CONSTITUTIONAL ISSUES IN THE SUPREME COURT, 1937 TERM

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At the 1936 Term, the Supreme Court resolved the conflict which had gone on for many years between its liberal and conservative members.1 The impetus so generated naturally carried over into the succeeding session, and the momentum increased through the first changes in the Court’s personnel in five years.

The 1937 Term is distinguished, therefore, by the large number of cases in which the Court reversed earlier positions. In some of these cases old landmarks of the law have been expressly overruled; in others the change was less directly announced. The session has been conspicuous also for the numerous dissents—for the most part solitary ones—by Mr. Justice Black. We shall open our discussion of the year’s cases with a consideration of these reversals and dissents.

I. THE COURT REVERSES ITSELF

During the 1937 Term, the Court has expressly overruled a number of very old landmarks. Some of the decisions lay in the field of taxation and were precipitated by much public discussion of the evils of tax exemption. It is not unlikely that they will lead to reversals more extensive still.2 The most sensational new position was not heralded, nor noticed publicly when it occurred. Yet it destroyed a doctrine nearly a hundred years old: the notion that there is a federal “common law”.

The Federal “Common Law”

In 1842, in Swift v. Tyson,3 Mr. Justice Story laid down the rule that, in matters of general law, the federal courts were free to exert—


1. At the 1935 Term, there were eleven five-to-four decisions, in seven of which the conservatives prevailed. See Fraenkel, Constitutional Issues in the Supreme Court, 1935 Term (1936) 85 U. of Pa. L. Rev. 27, n. 2. At the 1936 Term, there were thirteen such cases, but the conservatives prevailed in only three. See Fraenkel, Constitutional Issues in the Supreme Court, 1936 Term (1937) 86 U. of Pa. L. Rev. 38, n. 4. At the 1937 Term, there were only two, and the conservatives prevailed in only one. This was Bogardus v. Commissioner, 302 U. S. 34 (1937); the other case being James v. Dravo Contracting Co., 302 U. S. 134 (1937), and its companion case, Silas Mason Co. v. Tax Comm., 302 U. S. 186 (1937).


cise their independent judgment. The decision rested upon an interpretation of a statute enacted by the first Congress, which prescribed that the "laws" of the states should control in cases tried in federal courts. Such "laws", said Story, meant only statutes, not the "common law". Following his decision, a large body of federal law arose on subjects such as insurance, negligence and negotiable instruments. It had the advantage of uniformity throughout the federal judicial system, but suffered the disadvantage of conflicting frequently with state rules. Suitors began choosing their forum now, with an eye to the prevailing rule of law; and large corporations, taking advantage of the diversity of citizenship basis of federal jurisdiction, resorted to the federal courts in labor cases in order to circumvent local decisions favorable to labor.

The spectacle of a federal court refusing to apply the law as laid down by the highest court of the state in which it was sitting has been the subject of much adverse criticism. Mindful of this, the Supreme Court had, in recent years, shown a growing disposition to apply state law to the interpretation of contracts made within the state. But there had come no intimation that the doctrine of the Swift case was to be abandoned. It is not surprising, therefore, that when the final step was taken the Court was divided.

In *Erie R. R. v. Tompkins* the railroad company attempted to relieve itself of responsibility under the common law of Pennsylvania for injuries sustained by plaintiff in Pennsylvania while walking along its right of way. The lower courts held that the question was one of general law to be determined by the federal courts irrespective of decisions of the Pennsylvania courts. The Supreme Court reversed these decisions and remanded the case for a determination of what the Pennsylvania law was.

Mr. Justice Brandeis, speaking for the majority, reached the conclusion that the doctrine of the Swift case was unconstitutional. It is important to bear in mind that this doctrine had arisen from a negative interpretation of a statute. Story had not decided that the statute required federal courts to ignore state decisions, but merely that it had

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8. See *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335 (1934); *Willing v. Binenstock*, 302 U. S. 372 (1937). The case last cited noted criticisms of *Swift v. Tyson*, but contained no intimation that it was so soon to be overruled.
10. *50 F. (2d) 603 (C. C. A. 2d, 1937). After the Supreme Court decision, the circuit court decided for defendant, *98 F. (2d) 49 (C. C. A. 2d, 1938).*
not compelled them to do so. The new decision, therefore, did not hold that any act of Congress was unconstitutional but that the course of conduct pursued by the courts had been so. Here, for the first time, the Supreme Court decided that one of its own decisions violated the Constitution.

While accepting criticisms of the earlier doctrine, the majority rested their decision upon the sole ground that Congress could not expressly delegate to the courts the power to establish rules of law in fields over which Congress might not itself determine such rules. Mr. Justice Brandeis said:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 

Mr. Justice Reed, objecting to this ruling as unnecessary and too far-reaching, was of the opinion that the Court should have expressly repudiated Story's interpretation of the statute, and interpreted "laws" to include rules formulated by judicial decision as well as by statute.

Justices Butler and McReynolds insisted that under the facts of this case, it was unnecessary to consider *Swift v. Tyson* at all. They said that the evidence, under well settled principles prevailing in Pennsylvania, as elsewhere, required a reversal. However, because the issue of constitutionality had not been argued, they objected to the decision of the majority; and they indicated their belief that the case should not have been decided on that ground, but should have been set down for reargument. This suggestion seems eminently reasonable. Surely, if a court finds in a case a point not suggested by counsel, it is only fair to give the parties an opportunity of meeting the point.

Nevertheless, and regardless of the precise grounds of the decision, it is a good thing that the doctrine of *Swift v. Tyson* has been swept away. The new ruling will, of course, destroy the usefulness of many old precedents. It is no longer important to know how the federal courts have decided questions of general law except when there are no binding state decisions on the subject. Federal courts must

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11. 304 U. S. at 78.
12. "If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy, but no one doubts federal power over procedure." *Id.* at 91.
now apply state law, whether or not it rests on statute, even though they are put to the trouble of determining which state’s law applies to a situation spread across many states. It will be interesting to observe how quickly the lower courts adjust themselves to the new dispensation.¹⁴

**Sovereign Instrumentalities**

Another field in which earlier decisions of the Supreme Court have created difficulties in one in which, as in that of the federal “common law”, the Court had taken to embroidering upon the Constitution: the field of “sovereign instrumentalities”. The reader is referred to the article of Professor Lowndes in the current issue for a full discussion of this subject.¹⁵


¹⁵ See Lowndes, Taxation and the Supreme Court, 1937 Term (1938) 87 U. of Pa. L. Rev. 1, 2 et seq. The strict application of the principle restricting federal taxation of state instrumentalities to the increased activities of state and federal governments has tended to create a vast field of tax exemption which covered official salaries, government obligations, sales to governments, and income from leases of government property. See Powell, National Taxation of State Instrumentalities (1936); Note (1938) 15 N. Y. U. L. Rev. 426. In its efforts to escape from the logical consequences of the original rule, the Supreme Court, from time to time, indulged in a variety of distinctions, often so confused as to be unintelligible. For recent cases see Fraenkel, The Supreme Court and the Taxing Power of the States (1934) 28 Ill. L. Rev. 612, 613, n. 4; Fraenkel, The Supreme Court and the Taxing Power of the States—1933 Term (1934) 4 Brooklyn L. Rev. 123, 126; Fraenkel, Constitutional Issues in the Supreme Court, 1934 Term (1935) 84 U. of Pa. L. Rev. 345, 364; Fraenkel, Constitutional Issues in the Supreme Court, 1935 Term (1936) 85 U. of Pa. L. Rev. 27, 66; Fraenkel, Constitutional Issues in the Supreme Court, 1936 Term (1937) 86 U. of Pa. L. Rev. 38, 68; Lowndes, The Supreme Court on Taxation, 1936 Term (1937) 86 U. of Pa. L. Rev. 1, 15; Warren and Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way (1938) 38 Col. L. Rev. 49. It has since had expressly to overrule some of these decisions, in order to clear the atmosphere. Fox Film Corp. v. Doyal, 286 U. S. 123 (1932), overruling, Long v. Rockwood, 277 U. S. 142 (1928). At the present term, the Court proceeded to increase the list materially. James v. Dravo Contracting Co., 302 U. S. 134 (1937), upholding a tax on the gross amounts received by a contractor engaged in the construction of dams on the Ohio River for the Federal Government; Silas Mason Co. v. Tax Comm., 302 U. S. 186 (1937), to the same effect as the Dravo case; Helvering v. Gerhardt, 304 U. S. 405 (1938), upholding a tax on the income of employees of the Port of New York Authority in seeming contradiction to Brush v. Commissioner, 300 U. S. 332 (1937); Allen v. Regents of University System, 304 U. S. 439 (1938), sustaining a federal admission tax on tickets to a state university’s football games; and Helvering v. Mountain Producers’ Corp., 303 U. S. 376 (1938), validating a state tax on income which included that received from oil leases made by the United States Government of Indian lands, and overruling Gillespie v. Oklahoma, 257 U. S. 501 (1922).

