducted in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material.”

The opinion may thus be limited to the right to seize upon arrest material which belongs to the government, the possession of which is a crime.


113 Harris v. United States, 67 S. Ct. 1098, 1103 (1947).
Since the Court cited the earlier decisions without any indication of a desire to overrule them, some such limitation is likely. This is further indicated by the fact that the Chief Justice himself, as a member of the District of Columbia Court of Appeals, wrote one of the opinions most broadly extending the protection of the Fourth Amendment. In this view, the conviction of Harris was possible only because the draft cards were found—if the checks the agents had been looking for had been found, and a prosecution had been based on them, a reversal of conviction would have been necessary.

If there is such a limitation on the majority opinion, the minority did not see it. Justices Frankfurter and Murphy wrote dissents in each of which both they and Mr. Justice Rutledge joined. The essential theory of these dissents was that while under the rule of the earlier cases, limited search might be made on arrest, this had not been such a search. Mr. Justice Jackson, dissenting, seemed to go farther and suggest that there should be no search beyond the person of the individual arrested. The opinions of Justices Frankfurter and Murphy were temperate, scholarly, and, to this reader, completely convincing, while the Jackson position, though more novel, has real force.

The fundamental issue in the recurrent right to counsel cases is whether in state prosecutions a man may be deprived of right to counsel because he is too poor to pay for a lawyer’s help. Under the Sixth Amendment, all persons must have counsel in federal cases if they desire it, without reference to their financial condition. Under the decision in Powell v. Alabama, the states, too, must afford counsel in capital cases.

But in Betts v. Brady, four years ago, a slightly different situation was presented. There it was held that an ignorant man charged with robbery, who pleaded for counsel which was denied him because he could not pay for the help, had no right to counsel under the federal Constitution. The decision was 5 to 3, and the rationale was that described earlier in this discussion: that in noncapital cases, the right to counsel was not sufficiently important or valuable to be required by the Fourteenth Amendment in the absence of proof in the particular case that some special and additional injustice had been done.

Betts v. Brady seemed destined for a quiet demise. From 1943 until the last day of the term in June 1947, that decision was never cited by the Supreme Court as controlling, and the decision of numerous cases gave

115 287 U.S. 45 (1932).
116 316 U.S. 455 (1942).
room for the hope that it had been abandoned. But in the case of *Foster v. Illinois*,\(^{117}\) the *Betts* case was once again cited with approval. Justices Reed, Frankfurter, and Jackson have not abandoned it, and Mr. Chief Justice Vinson and Mr. Justice Burton have been won to its standard. The remaining four justices dissented. In the *Foster* case the petitioners had pleaded guilty to a charge of burglary and larceny in Illinois without having been advised of a right to counsel. The majority opinion of Mr. Justice Frankfurter found failure of proof that the lack of counsel had harmed petitioners.

Accompanying the problem of substantive right in the fair trial cases is the problem of the procedure for securing it. Here is a body of constitutional law for the defense of those railroaded to the penitentiary. Such persons frequently do not raise their claims until after the prison doors shut. Counsel would have taken appeals; but the law of collateral attack must be practiced by those who have no counsel. It follows that if the Supreme Court establishes high-sounding rights and then creates or insists upon awkward procedures for collateral attack, it will give with one hand and take with the other. Most of the controversy in recent years has been over procedure—to what court must the prisoner go to make his application, for what writ shall he ask, etc. In some states, the release procedures are not a pathway, they are a maze; and the decisions unhappily leave possibly guiltless men lying in prison cells as they vainly attempt to work out the mysteries of habeas corpus, coram nobis, common law certiorari, and the many other procedural devices which torment the legal system.\(^{119}\) In the *Gayes*\(^{120}\) and *Carter*\(^{121}\) cases this year, the Court has sanc-
tioned procedural clumsiness which hangs relief like fruit beyond the reach of the hungry. The Gayes case holds that petitioner waived his right to protest improper procedure at a time when he probably did not know it was his to waive, and when, under the New York law involved, he could not have raised it; and in the Carter case the Court found itself barred from considering the entirety of petitioner's grievance because it was restricted to the "common law record," which contained nothing relevant to his real complaint of denial of due process.

Congress has an excellent opportunity to improve the procedural muddle at the present time. Section 2254 of the proposed revision of the Judicial Code would give statutory status to the present rule that state remedies must be exhausted before recourse can be had to federal courts in habeas corpus proceedings. A simple amendment might insert the requirement that the state remedy be simple, speedy, and efficient if it is to deserve this priority.

In still another case affecting fairness of trials, the Court upheld the blue-ribbon jury system in New York, at least as applied in the particular case before it. The principal religious freedom case was the New Jersey school bus matter. There the issue was whether a New Jersey township could reimburse parents for the cost of bus transportation to school where the allowance was made not only for children attending public schools, but for children attending Catholic schools. A taxpayer contended that the allowance to Catholic parents was unconstitutional because it violated the principles of separation of church and state.

The majority of five, in an opinion by Mr. Justice Black, saw the problem in terms of two polar concepts, to one of which the particular case must be assigned. On the one hand, the Court believed that general social welfare legislation could as properly be applied for the benefit of parochial as for public students. Thus police protection could be given to students at all schools and reduced bus fares might be required for all children regardless of religion. On the other hand, direct aid to parochial schools could not be permitted, the majority declaring that "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which

122 See cases collected, Gayes v. New York, 67 S. Ct. 1711 (1947), Rutledge dissent at 1715. The majority distinguishes those cases on various grounds, the first of which is that they were decided "in courts of very limited authority." Ibid., at 1713.


teaches the tenets and faith of any church." However, the majority consigned this particular case to the category of general welfare legislation. The principal dissenting opinion, by Mr. Justice Rutledge joined by Justices Frankfurter, Jackson, and Burton, acknowledged that some general services could be performed by the state for parochial schools, but felt that this one was beyond the narrow limit of those proper services. Both the majority opinion and the Rutledge dissent will serve as a useful storehouse of historical information on the meaning of the Amendment. The dissent conceded that precedent is with the majority; and to this reader, the majority reasoning is completely sound.

The opinions suggest certain general conclusions. The state can extend various types of relief and welfare measures to all children and parents, regardless of whether the children attend parochial or public school. Here free transportation was approved. Presumably free textbooks or free morning milk and crackers for all poor children, or free vaccinations given all school children would still be approved. On the other hand, no appropriations may be made for buildings, grounds, or teachers' salaries in parochial schools, and this would presumably preclude reaching the same result either by direct appropriation or by rebate to taxpayers. It would seem to follow from both the majority and the minority opinions that the use of public school buildings for any type of religious education would be precluded as direct aid.