These decisions, although they have abolished the subtle distinctions developed in the field of income from leases of government property, have apparently started a new field for subtle distinctions in the attempt to determine which employees of a state are engaged on essential business. The Court, moreover, has reiterated its previous stand in connection with taxes on sales to government agencies, citing with approval Indian Motocycle v. United States, 283 U. S. 570 (1931), and has done nothing to indicate that it will interpret the Sixteenth Amendment in accordance with its terms and permit federal taxation of state and municipal securities. The field of the tax exempt, therefore,
Municipal Bankruptcy

At the current Term, in United States v. Bekins, the Court in effect, though not in express terms, overruled the five-to-four decision in the Ashton case to the effect that Congress could not permit municipalities to go into bankruptcy. The Court was considering a new law which differed from that involved in the Ashton case in one respect: the earlier law permitted states to establish agencies for supervising voluntary petitions filed by municipalities and forbade acceptance of petitions which had not the consent of such agency; the new law required the state to consent to the filing of each petition and spoke of compositions rather than bankruptcies.

This shadowy difference was found sufficient by a majority of the Court, eager, no doubt, to avoid by any possible means the consequences of the Ashton case. It would have been better had the Court expressly rejected that case, especially since the Chief Justice substantially followed the arguments Mr. Justice Cardozo had there advanced in dissent.

II. THE CONSTITUTION ACCORDING TO MR. JUSTICE BLACK

Mr. Justice Black continues to shatter those precedents, the breaking of which marked his appointment, confirmation and seating. In his first Term on the Supreme Court, he has recorded frequent solitary dissents, some of which question positions accepted without challenge during the last half century. These opinions have led certain commentators to regard their proponent as a leader in a new orientation, expectations which others believe unfounded.

His two principal disagreements relate to the due process clause of the Fourteenth Amendment, the first case involving regulation of utility rates, and the second, taxes. In each, it seems to the writer that, instead of going to the root of the evil, Mr. Justice Black has directed his attack against by-products.

The real objection to the "modern" interpretation of the due process clause is that, in applying it, the courts have departed from its

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20. Justices McReynolds and Butler based their brief dissent entirely upon the Ashton case.
21. Anderson (1938) 146 NATION 577, 634; Hamilton, Mr. Justice Black's First Year (1938) 95 NEW REPUBLIC 118; Havighurst, Mr. Justice Black (1938) 1 NAT. LAWYERS' GUILD Q. 181; Lerner, Justice Black Dissenting (1938) 146 NATION 264.
22. Childs, The Supreme Court To-day (1938) 176 HARPER'S 581; see criticism of this article in N. Y. Post, May 16, 1938, p. 10.
original, merely procedural, meaning.\textsuperscript{23} Except for occasional vagaries such as Mr. Justice Taney's in the \textit{Dred Scott} decision,\textsuperscript{24} the Supreme Court originally interpreted "due process" as requiring a fair hearing after proper notice.\textsuperscript{25} Laws could not be challenged as violating due process merely because they ran counter to judges' notion of sound economics;\textsuperscript{26} and it was not until near the end of the nineteenth century that the Supreme Court departed from the earlier tradition.\textsuperscript{27}

The results of that departure are well known.\textsuperscript{28} There were slaughtered on the altar of "due process" countless laws which had been designed to make of the country a better place in which to work. Among them were laws regulating the conditions of labor,\textsuperscript{29} the conduct of employment agencies,\textsuperscript{30} and that of various kinds of business enterprise.\textsuperscript{31} Until very recently the category included the establishment of minimum wages.\textsuperscript{32} Although the Court has now\textsuperscript{33} advanced from the low standard of judicial self-control reflected by these cases, it has not repudiated its underlying principle.

1. The Court has applied that principle to justify the review of utility rates fixed by various state commissions or legislatures on the theory that, if the rates were insufficient, a confiscation of property resulted.\textsuperscript{34} For a brief generation succeeding the adoption of the Fourteenth Amendment, the Supreme Court had left this matter to the legislatures, with the wise comment that, if the people were dissatisfied, they "must resort to the polls, not to the courts".\textsuperscript{35} But after 1890, the Court turned its back on this view\textsuperscript{36} and began to engage on what Mr. Justice Stone has called "the most speculative undertakings imposed upon them in the entire history of English jurisprudence".\textsuperscript{37} Over the dissenting views of Justices Holmes, Brandeis, Stone, and later, Cardozo, the Court insisted upon a consideration by commissions


\textsuperscript{26} See Slaughterhouse Cases, 16 Wall. 36 (U. S. 1873).

\textsuperscript{27} Commencing with Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418 (1890) and Allgeyer v. Louisiana, 165 U. S. 578 (1897).

\textsuperscript{28} See articles cited \textit{supra} note 23; Boudin, Government by Judiciary (1932).

\textsuperscript{29} Lochner v. New York, 198 U. S. 45 (1905).


\textsuperscript{32} Adkins v. Children's Hospital, 261 U. S. 525 (1923).

\textsuperscript{33} West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

\textsuperscript{34} See cases cited \textit{infra} notes 36, 38.

\textsuperscript{35} Munn v. Illinois, 94 U. S. 113, 134 (1877).


of the "cost of reproduction" of a company's properties; and the difficulty of establishing this mythical "cost" has made of rate regulation a series of long, drawn out, expensive lawsuits and encouraged fictitious write-ups in property values. All progressive groups now agree that the amount prudently invested in a company constitutes a much more satisfactory criterion of value than does this so called cost of reproduction.

Despite this feeling, in McCart v. Indianapolis Water Co. all the members of the Court, except Mr. Justice Cardozo, who was ill, adhered to the old view and disagreed with Mr. Justice Black. They reversed a decision upholding rates on the ground that the trial judge had ignored an upward price trend occurring during the thirty-two months between the date of the valuation of the property and the entry of his decree.

Mr. Justice Black's dissent challenged the right of the Court to review rates at all. It did this on the narrow ground that the determination of utility rates is a legislative function entitled to special consideration rather than on the broader one, suggested here, that the Court should restrict due process to procedural matters. We are not astonished to find that no one of his confrères joined Mr. Justice Black in this portion of his dissent. Yet it seems curious that neither Mr. Justice Brandeis nor Mr. Justice Stone concurred in his sharp criticisms of the "cost of reproduction" theory, criticisms which did no more than reflect views each had previously himself expressed.

Mr. Justice Black argued that no confiscation had been established because no substantial investment had ever been made by the stockholders. He insisted that stockholders be not entitled to a return on an investment represented by borrowed capital in excess of the interest paid on it. He commented on the senselessness of sending back for further trial a case which had already been many years in litigation, and said:

"I cannot agree that the District Court should be reversed for failure to prophesy the exact future course of commodity prices. The legal knowledge of few judges is such that they can accurately foresee and forecast all price fluctuations. . . ."


39. RIPLEY, MAIN STREET AND WALL STREET (1927) 337; Cohen, Confiscatory Rates and Modern Finance (1929) 39 YALE L. J. 151, 179, 180, 186; Willis, Has Government Regulation of Utilities Proven a Failure? (1930) 6 IND. L. J. 111.


41. 302 U. S. 419 (1938), 38 Col. L. Rev. 1100.
"Wherever the question of utility valuation arises today, it is exceedingly difficult to discern the truth through the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of those who seek inflated valuations to support excessive rates. . . . Completely lost in the confusion of language—to too frequently invented for the purpose of confusing—commissions and courts passing upon rates for public utilities are driven to listen to conjectures, speculations, estimates and guesses, all under the name of 'reproduction costs.'"  

Some absurdities due to the application of cost of reproduction receive comment in this decision. Mr. Justice Black describes how the cost of rebuilding a canal was laboriously guessed at though no modern water plant would build a canal at all for that purpose, how water diversion rights were created where no water was diverted, how the cost of relaying pipes was considered, though actually it would not be necessary to relay pipes for a century to come.

The specific ruling of the majority might, in spite of these facts, have been answered more persuasively had Mr. Justice Black suggested that the trial court's decision be modified, rather than affirmed, so as to restrict its force to the date as of which the property had been valued. That would have left the company free to challenge the rates as applied to a later period if the facts justified such challenge, and would have kept the Court free from any further entanglement with "cost of reproduction".

2. The question of "corporate personality" first engaged the attention of the Supreme Court in cases arising under the equal protection clause of the Fourteenth Amendment at a time when the due process clause was still confined to its procedural meaning. The argument was then advanced that, since the Fourteenth Amendment was designed to help the Negro, only natural persons, not corporations, which are artificial legal entities, were intended to be embraced within its terms. Yet the word "person", used in other connections, had been interpreted to include corporations. Without any discussion of the question, in 1886 the Court refused to hear argument on it, so clear did it seem that corporations were included.

However, in Connecticut General Life Ins. Co. v. Johnson Mr. Justice Black with much eloquence urged otherwise. He indicated the many instances in which, in the Fourteenth Amendment, the word "person" does not include corporations. The privilege and immunities of

42. 302 U. S. at 426, 428, 429.
43. See supra notes 23 to 28.
citizenship, for example, are not granted to artificial entities. In the apportionment of representatives referred to in the forgotten second section of the Amendment, corporations could not be included among the "numbers" of "persons in each State". Under the very due process clause itself, a corporation is not a person when life or liberty are at stake; not, however, on account of the inappropriateness of the word "person", but because the concepts, life and liberty, do not apply to corporations. Mr. Justice Black said:

"If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An Amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose." 49

The argument, however, proves too much. So long as "due process" was confined to procedure, there could be no possible objection to considering corporations as persons and thus entitled to protection in their property rights. A tax on property owned by an individual can not be sustained, provided the individual has been denied opportunity to test the valuation of his property; surely a corporation in a like situation is entitled to the same right. Such would undoubtedly have been true regarding the due process clause of the Fifth Amendment as originally interpreted by the Court. Moreover, the historical fact that the Fourteenth Amendment was enacted primarily to aid the Negro should not result in any divergent interpretation of its identical due process clause.

In the Johnson case a Connecticut insurance company challenged a California tax which was based on premiums received on reinsurance contracts entered into in Connecticut, with regard to the California risks of other companies. The majority of the Court, through Mr. Justice Stone, held that California had no jurisdiction to tax these premiums since the taxpayer performed no act in California with reference to this business. While the decision rested upon the Fourteenth Amendment, actually a principle even older than the modern notion of due process was here involved; for before the adoption of the Fourteenth Amendment, the Court had declared it to be "self-evident" that no state might tax anyone on property not actually situated in that

49. 303 U. S. at 90.
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This was accomplished by the bland statement that taxation of property outside the state was "as much a nullity as if in conflict with the most explicit constitutional inhibition." The Court invoked this principle for the benefit of corporations as well as for individuals. Therefore, in this field the discussion which forms the chief basis of Mr. Justice Black's dissent, whether a corporation is a "person," is theoretically entirely irrelevant.

Nor has the contention that corporations are not protected by the Fourteenth Amendment much practical value. Although our most important industries are dominated by corporations, there are still many individuals and partnerships in almost every business. One of these could always be brought forth as the challenger of legislation which big business wanted to see overthrown. Moreover, as there is little likelihood the Court will follow Mr. Justice Black in this dissent, its chief value must be to familiarize the public with the need for constitutional amendment. Viewed from that point of view, it lacks comprehensiveness; for the real problem under the Fourteenth Amendment is the meaning of "due process", a problem no member of the Supreme Court has faced in modern times.

3. In Indiana ex rel. Anderson v. Brand the very troublesome contract clause was involved. At the time of the Constitutional Convention, many of the states had attempted to destroy creditors' claims against their residents. To stop this a clause was inserted in the Constitution which prohibits any state from impairing the obligation of a contract. The clause has been the subject of much litigation; prior to the adoption of the Fourteenth Amendment, it was the chief bulwark of property interests against legislative interference.

The question was now presented whether school teachers had acquired contract rights by virtue of an Indiana tenure law which was later repealed. Mr. Justice Roberts was of the opinion the law was intended to create a contract terminable only in a certain manner and that its repeal could not deprive teachers of the protection given by the law: the right to a hearing on charges. Mr. Justice Black alone dissented.

After arguing a technical point which need not concern us here, Mr. Justice Black insisted that the statute created no contract rights.

50. McCulloch v. Maryland, 4 Wheat. 316, 429 (U. S. 1819); Hays v. Pacific Mail S. S. Co., 17 How. 596 (U. S. 1855); St. Louis v. The Ferry Co., 11 Wall. 423 (U. S. 1870); Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300 (U. S. 1872). See Fraenkel, supra note 15, 28 Ill. L. Rev. at 615.


54. See infra note 209.
He saw no distinction between it and the laws of New Jersey and Illinois which the Court had recently declared created no contracts; and he declared that the legislature must have the power to change tenure laws whenever it seemed desirable, as a matter of public policy, to do so, observing that democracy permits the people to rule.

The trouble with this last observation is that its application would destroy all constitutional inhibitions. Besides, in the case under consideration, the decision of the majority merely interpreted the intention of the Indiana legislature in the same way that its own courts, until this case arose, had also interpreted the same law. This interpretation followed from the frequent reference in the Indiana law to “contracts” with teachers, contracts which the teachers as well as the school authorities were under a duty to observe. Since there were no such “contract” references in those laws of New Jersey and Illinois which were involved in the earlier cases, the majority of the Supreme Court quite naturally concluded that the earlier decisions were not binding.

4. In *New York Life Ins. Co. v. Garner* the constitutional issue was presented only in Mr. Justice Black's dissent. The action was on an accident policy, the majority holding that the burden of proof was on the plaintiff to show that death was accidental under the contract; that the presumption against suicide was not evidence.

Mr. Justice Black contended that, under the law of the state where the contract was made, Montana, the instructions were proper. But the greater part of his dissent discussed an issue not really in the case at all, namely, whether part of the jury's functions were improperly usurped by the trial court in violation of the Seventh Amendment. He criticized giving the judge the right to determine whether enough evidence had been introduced to overcome the effect of the presumption. But his contention that this usurps the function of the jury has no validity since in every case the judge must determine whether enough evidence has been introduced to permit submission to the jury at all. Mr. Justice Black forgets that the jury in the case under discussion still had the final right to weigh the evidence and determine that death occurred accidentally.

56. The majority relied on State ex rel. Black v. School Comm'rs, 205 Ind. 582, 187 N. E. 392 (1933) and Arburn v. Hunt, 207 Ind. 61, 191 N. E. 148 (1934).
58. Citing Nichols v. New York Life Ins. Co., 88 Mont. 132, 292 Pac. 253 (1930), also cited by the majority. Actually that case does not support Mr. Justice Black since the Court said that the presumption disappears with proof. Most of the language which he relied upon dealt with the effect of the presumption against a motion to dismiss. The majority did not discuss the question whether Montana law should govern. The controversy on this point has now been settled in accordance with the views expressed by Mr. Justice Black; see supra note 9.
5. In *J. D. Adams Mfg. Co. v. Storen*[^60] the majority, by Mr. Justice Roberts, held void a tax on gross income derived from transactions in interstate commerce, following earlier cases which had distinguished between taxes on gross income and taxes on net income. In the majority opinion, however, lurks the old fallacy that double taxation is prohibited by the Constitution.[^60] Mr. Justice Black, in dissent, insisted that a local manufacturing industry should pay its full share of local taxes whether or not it makes a net profit. He believed that the Constitution did not prohibit taxation on interstate commerce, provided that it was in no way discriminatory, and that Congress was the proper guardian of such commerce, not the courts.

6. In three cases other Justices concurred with Mr. Justice Black in dissent.[^61] Only one of these involved a constitutional issue. That case, *Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp.*,[^62] involved the power of a state to terminate a corporation. Mr. Justice Sutherland, speaking for the majority, concluded that a corporation dissolved under Illinois law could not file proceedings under §77-b of the Bankruptcy Act. The minority, by Mr. Justice Cardozo, rested their contrary opinion upon the circumstance that under Illinois law the corporation had the right to defend suits pending against it. They believed it to be beyond the power of the state to preserve corporate form for one purpose and deny it for withdrawal from the supremacy of the federal law.

7. In a number of cases, most of which involve no constitutional issues,[^63] Mr. Justice Black either dissented or concurred in the result. Two of these special concurrences are, however, sufficiently important for separate discussion.

8. In *United Gas Pub. Serv. Co. v. Texas*,[^64] while agreeing with the majority on the main issue relating to the propriety of trial by jury

[^60]: 304 U. S. 307 (1938). See (1937) 37 Col. L. Rev. 1418, for a discussion of the case in lower court. For a discussion of the contract clause issue, see infra note 166.

[^61]: Ever since First Nat. Bank v. Maine, 284 U. S. 312 (1932), the Court has ruled against double taxation. Earlier decisions had denied that the Constitution was concerned with that phenomenon. See Fraenkel, supra note 15, 28 Ill. L. Rev. at 631, n. 81.