With the exception of two cases concerning free speech, the remaining civil rights cases were either minor or so unique as to be of no recurrent interest. In the Hatch Act cases, the problem was whether Congress

126 Mr. Justice Jackson filed a separate dissent emphasizing that the ordinance provided for children in public and Catholic schools, but made no mention of children attending other private schools. Ibid., at 513-14. This apparently raised equal protection doubts for him. The majority had no similar difficulty because so far as the record showed there were no other schools in the township, and hence the ordinance quite possibly was comprehensive. Ibid., at 506.

128 This thesis will be tested in Illinois ex rel. McCollum v. Bd. of Educ., pending as No. 90 for the October term, 1947. The problem of "Public Funds for Sectarian Schools" is discussed in Note, 60 Harv. L. Rev. 793 (1947).
can, as a condition of federal employment or of a grant in aid, control the
dpolitical activities of federal employees or of state employees at least par-
tially receiving federal funds. The Act forbids employees to "take any ac-
tive part in political management or political campaigns."\textsuperscript{z31} The Act and
the regulations permit the employees to vote as they choose and to ex-
press political opinions; but those opinions cannot be expressed in speeches
at party gatherings, nor can they be made effective by party work. It was
challenged in two cases, one by a federal employee, Poole, and one by a
state employee, Paris. Poole, an industrial worker in the United States
Mint, was a ward executive committeeman, worked at the polls on elec-
tion day, and was party paymaster for other election workers. Paris was
Oklahoma State Democratic Chairman and a member of the state high-
way commission. His principal offense was helping to organize a party
"Victory Dinner' and introducing the toastmaster on that occasion.

Mr. Justice Reed for the Court upheld the Act over the dissent on the
merits of Justices Black and Rutledge, and the partial dissent of Mr. Jus-
tice Douglas. Justices Jackson and Murphy did not participate and the
decision was thus in part 4 to 3, and in part 5 to 2.

With two possible paths to decision, Mr. Justice Reed chose the one
which gave at least some constitutional protection to Government em-
ployees. The Court denied that Government employees were totally de-
void of rights, saying that it would interfere to invalidate congressional
legislation "when such regulation passes beyond the general existing con-
ception of governmental power.'\textsuperscript{z32} At the same time it held that this was
not such a regulation.

The Court did not approach the problem specifically in terms of the
clear and present danger found in each specific act which Poole and Paris
had performed. Instead it balanced generally a congressional desire for a
good and efficient civil service against the general activities of the em-
ployees. There was none of the usual effort in free speech cases to consider

\textsuperscript{z32} Mr. Justice Reed also said, "Appellants urge that federal employees are protected by
the Bill of Rights, and that Congress may not 'enact a regulation providing that no Republican,
Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend
Mass or take any active part in missionary work.' None would deny such limitations.... "
67 S. Ct. 556, 569 (1947).
whether in fact there really was so serious a menace to society as to warrant the restraint on the liberty. Yet as Mr. Justice Holmes had shown in dealing with the Espionage Act of 1917, a statute limiting free speech must prove its justification in each application. Here it was not shown that Paris’ introduction of a toastmaster or Poole’s service as ward committeeman did the slightest bit of “danger to any interest which Congress has the right to protect,” much less a “clear and present” danger. On the other hand, it may be that a general evil of possible damage to the civil service must be dealt with generally, rather than case by case.

The dissenting opinion of Mr. Justice Black cast a different balance. To him the practical exclusion of 3,000,000 Americans from participation in the political life of the community was a far more serious evil than any which Congress had sought to rectify. Mr. Justice Rutledge shared this view, and Mr. Justice Douglas sought to split the difference by upholding the Act as to some Government employees but not as to industrial workers like Poole.

In the contempt case of Craig v. Harney, the Court took a different approach. There the issue was whether a Texas court could punish the publisher and certain employees of a newspaper for contempt for commenting critically, and indeed, unfairly, upon the judge’s handling of a trial. The Court, in holding that the particular activity could not be so punished, did not hold that there was no contempt power ever available to protect courts against publications which would be “a serious and imminent threat to the administration of justice.” But Mr. Justice Douglas, in the majority opinion, analyzed the articles to determine whether in fact they met the constitutional measure: “The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.” He then concluded that these publications met no such test. The Chief Justice joined in a dissenting opinion by Mr. Justice Frankfurter, and Mr. Justice Jackson also dissented.


134 The Hatch Act cases are analyzed in terms of the “clear and present danger” theory in Note, 22 Ind. L. J. 246, 249–51 (1947). The statement of the problem is clear, but unhappily the author does not explain the reason for his own seeming acquiescence in the proposition that the clear and present danger test is inapplicable. For further comment see Note, Political Sterilization of Government Employees, 47 Col. L. Rev. 295 (1947); Mosher, Government Employees under the Hatch Act, 22 N.Y.U. L.Q. 232 (1947), and, on the clear and present danger problem, Ibid., at 251.


136 Ibid., at 1253.

137 Ibid., at 1255.
Here is a fundamental difference in approach. In the *Craig* case, the Court studied every utterance to determine whether there was "an imminent, not merely a likely" threat to the public welfare. In the Hatch Act cases, it was enough that Congress might reasonably have feared "the cumulative effect on employee morale of political activity" without any reference to the facts at hand. The cases leave this puzzling problem: Are we on the verge of a division of theory in free speech cases, in which some kinds of activity may be limited because it is convenient and desirable to do so, while other kinds of activity may be limited only on clear and present danger rationale? Or are the Hatch Act cases merely a theoretical deviation in conformity with a tradition of some qualification of the rights of Government employees for the good of the service? The solution may come when those provisions of the new labor bill limiting political activities of unions come before the Court.

IV. LAWYER'S LAW

FEDERAL JURISDICTION AND PROCEDURE

As usual, the Court had before it in the 1946 term a substantial number of cases involving jurisdiction and procedure in all federal courts. At least a half dozen of these cases deserve and will receive separate treatment by many authors in many law reviews. It is difficult to do more than enumerate them here.