[^62]: 302 U. S. 34 (1937) (Justices Brandeis, Stone and Cardozo); Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U. S. 120 (1937) (Justices Stone and Cardozo); Deitrick v. Standard Surety & Cas. Co., 303 U. S. 471 (1938) (Mr. Justice Reed). The opinion was written by Mr. Justice Black in only the last of these.

[^63]: Bogardus v. Commissioner, 302 U. S. 34 (1937) (Justices Brandeis, Stone and Cardozo); Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U. S. 120 (1937) (Justices Stone and Cardozo); Deitrick v. Standard Surety & Cas. Co., 303 U. S. 471 (1938) (Mr. Justice Reed). The opinion was written by Mr. Justice Black in only the last of these.


The opinions in two of these cases, involving patents, are noteworthy: Crown Cork & Seal Co. v. Ferdinand Guttmann Co., 304 U. S. 159 (1938); General Talking Pictures Corp. v. Western Elec. Co., 304 U. S. 175 (1938). In the latter of these cases the dissent protested against monopolistic practices; the Court has granted a rehearing, *id.* at 176. In the important *Morgan* case, discussed infra p. 64, Mr. Justice Black wrote no opinion in dissent. In some of the cases in which Mr. Justice Black concurred he indicated disapproval of a particular portion of the majority opinion: United States v. Griffin, 303 U. S. 226 (1938); United States v. Carolene Products Co., 304 U. S. 144 (1938).

[^60]: 303 U. S. 123 (1938), 38 Col. L. Rev. 1109.
in a rate case, he took issue with them for their reference to the valuation of the property involved, fearing that the mention of specific figures might affect future litigation. He emphasized the absence of satisfactory evidence of costs and expenses, commenting on the intricacies of the Electric Bond and Share system, of which the company here involved was a subsidiary.

9. The most significant of Mr. Justice Black's minority opinions is probably his concurrence in the *Gerhardt* case. There he strikes out boldly in a field that has long needed such action. He urges the Court to abandon all nice distinctions of what now are, or historically have been considered, "essential" governmental services and asks for a reconsideration of the entire doctrine of the immunity of sovereign instrumentalities, so that the Sixteenth Amendment may, indeed, mean what it says and may give Congress the right to tax income "from whatever source derived". Presumably, he is in favor of terminating tax exemption of state and municipal bonds and would uphold the legislation recently proposed which would subject all *new* issues to federal taxation. He said:

"Testing taxability by judicial determination that state governmental functions are essential or non-essential, contributes much to the existing confusion. I believe the present case affords occasion for appropriate and necessary abandonment of such a test, particularly since recent decisions have already substantially advanced toward a reexamination of the doctrine of intergovernmental immunity.

"Conceptions of 'essential governmental functions' vary with individual philosophies. Some believe that 'essential governmental functions' include ownership and operation of water plants, power and transportation systems, etc. Others deny that such ownership and operation could ever be 'essential governmental functions' on the ground that such functions 'could be carried on by private enterprise.'" 66

**Summary.**

A review of these dissenting opinions and special concurrences of Mr. Justice Black shows him to be both a realist and a progressive. Wherever the opportunity has arisen, he has taken a stand against technicalities, against monopoly and against special privilege. It is unfortunate that in some instances his opinions have been marred by carelessness as to historical and legal fact and that he has indulged in discussions often irrelevant to the issue before him. These shortcomings may account for the fact that most of his dissents were solitary ones. It will be interesting to observe the extent to which in the near future he will gain converts for his views which, in the main, are fundamentally sound.

66. *Id.* at 426.
III. Administrative Law

1. The increased expansion of administrative and regulatory agencies has created serious problems of procedure. It is, of course, obvious that the individual or board charged with responsibility for decision cannot possibly conduct the hearings necessary for a determination of the facts. Yet these hearings are of vital importance on account of the usual provision of law that the decision of the agency on the facts is conclusive and, if sustained by competent evidence, cannot be reviewed by any court. The practice has, therefore, grown up of having the hearings held before trial examiners, sometimes subordinates of the board, sometimes individuals of standing specially selected for the purpose. The National Labor Relations Board, for instance, has generally chosen its examiners from the ranks of outsiders. These examiners see the witnesses and issue a report based on the testimony. Normally the report is submitted to the lawyers on both sides so that they may have an opportunity to note criticisms and argue their objections before the final authority.

As a matter of fact this procedure was laid down in the rules of the National Labor Relations Board. The rules, however, reserved to the Board the right to deviate from that practice; and this was done in a number of recent cases, notably those relating to Consolidated Edison, Mackay Radio, Republic Steel, Inland Steel and Ford Motor Co. Under the practice adopted in these cases the trial examiner’s reports were not submitted to the attorneys for the employers, nor were these afforded an opportunity for oral argument before the Board. Briefs on the facts, however, were received from them.

Attorneys for employers challenged this procedure as lacking in due process of law. The challenge was overruled in the Consolidated Edison case by the Circuit Court of Appeals for the Second Circuit, although Judge Swan expressed the court’s dislike of the procedure as "not one likely to inspire confidence in the impartiality of the proceed-

67. See Landis, Administrative Policies and the Courts (1938) 47 Yale L. J. 519, and other articles in the same issue.
70. Rules 32 and 34, 1 Decisions and Orders of National Labor Relations Board 1038 (1936).
71. Rule 37, id. at 1039.
72. Consolidated Edison Co. v. National Labor Relations Board, 95 F. (2d) 390 (C. C. A. 2d, 1938), cert. granted, 58 Sup. Ct. 1038 (1938). But the case involves also issues of interstate commerce.
The court nevertheless pointed out that the criticized procedure was not unlike that followed by judges who often decide cases on depositions—as is very common in patent and admiralty cases—and who frequently permit no oral argument at all. Such judicial procedure is taken for granted as necessary to conserve the time and energy of the judges. Why, then, it should be open to criticism when adopted by an administrative agency, such as the Labor Board (except for the fact that, in a sense, this Board acts as prosecutor as well as judge), is difficult to see.

A few weeks after the ruling in the Edison case came the decision of the Supreme Court in the Morgan case. There a determination by the Secretary of Agriculture was challenged, on the ground that the proceedings had been held before an Acting Secretary at a time when the Secretary himself was available; and that the Secretary had issued his order without having given personal consideration to the case. In 1936 the Supreme Court had ruled that a determination arrived at in a fashion such as this was contrary to the provisions of law which authorized the Secretary to proceed "after full hearing". The Supreme Court expressly said, however, that the law did not require the submission of a trial examiner's report nor argument based upon it. Chief Justice Hughes rested the first decision on the principle that there has been no hearing "if the one who determines the facts which underlie the order has not considered evidence or argument. . . ." The Supreme Court then ruled that Secretary Wallace should tell to what extent he had considered the evidence; and, since he admitted that he had read practically none of it, in its second decision the Supreme Court voided his order on the grounds that the person charged with decision must read the record and that the practice of not submitting a preliminary report violated requirements of due process in a case such as this, where no specific complaint had ever been made. The Chief Justice said:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. . . . But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings

73. 95 F. (2d) at 395.
74. Morgan v. United States, 304 U. S. 1 (1938) (second appeal). The decision on the first appeal was reported in 298 U. S. 468 (1935).
75. 42 Stat. 166 (1921), 7 U. S. C. A. §211 (1926).
76. 298 U. S. at 480.
is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect." 77

The immediate result of the announcement of this decision was the making of a series of applications on behalf of employers to require the members of the Labor Board to show what they had done in review of the evidence, and, particularly, to state whether, in reaching their conclusions they had consulted anyone outside their own organization.78 The Board countered with applications to withdraw the proceedings for the enforcement of their orders.79 And in the Republic Steel case,80 the Supreme Court held that this was a right clearly granted by the statute. The Board has announced its intention of conforming to the procedure under which attorneys for employers will have a chance to object to trial examiners' reports.81

In National Labor Relations Board v. Mackay Radio & Telephone Co.,82 however, the Supreme Court unanimously upheld a Board order arrived at without the submission of any preliminary report. This procedure, said Mr. Justice Roberts, was not unlawful because the issues in the Mackay case had been clarified in advance of the hearings; and, therefore, the decision in the Morgan case was inapplicable.

The Government thereupon applied for a rehearing in the Morgan case. It claimed inconsistency between the two decisions of the Court in that case because of the statement in the first opinion that the filing of a preliminary report was not necessary. It also claimed that the issues had been in fact developed during the hearings. In a per curiam opinion, the Court denied any inconsistency.83 The application for rehearing at least resulted, however, in the remanding of the case to the lower court instead of merely reversing the order of Secretary Wallace. As a result the money impounded during the original proceeding will probably await further action by the Secretary instead of being distributed to the packers who challenged the order.

77. 304 U. S. at 18, 22. Mr. Justice Black alone dissented without opinion.
80. In re National Labor Relations Board, 58 Sup. Ct. 1001 (1938) (application for mandamus to prevent the judges of the circuit court of appeals from interfering with the Board's right to withdraw; Justices Butler and McReynolds dissented on the propriety of mandamus).
81. N. Y. Times, loc. cit. supra note 79.
82. 304 U. S. 333 (1938). The Court also held that the Act applied to employees on strike; that to order reinstatement with back pay did not deny due process. (1938) 51 Harv. L. Rev. 553 (in lower court).
83. Morgan v. United States, 304 U. S. 1 (1938), rehearing denied, id. at 23. Mr. Justice Black again dissented without opinion.
It is probable that the consequences of the *Morgan* decisions will not be so far reaching as had been feared. The case should serve as a warning against careless administrative practice rather than as a precedent which will actually impair the freedom of administrative action.

2. In a number of other cases the Supreme Court overruled attempts to interfere with the functioning of various administrative agencies. In *Natural Gas Pipeline Co. v. Slattery* 84 an interstate company sought to enjoin an investigation of its dealings with a local affiliate in a proceeding for the regulation of the rates of the latter, both as an interference with interstate commerce and as a deprivation of due process. Mr. Justice Stone, for a unanimous Court, upheld a denial of an injunction; in part on the merits, in part because administrative remedies had not been exhausted. In *Myers v. Bethlehem Shipbuilding Co.* 85 the same principle was applied to a suit which endeavored to restrain the National Labor Relations Board from hearing a case on the ground that the employer was not engaged in interstate commerce. Mr. Justice Brandeis said that the exclusive power to determine this issue was constitutionally vested in the Board because adequate provision for review of its action had been afforded.

3. Administrative decisions were involved in a number of rate cases. 86 *Railroad Comm. v. Pacific Gas & Electric Co.* 87 is important for the light it throws on the present status of the famous "cost of reproduction" theory. 88 The precise ruling of the Court, however, was very narrow. The trial court had held 89 that the rates violated constitutional guarantees because the commission, after rejecting as "not at all convincing" the evidence offered by the company to show reproduction costs, had found no substitute value for the property. The trial court, however, did not reach any conclusion of its own regarding either the proper value of the company's assets or the confiscatory character of the rates. The majority of the Supreme Court concluded the action of the commission had not been arbitrary and that the case should be remitted to the district court to determine whether the rates were in fact confiscatory.

Mr. Justice Butler, with whom Mr. Justice McReynolds concurred, argued in dissent that the commission had made no finding of value,

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86. The *McCart* and *United Gas* cases have already been discussed. See *supra* pp. 55, 61.
88. See *supra* pp. 55, 56.
89. 13 F. Supp. 931, 16 id. at 884 (N. D. Cal. 1936).
that its conclusion as to the proper rate base rested on "historical cost", and that a finding so arrived at conflicted with earlier decisions of the Supreme Court. He insisted that the rate base must be equivalent to the value of the property "to which the owner would be entitled upon expropriation", and that "cost is not the measure of value". Emphasis was placed upon the fact that the commission not only rejected the evidence submitted by the company on the subject of reproduction costs but also refused to make any effort of its own to establish such costs. In effect, reproduction costs were considered a determining factor. Mr. Justice Black concurred in the result reached by the majority.

It is probably premature to consider this decision as the end of the Court's insistence upon cost of reproduction as the determining element in value. Judging from its decision in the McCart case, the Court has gone no further than to permit a commission to disregard cost of reproduction when the evidence was weighed by the commission and found wanting. It is important also to remember that the plant involved in the Pacific Gas case was constructed during the period of high prices following 1919 and that the time as of which reproduction was considered was early 1933. In that respect this decision but follows the Los Angeles case.

Neither the Lone Star case nor the Denver Union Stockyard case throws further light on the fundamental problem. In the first of these cases no constitutional issue arose; in the second, the attack on the rate order was based on details. It still remains uncertain, therefore, whether the Court has abandoned the cost of reproduction theory or merely limited its application.

IV. Interstate Commerce

At the 1937 Term no such far reaching decisions concerning the "commerce clause" were rendered as at the previous Term when the scope of federal power was so greatly increased in the National Labor Relations Board cases. The current decisions do no more than apply well known principles. Only two cases involved federal power; each time the exercise of this power was upheld. In eight cases state power was challenged; its exercise was upheld in six and, in part, in the other two also.

90. 302 U. S. at 403.
92. Lone Star v. Texas, 304 U. S. 224 (1938). The Court reinstated a jury verdict finding a rate unreasonable; no constitutional issue was involved.
93. 58 Sup. Ct. 990 (1938).
94. The Denver case, however, is interesting in that it reiterates the rule that property need not be considered unless "used and useful for the performance of services covered by rates being regulated". Id. at 994. Hence, property used for a stock show whose only function was one of advertising was properly excluded.
1. In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, the Court upheld jurisdiction assumed by the Labor Board over a canning industry which claimed exemption on the ground that the produce it used was all grown in the state where it was canned. As a substantial portion of the canned goods were sold in interstate commerce, the Chief Justice held the case governed by the previous decisions. He discussed at some length the question of the extent to which interstate commerce must be affected in order to justify federal interference and concluded that no mathematical or rigid formula could be devised:

"The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."  

The opinion then pointed to the facts found as justifying application of the principle, and the Chief Justice concluded that it "would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce."  

Mr. Justice Butler, together with Mr. Justice McReynolds, dissented on the ground that the *Carter* case was controlling. Somewhat wistfully he noted that the majority had refused expressly to overrule that case:

"If the decision of the *Carter* case upon the point stated stands, the Board's order cannot be upheld. The lower court made its decision depend upon that question. Save authoritatively to decide it here, there was no reason for granting the writ. But the opinion just announced does not refer to the question."  

2. The other federal case, *United States v. Carolene Products Co.*, involved the validity of a statute which prohibited the interstate shipment of "filled" milk (milk to which a non-milk fat has been added) on the ground that it was injurious to health. The general principle of Congressional power is well established; its application to the instant case seemed fairly obvious. The main question in the case was one of

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96. 303 U. S. 453 (1938), 47 YALE L. J. 1221.
98. 303 U. S. at 467.
99. Id. at 468.
101. 303 U. S. at 469.
102. 304 U. S. 144 (1938). For issues arising under the 14th Amendment, see *infra* note 151.
due process, which we shall discuss hereafter. Mr. Justice Stone wrote for the majority; Mr. Justice McReynolds dissented without opinion; the special concurrences of Justices Butler and Black dealt with the due process aspect of the case.

3. Three of the state cases concerned taxes. A New Mexico excise tax on sales of advertising space in a New Mexico periodical made to advertisers located in other states was upheld. A Louisiana tax on mechanical power applied to an engine which increased the pressure of gas transported across state lines was sustained. The Court also held good, in part, a tax on gross receipts of a stevedoring concern engaged in unloading freight which moved in interstate and foreign commerce.

4. The remaining cases deal with regulation. In each instance the Court unanimously upheld the challenged statute or administrative action. In Kelly v. Washington the Chief Justice approved a Washington law requiring the inspection of motor boats even though these were used in interstate commerce. He found that federal laws had not preempted the field and the extent to which the law might be enforced was left for determination after an inquiry into the facts.

Mr. Justice Brandeis, in Atlantic Refining Co. v. Virginia, held that a statute which measured a fee for the privilege of doing business by a foreign corporation on the amount of its capitalization was not a burden on interstate commerce. Earlier decisions apparently to the contrary were distinguished on the ground that in those cases, the company had obtained permission to do business prior to the exaction of the fee so that it became a tax, rather than a regulation, and actually burdened the company in its interstate activities.

The most far reaching of these state decisions is South Carolina State Highway Dept. v. Barnwell Bros. There the Court, by Mr. Justice Stone, upheld the right of a state to regulate the weight and size of motor trucks even though these were engaged wholly in interstate commerce. He pointed out that Congress had not adopted any regulations on the subject and that the state regulations in no way dis-

104. See infra note 152.
105. For a detailed discussion, see Lowndes, supra note 15, 87 U. of Pa. L. Rev. at 15 et seq.
110. An interesting question alleging conflict between local and federal law was involved in Puerto Rico v. Shell Co., 302 U. S. 253 (1937). As the statute was of a territory, no constitutional issue was involved. The Court unanimously held the local anti-trust law enforceable.
111. 302 U. S. 22 (1937); Note (1938) 51 Harv. L. Rev. 508.
112. Cudahy Packing Co. v. Hinkle, 278 U. S. 460 (1929), and cases cited in 302 U. S. at 33, n. 5.
criminated between intrastate and interstate commerce. Mr. Justice Stone said:

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power... In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought". 114

V. Civil Liberties

The Court has continued the liberal trend of recent years in a number of cases most of which reaffirm old principles. Two cases raised somewhat novel issues: in one the Court extended the conception of freedom of the press; in the other, it refused to extend the notion of double jeopardy.