Perhaps the most interesting and probably the most difficult problem in federal jurisdiction was *Angel v. Bullington*. Bullington, a Virginia citizen, sold Virginia land to Angel, a North Carolinian, for cash and notes secured by the land in Virginia. Upon non-payment of the notes, the land was sold and a deficiency resulted. Thereupon Bullington brought an action for a deficiency judgment in the face of a North Carolina state statute which provided that such persons "shall not be entitled to a deficiency judgment." The statute may appear to be substantive, but the North Carolina court in Bullington's case held that it was "jurisdictional." In fairly plain language, the North Carolina court suggested that, while the statute closed the North Carolina courts, it did not close the federal courts, and that Bullington might well bring the same action in the federal district court. Bullington took the tip, did not appeal the North

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138 As, for example, Ex parte Curtis, 106 U.S. 371 (1882).
140 67 S. Ct. 657 (1947).
141 Bullington v. Angel, 220 N.C. 18, 16 S.E. 2d 411 (1941).
Carolina decision to the United States Supreme Court, and brought a second action in the federal district court.

This second action in due course came to the United States Supreme Court, which after argument and reargument decided this term that Bullington’s failure to appeal the judgment denying the jurisdiction of the North Carolina courts was fatal; that the first judgment was res judicata; that the merits of his claim were so locked with the jurisdictional issue that the decision on the latter included the former; and that under *Erie v. Tompkins* principles, the federal district court was bound by the same “jurisdictional” decision as the state courts, and could give no more relief than the state courts.

In the circumstances, the North Carolina decision, which carefully rested not on the merits but on a deficiency in the jurisdiction of the North Carolina courts, should not preclude action in another court whose jurisdiction is unquestioned. To this view the majority responded, in effect, that the issue on the merits and the issue on jurisdiction were identical; that is to say that Bullington must show the North Carolina statute to be unconstitutional to recover, and if it is unconstitutional, it is unconstitutional construed either as a substantive rule of law or as a limitation on jurisdiction. Of course, the North Carolina court obviously had no such conception and had not decided the constitutional point. To this the majority replied that the issue was necessarily decided whether the North Carolina court thought so or not.

The reference to *Erie v. Tompkins* is in point in the majority opinion because, essentially, the majority is, without saying so, devising a principle for the limitation of diversity jurisdiction by permitting state legislatures to limit federal jurisdiction. As Mr. Justice Reed in dissent said, this “departs from controlling precedents that state enactments on jurisdiction, remedies and procedures do not affect the jurisdiction, remedies, or procedures of federal courts.”

In other cases this term, the Court materially expanded the scope of the doctrine of forum non conveniens, and thereby read a new and severe limitation into the federal venue statute. In one case it held that the doctrine permitted a federal district court in New York, plaintiff’s domicil, to refuse to consider a policyholder’s derivative action against an

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Illinois mutual insurance company and its officer, where plaintiff’s case was to be made largely out of materials in the hands of the defendants.\textsuperscript{146} In a second and more startling case, the Court relinquished the application of this doctrine in the field of equity. It held that a federal district court in New York might decline to hear the case of a Virginia plaintiff suing a Pennsylvania corporation doing business in New York where the suit was brought on a tort claim arising in Virginia.\textsuperscript{147} The plaintiff’s dominant reason for preferring New York was apparently the belief that he was more likely to receive a sizable verdict there than in Lynchburg, Virginia. Mr. Justice Jackson wrote the majority opinion, and Justices Black, Reed, Rutledge, and Burton dissented in opinions by Black and Reed.

The difficult issues raised in these cases cannot be adequately discussed here, but the compromise chosen by the Court is an unfortunate practical solution. Either rigid application of the broad federal venue statute, giving the plaintiff great latitude in selecting the place of suit, or a sharp legislative amendment taking away the plaintiff’s prerogatives would appear to be better than reducing the matter to question of discretion. The doctrine permits the intrusion into many suits of a time-consuming issue, irrelevant to the decision on the merits which may be time consuming enough. If, as the dissent fears, the new doctrine will permit suits to be dismissed on this ground when the statute of limitations has run between the time of filing the suit and the time of the dismissal, then serious injustice will result. However, the decision in \textit{Hillsborough Township v. Cromwell}\textsuperscript{148} in 1945 on a functionally related problem is an indication that where the statute of limitations has run, the expanded forum non conveniens doctrine will not be applied.\textsuperscript{149}

Of the several procedural cases, the most noteworthy was \textit{Hickman v. Taylor}.\textsuperscript{150} The issue was whether, under the Federal Rules, one party might inquire into the statements of witnesses collected by counsel for opposing party. Rule 26 (b) permits the taking of depositions in “any matter, not privileged.” The Court held that the particular matter was not privileged. However, Mr. Justice Murphy stated for the Court that

\textsuperscript{147} Gulf Oil Co. v. Gilbert, 67 S. Ct. 839 (1947).
\textsuperscript{148} 326 U.S. 620 (1946).
\textsuperscript{149} The danger of the running of the statute of limitations because of the shift of district will be avoided if the proposed revision of the Judicial Code is adopted, since the revision provides for transfer of actions from one district to another. Note, The Proposed Revision of the Federal Judicial Code, 60 Harv. L. Rev. 424, 435 (1947).
\textsuperscript{150} 67 S. Ct. 385 (1947).
"all the files and mental processes of lawyers" were not "thereby opened to the free scrutiny of their adversaries" by Rule 26.\textsuperscript{132}

In dealing with its own procedure, the Court several times considered the use of its discretionary power to decide cases or to postpone judgment. There are many occasions when a technicality will avoid a decision on the ultimate issue. Among other values, delay serves to avoid decision before judges can make up their minds.

But delay should not be a habit, for litigants, too, have rights. The Supreme Court is not a disembodied God for whose convenience lawyers and clients were created to provide it with Great Problems. It has a dual function of making policy while it serves as a convenience for parties.\textsuperscript{152}

\textit{Hickman v. Taylor}, as compared with several other cases, provides a contrast. In the \textit{Hickman} case, the Court discovered that the petitioner had proceeded under the wrong rule of Civil Procedure. The Court said, "Under the circumstances we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below."\textsuperscript{153} This attitude of desire to get the main matter decided and done with may be compared with the following cases:

The \textit{Alma Motor Co.} case,\textsuperscript{154} which the parties and the court below had innocently thought involved the constitutionality of the Royalty Adjustment Act of 1942. The case was argued in 1945 and reargued in 1946. Not until the reargument did the Government suggest that the decision might have been based upon a nonconstitutional question, and the case was remanded for its consideration.

The case of \textit{Ballard v. United States}\textsuperscript{155} came to the Court for the second time in 1946. The defendants had been indicted for using the mails to defraud in the course of religious activities. Suffice it to say that the case had gone from the district court to the circuit court of appeals to the Supreme Court and back to the circuit court upon reversal and remand. It returned

\textsuperscript{132} It is rumored that in response to this decision some insurance companies are making all their investigators into "counsel" to keep their reports confidential. If true, the device fails to appreciate the care with which the decision was rested not on formal "privilege," but on genuine professional tradition. Ibid., at 394–95. For a more complete discussion, see Recent Cases, 14 Univ. Chi. L. Rev. 497 (1947).

\textsuperscript{133} The primary reason for the prolonged congressional resistance to the abolition of circuit riding for Supreme Court justices stemmed from fear that isolation in Washington might give delusions of grandeur and destroy the common touch. See \textit{Warren, The Supreme Court in United States History} 133–35 (1923).


\textsuperscript{154} \textit{Alma Motor Co. v. Timken-Detroit Axle Co.}, 67 S. Ct. 231 (1946).

\textsuperscript{155} 67 S. Ct. 261 (1946), previously before the Court in 322 U.S. 78 (1944).
to the Supreme Court at this term. The Court reversed because it was called to its attention for the first time that women had been systematically excluded from the grand and petit juries in California at the time of the original indictment and trial. The indictment was ordered dismissed.

In neither the first appearance of the case in the Supreme Court nor in the second was the majority willing or able to decide the basic issue in the case, whether the First Amendment gave the defendants constitutional protection for their activities. In this case the majority declined to discuss the point since the defendants might never again be indicted or convicted.

In the *Gospel Army* and the *Rescue Army* cases, the issue was the validity of an elaborate set of Los Angeles regulations applicable to solicitors for charity. The two “Armies” contended that the regulations were unconstitutional interferences with religious liberty. The *Rescue Army* case arose on a writ of prohibition filed by one Murdock and the Rescue Army in an appropriate state court on the ground that Murdock had twice before been arrested and convicted for violating these municipal regulations. Under California law this is an appropriate way to test the constitutional issues involved. The California Supreme Court decided against Murdock and the Rescue Army on the merits, and on October 28, 1946, the Supreme Court noted probable jurisdiction. On June 9, 1947, Mr. Justice Rutledge for the Court held that the appeal could not be considered at this time since the resolution of certain ambiguities in the statute in some other state proceeding might result in avoidance of some constitutional issues. The *Gospel Army* case had also come up, and it was dismissed on the ground that the judgment of the California Supreme Court, in that case only, had not been “final.”

In the *Rescue Army* case, the judgment was unquestionably “final.” One may doubt, therefore, whether the Court had discretion not to hear the matter, since it came up on appeal rather than on certiorari, and the essential practical difference between the two is that the Court lacks discretion as to the former while it may deny the latter.

Mr. Justice Black concurred in the result. Justices Douglas and Murphy dissented on the grounds that the time had come for the Court to decide the merits. And Murdock went away with no decision to face a third conviction in the Los Angeles Municipal Court, and with the prospect of financing, if he or his organization can, another trip through the California court system to the United States Supreme Court.

On the last day of the term, the case of *Winters v. New York* was set

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down for its second reargument, its third argument, in the Supreme Court. The issue was the validity of a New York obscenity statute applied in a criminal prosecution to a magazine peddler.

It is not the purpose of these paragraphs to assert that undesirable action was taken in any of these four cases. The basic issues in all could have been decided if the Court had wanted to decide them. Nothing but pure discretion forced these delays. In each, litigants were put to great costs in time or money because the Court did not choose to decide. On the face of them, all should have been decided on their fundamental issues. But of course no outside observer can know what conference room tensions or indecisions make it propitious to delay decision until another year.

CONFLICT OF LAWS

There were several important conflicts decisions this year. They are enumerated in the note and cannot be discussed here. The most interesting from a general standpoint was *Industrial Commission v. McCartin*, which so sharply limited *Magnolia Petroleum Co. v. Hunt* to its facts as to come close to overruling it. As limited here, the *Hunt* decision would appear to be inapplicable to anything but the Texas statute from which it arose. The scope of this year's conflict of laws decisions requires an article on Full Faith and Credit at the 1946 Term.

V. THE INSTITUTION AND ITS JUSTICES

THE WORK OF THE INSTITUTION

The Court handed down 142 opinions this year, not a large number. Of these, about 40 per cent, a strikingly large proportion, were written


164 Ibid.

163 Such an article by Professor Fowler Harper appears in 47 Col. L. Rev. 883 (1947).

164 There are likely to be some divergencies in statements as to the number of opinions because of differences in appraising related cases as one or two opinions. The figure 142 is

163 The Magnolia case is reported at 320 U.S. 430 (1943). Professor C. Ben Dutton comments that the McCartin case may indicate that the Magnolia rule "is to be sharply limited and perhaps indirectly overruled for it attributes to the Magnolia case a finding that that case did not necessarily embrace." 22 Ind. L. J. 201, 217 (1947).

162 Or in *United States v. Petrillo*, 67 S. Ct. 1538 (1947), a more limited example of postponement. There are of course some cases in which reargument is most appropriate. Foremost among them is *Gayes v. New York*, 67 S. Ct. 1711 (1947), in which the majority rested its decision on a point of New York procedural law which had not been argued by the unusually competent counsel handling the case. A petition for rehearing by Gayes indicates fairly clearly that the Court was in error on its surprise point of New York procedure. That petition had not been acted upon at the time of writing this article. The incident suggests that where the Court believes that an unargued point of local law is decisive and competent local counsel are available for research, the Court should at least receive new briefs before decision.
by Justices Black and Douglas. Justices Black, Douglas and Murphy together wrote 52 per cent of the opinions of the Court. This does not mean that the other justices did not do a great deal of serious work; for example, Mr. Justice Rutledge’s concurring opinion in *Freeman v. Hewit* and his dissenting opinions in the New Jersey school bus and the *Lewis* cases represent enormous effort, and Mr. Justice Reed’s Hatch Act opinions represent more work than a less significant case. It was Mr. Chief Justice Vinson’s first year, and it seems virtually certain that he will carry his full load hereafter. Nonetheless, a few shoulders bore an overlarge share of the common burden.

Though they wrote over half the opinions, Justices Black, Douglas, and Murphy did not dominate the thinking of the Court. To appreciate the weight of particular men or particular philosophies in the Court, it is necessary to concentrate on the most important cases. For the sake of the

taken from the Washington Star (June 29, 1947). The U.S. Law Week figure is 143. 16 U.S. L. Week 3019 (1947). There had been 136 opinions in the October Term, 1945, during which Mr. Justice Jackson was absent, and Mr. Chief Justice Stone died; and there were 162 opinions in the October Term, 1944. 14 U.S. L. Week 3443 (1946).