1. In *Lovell v. Griffin* 115 the Chief Justice, for a unanimous Court, held void an ordinance which required a permit for the distribution of pamphlets. The case arose upon conviction of a member of the sect of Jehovah's Witnesses, who had been arrested for house to house distribution of a statement of the aims of the sect. The ordinance was attacked on the ground that it denied religious liberty and freedom of the press, and also on the ground that no standards had been laid down to govern the action of the official vested with power to withhold permission. The Court held there was no substance to the first contention 116 and did not discuss the last. The Chief Justice ruled, however, that the protection of freedom of the press siphoned into the Fourteenth Amendment extended to pamphlets as well as to newspapers and to distribution as well as to publication.

He noted especially that the ordinance was not limited to a method of distribution "which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." 117 Whether or not this statement was intended as an intimation that an ordinance so limited would be approved remains to be seen. In some recent cases 118 these words have received that interpretation.

114. 303 U. S. at 189.
115. 303 U. S. 444 (1938).
116. This was in line with an earlier ruling dismissing an appeal in an identical case in which only the religious issue had been raised, Coleman v. Griffin, 302 U. S. 636 (1937), and with the dismissal in Leoles v. Landers, 302 U. S. 656 (1937), one of the flag salute cases. *Cf.* Hering v. State Board of Education, 303 U. S. 624 (1938). See Note (1938) 51 Harv. L. Rev. 1418; *cf.* (1938) 86 U. of Pa. L. Rev. 431.
117. 303 U. S. at 451.
2. In *Palko v. Connecticut* the Court was confronted for the first time with the question whether freedom from double jeopardy was a right so fundamental as to be embraced within the concept of due process, and thus protected against impairment by the states. It will be remembered that before the modern view of the scope of the due process clause had yet been adopted, the Court had held that various rights protected against infringement by the Federal Government were not protected against infringement by the states. These cases were now reaffirmed in an opinion by Mr. Justice Cardozo. He stated explicitly that there was no foundation to the notion that all the guarantees of the Federal Bill of Rights had been absorbed into the Fourteenth Amendment. He said that the dividing line lay here: was the right involved "... of the very essence of a scheme of ordered liberty".

The problem presented to the Court in the *Palko* case was a very narrow one. Connecticut permits the state to appeal from adverse rulings on the law. In this case the state appealed from a conviction of murder in the second degree, claiming errors in the court's charge with respect to the distinction between the degrees of murder and also error in rejecting a confession. The appellate court ordered a new trial, at which defendant was convicted of murder in the first degree and sentenced to death. On his appeal, which challenged the validity of the second trial, the judgment was affirmed. The Supreme Court, Justice Butler alone dissenting and without opinion, upheld the Connecticut practice against attack under both the due process and the privileges and immunities clauses of the Fourteenth Amendment. Mr. Justice Cardozo in effect held that a second trial under these circumstances did not amount to double jeopardy and reserved the question whether, under other circumstances, double jeopardy would violate due process. He said:

118. Milwaukee v. Snyder, Wis. Cir. Ct., May 24, 1938; People v. Young, Los Angeles News, July, 1938, Supp. p. 1 (Cal. Super. Ct. App. Dep't). Earlier decisions upholding convictions on the theory that street littering may be prevented are: People v. White [1935] Cal. Cr. App. 1255; Sieroty v. Huntington Park, 111 Cal. App. 377 (1931) (dealt with advertising matter). In the recent case of Commonwealth v. Kimball, 13 N. E. (2d) 18 (Mass. 1938), no constitutional issue was considered. On the other hand convictions have been set aside on the ground that such ordinances should not be construed as applicable to non-commercial matter: Coughlin v. Sullivan, 190 N. J. L. 42, 126 Atl. 177 (Sup. Ct. 1924); People v. Johnson, 117 Misc. 133, 191 N. Y. Supp. 750 (Ct. Gen. Sess. 1921); or on the ground that the ordinance violated freedom of speech: Chicago v. Schultz, 341 Ill. 208, 173 N. E. 276 (1930); People v. Armstrong, 73 Mich. 288, 41 N. W. 275 (1899) (emphasizing the fact that the ordinance was too broad in that proof of littering was not necessary); *Ex parte* Pierce, 125 Tex. Cr. 470, 75 S. W. (2d) 264 (1934). See also People v. Armentrout, 118 Cal. App. 761, 1 P. (2d) 556 (1931).


120. See Fraenkel, *What Can Be Done About the Constitution and the Supreme Court* (1937) 37 Col. L. Rev. 212, 220, n. 60.

121. 302 U. S. at 325.
“What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.” \(^\text{122}\)

Another aspect of double jeopardy was involved in the *Mitchell* case.\(^\text{123}\) The former president of the National City Bank had been acquitted of a charge of fraudulently withholding income taxes. The Government then sued to recover these taxes and asked for the imposition of a penalty. The circuit court of appeals upheld the imposition of the tax but disallowed the penalty on the ground that, under earlier decisions of the Supreme Court,\(^\text{124}\) the acquittal of the criminal charge barred it. The Supreme Court (except for Mr. Justice McReynolds who wrote no opinion) disagreed. The majority ruled first that there could be no claim of res adjudicata because of the difference in the degree of proof required in civil and criminal cases. Mr. Justice Brandeis rejected the contention that the protection against double jeopardy had been violated. He reached the conclusion that the penalty provisions of the tax laws were administrative sanctions to insure the filing of proper returns rather than punitive measures, and on this score also, he distinguished the earlier cases.

3. In *Johnson v. Zerbst*\(^\text{125}\) the Court greatly extended the usefulness of the writ of habeas corpus. Two men had been convicted in a federal court of counterfeiting. They claimed they had been denied the right to be represented by counsel and, after conviction, had been rushed to jail and there held incommunicado beyond the short time allowed for the taking of an appeal. The Supreme Court reversed an order which denied a second application for the writ on the ground that, under these circumstances, the constitutional guaranty of the right to counsel could otherwise receive no effective protection. For the majority Mr. Justice Black said:

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without juris-

\(^{122}\) *Id.* at 328.


\(^{124}\) Coffey v. United States, 116 U. S. 436 (1886); United States v. LaFranca, 282 U. S. 568 (1931).

\(^{125}\) 304 U. S. 458 (1938).
diction is void, and one imprisoned thereunder may obtain release by habeas corpus". 126

Since, however, the Government claimed that defendants had waived their right to counsel, the case was remanded to take proof on that subject. Mr. Justice Black indicated, however, that the burden was on the defendant to establish non-waiver. Justices Butler and McReynolds dissented, since they believed the facts conclusively established a waiver.

4. Two cases involving labor's rights involved constitutional issues. In Lauf v. Shinner 127 the Court reversed an injunction granted in disregard of the Norris-LaGuardia Act. Primarily the case involved a question of statutory construction. 128 The Court expressly upheld the constitutionality of the Norris-LaGuardia Act insofar as it restricted the jurisdiction of the federal courts. But Mr. Justice Roberts said in addition that the federal court had no greater power to enjoin acts committed within a state than the state court itself would have had. However, he expressed no opinion on the legality, under Wisconsin law, of the acts complained of, nor on the constitutionality of that law insofar as it legalized such acts. Mr. Justice Butler, however, insisted in dissent that the means employed were unlawful and that Congress had no power to define such acts as being a labor dispute.