The following table is taken from the Washington Star (June 29, 1947):

<table>
<thead>
<tr>
<th>Justice</th>
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<th>Concurring</th>
<th>Dissent</th>
<th>Total</th>
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<td>13</td>
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<td>14</td>
<td>1</td>
<td>9</td>
<td>24</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>12</td>
<td>10</td>
<td>15</td>
<td>49</td>
</tr>
<tr>
<td>Douglas</td>
<td>27</td>
<td>1</td>
<td>9</td>
<td>37</td>
</tr>
<tr>
<td>Murphy</td>
<td>17</td>
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<td>29</td>
</tr>
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<td>15</td>
<td>4</td>
<td>12</td>
<td>31</td>
</tr>
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<td>10</td>
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<tr>
<td>Burton</td>
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<tr>
<td>Totals</td>
<td>142</td>
<td>29</td>
<td>78</td>
<td>252</td>
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</table>

* Justice Frankfurter also wrote three separate opinions, dissenting in part and concurring in part.

The following table shows number of pages written and is taken from the Washington Post, p. 6b, col. 5 (Aug. 10, 1947). The Post quite properly adds, “for what it’s worth.”

<table>
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<th>Justice</th>
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<td>Vinson</td>
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<td>0</td>
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</table>
following analyses, I have, obviously arbitrarily, picked two groups of cases. The first is the group of eight cases which seem to be the most significant decisions of the year, the cases which may go unnoticed by the general public, but which deserve the attention of every citizen.\(^{166}\) The second group, twenty-nine in number, are the cases which, though less important, are far from routine.\(^{167}\) They are the cases which deserve the careful attention not only of lawyers but of economists and political scientists. The other 105 cases are those which are of less importance or which admitted of only one likely decision, even though a contrary decision would have made the case of general public interest.\(^{168}\)

The data in Table 2 are taken from the eight, or “major,” cases, and the twenty-nine, or “important,” cases. Disqualifications give some justices less than thirty-seven cases.

The distribution of agreements among some of the justices, excluding unanimous opinions, was as shown in Table 3.\(^{169}\)


Obviously, reasonable people might delete some of these cases or add others. The choice is concededly arbitrary.

\(^{168}\) For example, Testa v. Katt, 67 S. Ct. 810 (1947) would have been an extraordinarily important case if it had held that states did not have to enforce federal regulatory acts; and Fleming v. Mohawk Wrecking & Lumber Co., 67 S. Ct. 1129 (1947) would have been important if it had held that the Price Control Administrator did have to sign every subpoena personally.

\(^{169}\) This simplicity is a little delusive, but greater precision would be unmanageable. For example, the disagreement among the major cases between Justices Black and Douglas was their partial disagreement on the Hatch Act. The “agreement” in the Lewis case between Mr. Justice Black and Mr. Justice Frankfurter was the agreement in one part of the result only and none of the theory. The consistent Vinson-Reed-Burton position in the majority makes it unnecessary to classify their agreements. The following two tables of agreement and
The tabular data demonstrate that, for the practical purpose of deciding cases, the decisive element in the Supreme Court today is the group of

Vinson, Reed, and Burton. In the eight major cases, the Chief Justice and Mr. Justice Burton were never in dissent, and Mr. Justice Reed was disagreement in all cases rather than in those selected for importance are taken from an article on the Court by Dillard Stokes in the Washington Post, p. 6B (Aug. 17, 1947):

**TABLE I**

**Percentage of Agreement among Justices in Cases Decided at October Term, 1946, by a Divided Court**

<table>
<thead>
<tr>
<th></th>
<th>Vinson</th>
<th>Reed</th>
<th>Burton</th>
<th>Jackson</th>
<th>Frankfurter</th>
<th>Black</th>
<th>Douglas</th>
<th>Murphy</th>
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<td>71</td>
<td>67</td>
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<td>56</td>
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<tr>
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<td>69</td>
<td>69</td>
<td></td>
<td>67</td>
<td>69</td>
</tr>
</tbody>
</table>

**TABLE II**

**Number of Times Each Justice Agreed with Each Other Justice**

An entry under the Justice's own name shows the number of times he dissented alone.

<table>
<thead>
<tr>
<th></th>
<th>Vinson</th>
<th>Reed</th>
<th>Burton</th>
<th>Jackson</th>
<th>Frankfurter</th>
<th>Black</th>
<th>Douglas</th>
<th>Murphy</th>
<th>Rutledge</th>
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<td>2</td>
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<td>7</td>
<td>8</td>
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<td>6</td>
<td>1</td>
<td>3</td>
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<td>Jackson</td>
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<td>3</td>
<td>4</td>
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<td>6</td>
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<td>3</td>
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<td>4</td>
<td>15</td>
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<td>Douglas</td>
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<td>Murphy</td>
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<tr>
<td>Rutledge</td>
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<td>6</td>
<td>21</td>
<td>17</td>
<td>25</td>
<td>2</td>
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</tbody>
</table>
in dissent only once. In all of these cases, the Chief Justice and Mr. Justice Reed were in dissent only five and six times respectively. In most of the nonunanimous significant cases, the Court splits along fairly well definable lines, and the group which wins the three in the middle carries the decision.

Next most influential in the important matters are Justices Frankfurter and Jackson. Theirs was nearly the highest proportion of agreement of any of the Justices other than the three central figures, and they won the support of Justices Vinson, Reed, and Burton markedly more often than did Justices Black, Douglas, Murphy, and Rutledge. Thus in these cases Mr. Justice Frankfurter prevailed in five cases more than did Mr. Justice Black, while Mr. Justice Black dissented in four cases more than did Mr. Justice Frankfurter. This is particularly obvious with reference to the types of cases—as has been seen, this year Justices Frankfurter and Jackson very largely carried the day for their own views of civil rights and of the commerce clause.

Last place for influence goes to Mr. Justice Rutledge, who was in the majority in nineteen cases and in dissent in eighteen. In volume of dissents, the order was Rutledge, Murphy, Black, and Douglas.