The other case, New Negro Alliance v. Sanitary Grocery Co., 129 also involved primarily a construction of the same law. An injunction had been granted against picketing a store because it refused to employ negroes; the restrictions of the Norris-LaGuardia Act were not complied with. The Court emphatically rejected the contention that a labor dispute was any the less such because it involved matters of race or religion, Mr. Justice Roberts saying that "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation." 130

Mr. Justice McReynolds, with whom Mr. Justice Butler concurred, dissented on the ground that the acts complained of constituted " . . . mobbish interference with the individual's liberty of action." 131

It must be noted, however, that the Norris-LaGuardia Act legalizes nothing previously illegal and that it does not forbid the issuance of

126. Id. at 467.
128. The circuit court of appeals had ruled in 90 F. (2d) 250 (C. C. A. 7th, 1937) that no labor dispute was involved and upheld an injunction granted without the hearing required by the law. The Supreme Court held that the acts referred to constituted a labor dispute both under the Wisconsin Code, § 103.62, and the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (Supp. 1937). The case is important because the union had no members among the employees of plaintiff.
130. 303 U. S. at 561.
131. Id. at 563.
injunctions in labor disputes; it merely regulates the manner of their issuance.\textsuperscript{133}

5. Three unanimous decisions involved the equal protection clause. One\textsuperscript{133} reaffirmed the rule of the second \textit{Scottsboro} case,\textsuperscript{134} the Court ruling that affidavits showed a systematic and arbitrary exclusion of Negroes from jury service. In a second case,\textsuperscript{135} the Court upheld a Pennsylvania law which measured the punishment for breaking jail by the punishment originally imposed. Mr. Justice Butler said that it was immaterial that this might result in different sentences for a number of convicts involved in the same jail break. He maintained the principle was the same as that which permitted greater punishment of second offenders.

The third case, \textit{Breedlove v. Suttles},\textsuperscript{136} upheld a Georgia poll tax requirement for voting. The law was challenged on many scores: as denial of equal protection, because minors and persons over 60 were not required to pay the tax and it was cumulative for men, but not for women; as infringement of privileges and immunities; as violation of the Nineteenth Amendment, because of the discrimination against men already noted. Mr. Justice Butler rejected all the contentions. The deviations from exact uniformity he found supported by adequate reasons: voting was not a privilege of national citizenship;\textsuperscript{137} the difference in treatment of men and women arose out of tax requirements—"It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex."\textsuperscript{138}

6. The remaining cases can be disposed of briefly. Two of them, which deal with the right to trial by jury in civil cases, have already been considered.\textsuperscript{139} In \textit{Kay v. United States}\textsuperscript{140} the Court unanimously


\textsuperscript{133} Hale v. Kentucky, 303 U. S. 613 (1938).

\textsuperscript{134} Norris v. Alabama, 294 U. S. 587 (1935).


\textsuperscript{136} 302 U. S. 277 (1937).

\textsuperscript{137} See Fraenkel, \textit{Restrictions on Voting in the United States} (1938) 1 NAT. LAWYERS' GUILD Q. 135.


\textsuperscript{139} New York Life Ins. Co. v. Gamer, 303 U. S. 161 (1938), cited supra note 57; and United Gas Public Service Co. v. Texas, 303 U. S. 123 (1938), cited supra note 64.

\textsuperscript{140} 303 U. S. 1 (1938). The Court, however, reversed the conviction because the circuit court of appeals had refused to consider the bill of exceptions which had been filed too late, so that it might determine whether, to prevent miscarriage of justice, the bill should be received. The Court overruled contentions that the law was beyond congressional power, pointing out that appellant was in no position to raise such issue. For discussion of that subject see infra note 207.
Constitutional Issues in the Supreme Court, 1937 Term

Overruled a challenge of the Home Owners' Loan Act as void for indefiniteness. The statute prohibited all but "ordinary" charges for title examination, appraisal and "like necessary charges". The Chief Justice stated that the statute set up a sufficiently explicit ascertainable standard.

In *Nardone v. United States* the Court was confronted with the troublesome question of wiretapping. In the *Olmstead* case a closely divided Court had held evidence obtained by wiretapping not barred, both because there was no search or seizure involved in the act and because the prohibition against the use of evidence, otherwise relevant, did not apply when the method by which it had been obtained violated no constitutional guaranty, but only a law. While the law in question in that case was a state law, the decision did not rest squarely on this consideration.

In the *Nardone* case, however, the law involved was the Federal Communications Act. Both majority and minority ignored those arguments of the majority in the *Olmstead* case which differentiated between unconstitutional and illegal taking and assumed that, if the wiretapping was prohibited by the law, the evidence so obtained could not be used.

The decision thus turned on a construction of the Act. Mr. Justice Roberts, for the majority, ruled that, since it forbade the use of intercepted messages by "any person", government officers were included. Mr. Justice Sutherland, with whom Mr. Justice McReynolds agreed, thought otherwise, relying largely on the refusal of Congress to pass proposed laws which expressly forbade governmental wiretapping. After affirming his abhorrence of the private eavesdropper, he said:

"But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality."

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141. 48 STAT. 134 (1933), 12 U. S. C. A. 1467 (e) (1934).
A bill to amend the Communications Act to permit wiretapping by government agencies failed of passage in the last Congress.\footnote{146} A different method of approach to this problem was adopted by the Constitutional Convention in New York.\footnote{147}

VI. THE FOURTEENTH AMENDMENT AND DUE PROCESS UNDER THE FIFTH

The most important cases under this subject have already been considered.

1. In three cases the Court unanimously upheld challenged taxes. Two of these involved state taxes: a Pennsylvania tax on non-resident shareholders of a domestic corporation;\footnote{148} a New York City tax on the gross income of utilities, even though the complaining utility was unable to "pass on" the tax because of a fixed fare contract.\footnote{149} In the second of these cases it was contended that, since the tax was imposed for the relief of the unemployed and utilities are not specially responsible for unemployment, the tax was void. Mr. Justice Reed, in rejecting this argument, said that the purpose for which the moneys were to be spent was immaterial.

In Helvering v. Bullard\footnote{150} the Court upheld a federal estate tax on property transferred after the enactment of the law by an irrevocable trust which, however, reserved a life estate to the grantor. Mr. Justice Roberts held unsound the contention that the property could not be taxed as part of a transfer by death because the transfer was a gift inter vivos, on the ground that the name given the tax in no way affected Congressional power; and that the provision, moreover, was justified as being an appropriate means of stopping avoidance of estate taxes.

2. The cases in the field of regulation have already been discussed in connection with interstate commerce. In three instances the Court unanimously upheld the challenged regulation against attacks under

\footnotesize{\addcontentsline{toc}{section}{Notes}}

\footnote{146. N. Y. Times, June 17, 1938, p. 14, col. 6.}
\footnote{147. Wiretapping, except under court order, is forbidden; but a proposal to bar evidence obtained in disregard of this provision was defeated. See N. Y. Times, June 29, 1938, p. 1, col. 8.}
\footnote{148. Schuylkill Trust Co. v. Pennsylvania, 302 U. S. 506 (1938). In Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113 (1935), the law had been held invalid because of the inclusion of national bank stock in the base. Thereafter the Supreme Court of Pennsylvania ruled that the statute should be construed so as to eliminate the unconstitutional features. This, now said Mr. Justice Roberts, was within the power of the state court. The Court held, also, that no violation of equal protection resulted because a corporation owning only national bank stock would be exempt.}
\footnote{149. New York Rapid Transit Co. v. New York City, 303 U. S. 573 (1938). Mr. Justice Reed rejected the contention that there had been denial of equal protection because only utilities were taxed. For a discussion of the contracts clause see infra note 168.}
\footnote{150. 303 U. S. 297 (1938); cf. Hassett v. Welch, 303 U. S. 303 (1938), where the Court refused to consider the constitutionality of a retroactive tax by construing the law as intended to be prospective only and therefore inapplicable to the situation there presented.}
either or both the equal protection and due process clauses.\textsuperscript{151} In a fourth\textsuperscript{152} there was difference of opinion.

The question arose on demurrer to an indictment charging violation of the law prohibiting the interstate shipment of filled milk. The Court upheld the power of Congress to bar injurious products, Mr. Justice McReynolds dissenting without opinion. By Mr. Justice Stone, it rested its decision in part on the presumption of constitutionality, in part on evidence adduced before Congress. Mr. Justice Stone rejected the argument that the law was void for failure to include other adulterations, pointing out that Congress was limited by no equal protection clause. He indicated, however, that the legislature could not preclude inquiry into the harmfulness of the matter prohibited merely by applying an "opprobrious epithet", also that a defendant could always either challenge the existence of the facts upon which the statute had rested or show they no longer existed. With that portion of the opinion, Mr. Justice Black refused to agree; and Mr. Justice Butler said expressly that on the trial the facts could be established, stating that the law would be invalid if applied to products "... neither injurious to health, nor calculated to deceive ..."\textsuperscript{153}

3. In *Worcester County Trust Co. v. Riley*\textsuperscript{154} the Court unanimously rejected an attempt to use the Interpleader Act to avoid the payment of inheritance taxes to two states. Massachusetts and California both claimed that a certain person had been a resident. His executor brought suit against the tax officers of each state, contending that it was impossible for decedent to have been a resident of both places and that the claims should be litigated in the one action in order to avoid double tax liability which might otherwise result. The California officer objected to the maintenance of the suit on the ground that, being in effect a suit against the state, it violated the Eleventh Amendment.