### WORK OF THE INDIVIDUAL JUSTICES

The 1946 term was Mr. Chief Justice Vinson's first. He assumed his duties with all the calm poise produced by years as both a conciliator and

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\[\text{TABLE 3}\]

<table>
<thead>
<tr>
<th>Justices</th>
<th>Major</th>
<th>Important</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black-Douglas</td>
<td>7 (of 8)</td>
<td>14 (of 21)</td>
<td>21 (of 29)</td>
</tr>
<tr>
<td>Murphy-Rutledge</td>
<td>6 (of 7)</td>
<td>18 (of 23)</td>
<td>24 (of 30)</td>
</tr>
<tr>
<td>Black, Douglas, Murphy, Rutledge</td>
<td>4 (of 7)</td>
<td>12 (of 21)</td>
<td>16 (of 28)</td>
</tr>
<tr>
<td>Frankfurter-Jackson</td>
<td>6 (of 6)</td>
<td>16 (of 22)</td>
<td>22 (of 28)</td>
</tr>
<tr>
<td>Black-Frankfurter</td>
<td>1 (of 8)</td>
<td>5 (of 22)</td>
<td>6 (of 30)</td>
</tr>
<tr>
<td>Black-Jackson</td>
<td>1 (of 6)</td>
<td>3 (of 21)</td>
<td>4 (of 27)</td>
</tr>
</tbody>
</table>

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an arbiter of great events. His assignments of opinions were fair. His affection for his brethren is obvious. He wrote no dissents, and when he spoke for the majority, he spoke with a cool voice. For whatever reasons, the year was largely unruffled. 77

The new Chief Justice's philosophy appears to be strongly conservative. This was particularly evident in the civil rights field. In the divided cases, Vinson was the only Justice never to uphold a claimed civil right. Here there was no variety to his tone. He saw nothing wrong in it that a man should have his house ransacked by the police without a search warrant; that a man should be forced to trial without counsel because of the state of his purse; 778 that a man should be forced to incriminate himself. 779 In the civil rights field his philosophy is radically different from the late Chief Justice Stone, and since some of the most important advances in that field in recent years depended on Stone's vote, 774 the clock may go back when the issues arise again. There is unlikely ever to be a Gobitis dissent from the new Chief Justice. 775

Mr. Chief Justice Vinson in 1946 accepted completely the new Frankfurter theory of the state taxing power, and indeed pushed even further to occupy with Mr. Justice Jackson the most extreme anti-state rights position seen for years. 776 He showed himself a moderate apostle of the anti-trust laws. 777

As a technician, Mr. Chief Justice Vinson was short and clear. He still has something of the legislator's tendency to make the case easier than it is by either ignoring or burying the opposition; in the Lewis case he ignored controlling precedents; 778 in the search and seizure case he skimmed by them; 779 and in the Tillamook Indian case he put most of the

771 There were, however, 240 dissenting votes, more than in any year since 1941 when current Law Week statistics begin. 16 U.S. L. Week 3019 (1947).

777 See the Katzinger-MacGregor patent cases, 67 S. Ct. 421 (1947) and 67 S. Ct. 424 (1947); cf. the National Lead case, 67 S. Ct. 1634 (1947) and Bruce's Juices, 67 S. Ct. 1015 (1947).
778 See previous discussion of the Shipp theory, 15 Univ. Chi. L. Rev. 5 (1947).
issues into a footnote. At the same time he shows a free mind, not overawed by precedent, but where vested rights had not accrued, he overruled. His opinions in an unemployment compensation matter and on a point of federal jurisdiction and procedure were technically as satisfying as any work need be, precisely and carefully done.

For Mr. Justice Black, as has been shown, it was a year of more work than reward. But the year was not wholly without compensation. The new Chief Justice assigned him almost his first patent cases, in which he has a clear philosophy. Of the thirty-seven cases listed as most important, he wrote the opinions in six, and of these the California oil case was the most significant.

The principal question asked about Mr. Justice Black by close followers of the Court at the end of the 1946 term is, did Black himself shift with the changing tides and sentiments of the year? The argument that he did view some questions differently than might have been the case, say, six years ago is based upon his decisions in the Lewis case, the Louisiana pilots case, the New Jersey school bus case, the search and seizure case, and the wage-hour railroad trainee cases. The entire remainder of his work—the constitutional tax cases, the antitrust cases, the patent cases, the right to counsel cases, and the free speech cases—were unquestionably con-

182 The Lewis opinion apparently overrules sub silentio the group of cases previously discussed; Harris v. United States may have overruled the cases cited in note 111 supra; and Williams v. Austrian, 67 S. Ct. 1443 (1947), clearly overrules Bardes v. Hawarden Bank, 178 U.S. 524 (1900) and Schumacher v. Beeler, 293 U.S. 367 (1934) on the issue of federal jurisdiction in bankruptcy.
185 The Katzinger and MacGregor cases, 67 S. Ct. 421 (1947) and 67 S. Ct. 424 (1947); McCullocy v. Kammerer Corp., 67 S. Ct. 1165 (1947); Halliburton Oil Well Co. v. Walker, 67 S. Ct. 6 (1947). Milcor Steel Co. v. George A. Fuller Co., 316 U.S. 143 (1942) was Mr. Justice Black's only previous majority patent opinion.
186 There were for Mr. Justice Black some lesser pleasures. ICC v. Inland Waterways Corp., 310 U.S. 671 (1943), refusing to set aside an ICC order forcing midwest farmers to ship their crops to the east by train instead of barges drew the wrath of Mr. Justice Black's angriest dissent three years ago. The same case returned this year and Mr. Justice Black wrote the opinion at this stage which virtually makes the old dissent the present law. ICC v. Mechling, 67 S. Ct. 894 (1947). In Albrecht v. United States, 67 S. Ct. 696 (1947) he recouped ground lost in Muschany v. United States, 324 U.S. 49 (1945); and cf. SEC v. Chenery Corp., 318 U.S. 80 (1943) and the same case, 67 S. Ct. 1575 (1947).
sistent. The alleged aberrations are either so unique or—in the case of the trainee cases—so minor that no basic change of philosophy can be found in them. Certainly the clearest answer to the proposition, therefore, is "unproved." This is particularly true as to the Harris case, since Mr. Justice Black has never exhibited any great enthusiasm for a broad interpretation of the search and seizure clause.

For Mr. Justice Reed, as for Mr. Chief Justice Vinson, 1946 was the term of decision. His vote came close to controlling the disputed cases. And for Mr. Justice Reed, more than almost any other member of the Court, the process of decision is hard. Judicial temperament is something of a curse and something of a blessing. It may give balm to the spirit after decision is reached. But it does not make the path smooth.

Mr. Justice Reed has that kind of temperament. True enough, the meditative process of decision continued to keep Mr. Justice Reed far from the civil rights vanguard—this year in ten divided cases out of twelve he found against the claimed civil right—but in other matters he was less predictable. An example of his earnest moderateness is the United Brotherhood labor antitrust case. 188 His most important opinions of the year sustained the Hatch Act. 189 It is a significant tribute to Mr. Justice Reed’s character that he is able to stand at the decisive middle of the judicial road and still retain the apparent regard of all his brethren.

Mr. Justice Frankfurter enjoyed one of his most influential years since coming to the Court. He wrote the opinion in Freeman v. Hewit. 190 His restricted notions of the right to counsel won acceptance from a five-man majority, 191 and in his basic controversy with Mr. Justice Black over the coverage of the Fourteenth Amendment in civil rights cases he remains the clear-cut victor by one vote. 192 He was very frequently in dissent or in special concurrence; but in the cases of greatest importance he was fairly regularly of the majority. The switch of Vinson for Stone bids fair to make the Frankfurter restrictive conception of civil rights dominant at last.

As a matter of clear, as well as convincing, presentation, Mr. Justice Frankfurter’s least happy effort was Angel v. Bullington; 193 but his opinions in the Lewis and search and seizure cases were two of his finest. 194

189 Hatch Act cases, 67 S. Ct. 556 (1947) and 67 S. Ct. 544 (1947).
190 67 S. Ct. 274 (1946).
192 67 S. Ct. 1672 (1947).
193 67 S. Ct. 657 (1947). The confusion for readers of this opinion is highlighted by a case note in 56 Yale L. J. 1036 (1947).
The latter dissent, indeed, was one of the really great opinions of recent years.

Even with pneumonia to slow him down, Mr. Justice Douglas wrote approximately twice as many majority opinions as most of the members of the Court. The Douglas efficient energy is one of the phenomena of the profession, and this year it ran full force in steady rather than spectacular work. His most important opinion upheld the Interstate Commerce Commission order for adjustment of class freight rates, and gave him full opportunity to write the kind of basic essay in economics he most enjoys. The opinion contains seventeen tables and one graph, and will serve equally well for the student of law and the student of economy. Mr. Justice Douglas would probably deny that there could reasonably be a difference between the two. Probably his next most important opinion was Craig v. Harney, upholding the right of the press to criticize a court during a trial. From the standpoint of art for art's sake, the least satisfactory Douglas opinion was one done jointly with Mr. Justice Black in the Lewis case, and the oddest quirk was the introduction to his foreman case dissent. As a clear, short essay making a point well, his dissent in the National Lead antitrust case is one of his best.

Mr. Justice Douglas' assumed political availability and his increasingly frequent disagreements with Mr. Justice Black have given rise to the charge that he is trimming his opinions to the times. In thinly-veiled form that charge reached open statement this year. Yet the basis of the charge is so flimsy that it is impossible to assess such supporting evidence as it may have, and to date it must be chalked off as totally unfounded. Justices Black and Douglas are no longer as nearly 100 per cent united in conclusions as they were in former years, but as the tables above show, their agreement in the major cases is virtually unanimous and their agreement in the cases labeled "important" is extremely high. As a sheer guess, it may be that the extraordinarily heavy work load the two are carrying now precludes frequent detailed discussion of most of the cases. In any event, out of the 330 volumes of reports, very few Supreme Court de-

197 67 S. Ct. 677 (1947).
198 In Packard Motor Car Co. v. NLRB, 67 S. Ct. 789, 794 (1947), Mr. Justice Douglas began his dissent with observations indicating a conviction that coverage of foremen by the Wagner Act would be a really fundamental change in the economic order.
cisions in our history have ever been important campaign topics. Perhaps the least predictable Douglas opinion, for example, was the *Transparent Wrap* patent case, a matter which is scarcely likely to attract attention in a smoke-filled political caucus.

The 1946 term was the outstanding year Mr. Justice Murphy has had on the Supreme Court. He is now the fifth Justice in point of seniority, and this year his assignments gave him as much serious business as he could desire. Labor law continues to be the Murphy specialty and most of his work involved some aspect of employer-employee relations.

In addition, Mr. Justice Murphy wrote the opinion upholding the last major details of the Public Utility Holding Company Act, and in so doing declared his broad conception of the commerce clause. He wrote the opinion in *Hickman v. Taylor*, limiting the use of interrogatories before trial; and his was the important conflict of laws opinion which has virtually limited the unpopular principles of *Magnolia Petroleum v. Hunt* to their facts. He also wrote the *Yellow Cab* antitrust opinion. In short, Mr Justice Murphy enjoyed a gratifying year. In dissent he was much as always, and was again with Mr. Justice Rutledge the most inveterate upholder of claimed civil rights.

Like Mr. Justice Frankfurter, Mr. Justice Jackson’s views prevailed in a large number of the important cases, and his views were so nearly the same as Frankfurter’s that much of what has been said about the latter applies equally well here. He wrote the opinion in the case of *WOKO* with simple clarity and conviction, and it and the decision upholding the validity of provisions of the Home Owner’s Loan Act are samples of his best work.

While Mr. Justice Jackson’s results are almost identical with Mr. Justice Frankfurter’s, his methods are radically different. For Jackson cherishes that very practical end result which Frankfurter scorns. Thus

201 The *Dred Scott* case, 19 How. (U.S.) 393 (1857); *Pollock v. Farmer’s Loan and Trust Co.*, 158 U.S. 601 (1895); and *Lochner v. New York*, 198 U.S. 45 (1905) are noteworthy, but of course not the sole exceptions.


204 67 S. Ct. 385 (1947).


207 See Barnett, Mr. Justice Murphy, Civil Liberties, and the Holmes Tradition, 32 Corn. L. Q. 177 (1946).


the primary object of Jackson's essays in statutory interpretation is the selection of the most desirable result; once having discovered that result, it is the mere flick of a pen to prove that Congress meant the desirable.210 While Mr. Justice Frankfurter's own description of the thought process of statutory interpretation makes allowance for the desirable, it gives it no such Jacksonian precedence.211 In the Frankfurter concept, the Judge triumphs over self to declare law. In sum, the Jackson conservative philosophy of life and the Frankfurter philosophy of law achieve almost exactly the same results.

During the term, Mr. Justice Jackson continued a tendency to confuse judgment with morals, to assume that his adversaries were not merely wrong, but wicked. His dissents displayed a smug, tattle-tale virtue. For example, in the Tower case, involving an alleged fraud in a Labor Board election, Mr. Justice Jackson concluded his dissent with an observation suggesting that the majority had no personal desire to prevent election frauds;212 and in the Craig contempt case he concluded with a strong suggestion that a craven majority was yielding to newspaper pressure.213

The Rutledge year was spent largely in dissent or concurrence. The Justice wrote nine majority opinions. His Gibson opinion finally completed clarification of the process for religious conscientious objectors to follow in objecting to military service.214 The opinion obviously comes too late to make much difference for this war; but it may clarify rights in a future draft. His decision denying the Government recovery for negligent injury done a soldier by defendants is of considerable interest.215 Both his Scheele
tax opinion and his *Trailmobile* veterans seniority opinion have been discussed above.\(^2\) The latter was probably his most significant majority opinion.

In concurrence and dissent, Mr. Justice Rutledge had a fruitful time. His dissents in the *Lewis*, school bus, and right to counsel cases, and his concurrence in *Freeman v. Hewit* were in themselves a solid year's work.\(^3\) Yet one difficulty with the path of regular concurrence or dissent is the difficulty of hitting the jackpot every time. Mr. Justice Reed's dissent in *Angel v. Bullington* was very clear and scarcely needed additional expression,\(^4\) and the concurrence in the *Agnew* case,\(^5\) concerning removal of bank directors, seems hardly worth the bother.

The transition from Senator to Justice is not an easy one, as Mr. Justice Black discovered ten years ago, and Mr. Justice Burton is having the usual difficulties. A columnist's allegation that Burton is lazy\(^6\) is patently grossly unfair; his opinions bear every evidence of the most elaborate preparation. It is that evident painstaking thoroughness which is slowing down his output,\(^7\) but which will probably stand him in good stead as he catches up with many technical fields.

Certainly Mr. Justice Burton's most important opinion of the year was the *National Lead Co.* antitrust case.\(^8\) His most interesting dissent was in the case of Willie Francis, the Louisiana convict who claimed double jeopardy and cruel punishment when sent back to the electric chair a second time after it had failed to function initially.\(^9\) His dissent here, his participation in the dissent in the school bus case,\(^10\) and his participation in the press contempt case majority\(^11\) indicate a complexity of notions about civil rights which reduces to a less simple philosophy than that of most of his bretheren. Why should Mr. Justice Burton have felt so

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\(^4\) 67 S. Ct. 657, 662 (1947).


\(^7\) United States v. Carmack, 67 S. Ct. 252 (1947) is a typical example of a Burton opinion which evidences not too little but too much work for the point involved.


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strongly about Willie Francis, whose case is of a sort which may never occur again, and at the same time feel so indifferent to the pleas of the defendant who because of his poverty is tried and punished without counsel?

VI. CONCLUSION AND PROSPECT

The public law has either stopped moving or is drifting to the right. With the addition of new personnel, the philosophy of Justices Black, Douglas, Murphy, and Rutledge weighs less heavily in the decisions of the United States Supreme Court while that of Justices Frankfurter and Jackson tips the scales. The New Deal spirit in jurisprudence reached its peak four or five years ago; it is in recession now. Scarcely a case decided at the last term marks any material advance over anything gone before. Civil rights, antitrust, trade regulation, the taxing power—"the march now is largely in place."268.

In the course of the discussion of a position Senator George Norris

268 Indeed, one might go farther. The Court has concluded ten terms since President Roos-
velt made his first appointment. The Court as a whole is a more conservative body than the Court which convened in October, 1937. For a discussion of the work of the "Old Court" at its time of transition, see Sears, The Supreme Court and the New Deal, 12 Univ. Chi. L. Rev. 140 (1944). Such a statement, of course, implies a judgment relative to the changing issues of the times. Much of the Roosevelt platform in 1936 was good Republican doctrine by 1944. Yesterday's advance guard tends to be today's old hat, and times change more than men. Relative to the issues of the day, the New Deal appointed Court of today is more conservative than the Court of yesterday.

The measure can be made by the men. Mr. Justice Black was on the Court in October 1937, and is there today—there is no very perceptible change. Mr. Justice Douglas has succeeded Mr. Justice Brandeis, and Mr. Justice Burton has succeeded Mr. Justice Roberts. The first trade leaves the Court about where it was—the Douglas opinion on railroad rates this year reads like a Brandeis brief. Burton for Roberts is something of a shift to the right if we compare with the Roberts not of 1944 but of 1937. There is no evidence to date that Burton will ever write an opinion equivalent for its day to those of Roberts in Nebbia v. New York, 291 U.S. 502 (1934), or in Cantwell v. Connecticut, 310 U.S. 296 (1940).

We have gained Justices Reed, Murphy, and Rutledge as an exchange for Justices Sutherland, Butler, and McReynolds. Here is a tilt to the left indeed; but no matter how diametrically opposite each is to his predecessor, it must be remembered that each has only one vote. We are trying to assess the status of an institution.

Mr. Justice Jackson took the position of Mr. Chief Justice Hughes by indirection, since Stone became Chief Justice and Jackson succeeded him. But the swap in personnel was Jackson for Hughes, and here indeed is a switch to the right. Most of the law today is a mere extension of paths Hughes laid: free speech, Near v. Minnesota, 283 U.S. 697 (1931) and Lovell v. City of Griffin, 303 U.S. 444 (1938); freedom from torture, Brown v. Mississippi, 297 U.S. 278 (1936); the new contract clause, Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); police power emancipated from freedom of contract, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Mr. Justice Hughes needed pushing from the White House only on the commerce clause, and then he gave us the base of modern law on that, NLRB v. Jones & Laughlin Steel Corp., 311 U.S. 1 (1941). His was a creative liberalism.

Frankfurter for Cardozo was a shift to the right, and, as had been demonstrated, so was Vinson for Stone. The upshot is fairly clear: three paces to the left, four to the right, and two in place. The net effect is a move to the right.
advocated, opponents once made a protest based on their convictions as to what the Founding Fathers would have said. Senator Norris replied:

Probably if I had lived in the days of Washington I might have agreed with him. But I have such great respect for our forefathers that it seems to me the way we can honor them most is to try to progress and go a little bit further than they went, and to carry the torch of civilization on a little bit further into the wilderness than our forefathers carried it. I hope when I am gone that those who follow me will not stop where I do but will carry on.\footnote{70th Cong. Rec. 2519 (1929).}


Such a list can carry conviction to the reader only insofar as he shares the social value judgments which the selection implies; and minimal modesty requires the acknowledgment that in the minds of many a reasonable man, perhaps some of these cases should be eliminated and others added. And yet there is an irreducible core. Take, for example, the reaffirmation of the principle that the Constitution permits a man, solely because he is poor, to be convicted of a crime without counsel though he cry for legal aid. Few will contend that such a decision, whatever else may be said for it, is carrying the "torch of civilization a little bit further into the wilderness."