\textsuperscript{151} Atlantic Ref. Co. v. Virginia, 302 U. S. 22 (1937), cited supra note 111. Entrance fees of foreign corporations were based on capitalization. The Court rejected the due process argument because in fact the fee was not measured by property outside the state; it ruled there was no denial of equal protection because larger fees were required of foreign corporations for entrance than were required of domestic corporations on incorporation since taxes annually imposed were smaller on foreign corporations.

National Gas Pipeline Co. v. Slattery, 302 U. S. 300 (1937), cited supra note 84. An interstate affiliate was required to give information in a rate case. The Court rejected the contention that inquiry could be enjoined because arbitrary action might result; that could be challenged if it occurred.

South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177 (1937), cited supra note 113. The weight and size of interstate motor carriers was limited. The Court ruled that it was solely for the legislature to determine whether trucks should be judged by gross weight or axle weight and one legislature was not bound by the judgment of others.

\textsuperscript{152} United States v. Carolene Products Co., 304 U. S. 144 (1938).

\textsuperscript{153} Id. at 155.

\textsuperscript{154} 302 U. S. 292 (1937), 85 U. of PA. L. REV. 306 (in lower court), 86 id. at 306 (1938); see also infra p. 80 and note 172.
Since suit against an official may be instituted only if the action of the official has violated a state or federal law or the United States Constitution, it was argued that suit by both states, resulting in double liability, would violate the Fourteenth Amendment. Mr. Justice Stone ruled that there was nothing in the Constitution to prevent conflict of decisions of the courts of two states, or even to protect against erroneous decision. For that reason the suit was one against the state and could not be maintained.

4. In *Mahoney v. Joseph Triner Corp.* the Court unanimously extended the rule of the *Young's Market* case and virtually wiped out the Fourteenth Amendment insofar as the importation of liquor is concerned. In the current case the Court upheld a Minnesota law which forbade the importation of a brand of liquor unless the brand had been registered in the United States patent office. The law thus discriminated in favor of liquor manufactured in the state. Mr. Justice Brandeis held that the equal protection clause no longer applies to intoxicating liquor and refused to consider whether the regulation was a reasonable one. Under this decision one state may, in effect, levy a tariff on liquor produced in another—a result which, while possible under the wording of the Twenty-first Amendment, was certainly not the intention of its framers.

5. A few other cases require brief mention, in all of which the Court unanimously rejected various contentions arising under the due process clause. California practice, which permits a cross-complaint to be served only on plaintiff's lawyer, was upheld. A contract between a veteran and a Home, required by Act of Congress as a condition of admission to the Home, and whereby the Home receives all the veteran's property upon his death, unless this be reclaimed by an heir within five years thereof, need not provide for notice to the heirs of the fact of death, the heirs having no vested right. Congress can lawfully validate a theretofore ultra vires pledge by a National Bank. Mr. Justice Black pointing out that "No person has a vested right to be permitted to evade contracts which he has illegally made." The Court reaffirmed the doctrine that a statute permitting a reasonable stay in a bankruptcy proceeding or extension of time for


157. See Indianapolis Brewing Co. v. Liquor Control Commission, 21 F. Supp. 669 (E. D. Mich. 1938); Joseph S. Finch Co. v. McKittrick, 23 F. Supp. 244 (W. D. Mo. 1938). In these cases laws of Michigan and Missouri were upheld which prohibited sale of liquor made in any state whose laws discriminate against liquor manufactured in Michigan and Missouri respectively. Both courts considered the equal protection clause applicable, but not violated.


160. McNair v. Knott, 302 U. S. 369 (1937). Mr. Justice McReynolds concurred solely on the ground that both parties had recognized the contract as valid.

161. Id. at 373.
redemption under a mortgage violated no requirement of due process.162 However, it was decided that the "just compensation" specified in the last clause of the Fifth Amendment required an allowance of interest in addition to the value of property taken.163

VII. MISCELLANEOUS RESTRICTIONS IN THE STATES

The Contract Clause

1. The contract clause164 was invoked in a number of tax cases. The most far-reaching was the decision in Hale v. Iowa State Board.165 Various Iowa bonds were issued under statutes which provided that they were "not to be taxed", or were "exempt from taxation". Subsequently Iowa enacted an income tax law and sought to include in the net income, subject to tax, the interest on these bonds. The majority of the Supreme Court, assuming without deciding that the statutes of exemption had created contracts with the bondholders, held that the exemption related to property taxes only, not to income taxes. After analyzing Iowa tax statutes, state court decisions and various decisions of the Supreme Court, Mr. Justice Cardozo concluded that the tax was not laid on the bonds since it was a tax on net, not gross, income. Mr. Justice Sutherland dissented on the ground that the language of exemption was broad enough to include all taxes. Justices McReynolds and Butler agreed with him. The principle of this case was extended to an Indiana gross income tax in J. D. Adams Mfg. Co. v. Storen,166 the Court apparently disregarding the fact that the earlier decision had rested almost entirely on the difference between taxes on net income and taxes on gross income.167

In New York Rapid Transit Corp. v. New York City168 the Court unanimously rejected the contention that the five-cent fare contract precluded the imposition of a gross receipts tax. There, however, no words of exemption whatever existed in the contract. The company merely claimed that the tax gave to the city a different share of the receipts than was provided for by the contract.

2. In Honeyman v. Hanan169 an appeal was dismissed on the ground that the question raised was not substantial. The New York law170 prohibited suit on a bond, permitting a deficiency judgment in

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166. 304 U. S. 307 (1938). See also supra note 60. Mr. Justice McReynolds dissented without opinion.
167. It may be that the decision in the later case rested on the fact that the Indiana law distinguished between the bonds and the interest accrued on them.
168. 303 U. S. 573 (1938).
169. 302 U. S. 375 (1937); first decision on same case, 300 U. S. 14 (1937).
170. NEW YORK CIVIL PRACTICE ACT § 1083-a, b.
the foreclosure action under certain conditions. After denial of an application for such judgment, the mortgagee sued on the bond. The Supreme Court held that no contract right had been violated by such "distribution of jurisdiction"; proper procedure required the mortgagee to challenge the validity of the conditions by appeal in the foreclosure suit.

**Full Faith and Credit**

1. A curious application of the "full faith and credit" clause is found in *Adam v. Saenger.*\(^{171}\) Judgment by default was obtained in California on a cross-complaint served on the attorneys for plaintiff, a Texas corporation, in the action there instituted. Suit was brought on that judgment in Texas, which dismissed the complaint, on the ground that California had no jurisdiction over the Texas corporation because the California statute did not authorize service of the cross-complaint on the attorneys. Mr. Justice Stone recognized the right of the Texas court to litigate the propriety of the service but reversed its determination, on the ground that the California law, as construed by its courts, authorized such service. It was, therefore, immaterial that such practice was not recognized in Texas.

2. In *Worcester County Trust Co. v. Riley*\(^{172}\) the Court unanimously rejected a contention that the courts of one state were precluded from passing on the question of domicile by a decision on the same subject in another state. The case arose in an attempt to prevent the payment of inheritance taxes to both states.

**Miscellaneous**

1. Two cases concerned property in the custody of a federal court. In *United States v. Klein*\(^{173}\) the Court dealt with attempts by Pennsylvania to recover by escheat money deposited in a federal court for the benefit of unknown owners. The United States, although claiming no title to the money itself, contended that, because the money was in the custody of a federal court, the state could not have its title adjudicated in a state court. This contention was rejected by a unanimous Court on the ground that the decision of the state court on the subject of title was no more an interference with the control of the federal court than a transfer of title by any other means. The Court refused to pass on the further contention that the escheat decree was ineffective to destroy title of non-resident owners, reserving that question until application might be made in the federal court for payment of the money.

A curious issue arose in *Texas v. Donoghue.*\(^{174}\) Texas sought permission of a bankruptcy court to sue in a state court for the recovery

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171. 303 U. S. 59 (1938).
173. 303 U. S. 276 (1938).
of oil which, it claimed, had been confiscated because produced in violation of law. The Court held that, since the bankruptcy court was a court of a sovereign independent of Texas, it had no power to enforce penalties imposed by the state. The majority, however, held, speaking through Mr. Justice Butler, that permission to sue should have been granted in order that Texas might have determined whether or not, at the time the bankruptcy proceeding was filed, title to the oil had vested in the state. Mr. Justice Cardozo dissented on the ground that, since it was evident that Texas could not succeed on this issue, it was a waste of time and money to allow the suit to be brought.\textsuperscript{175}

2. The scope of compacts between states was considered in \textit{Hinderlider v. LaPlata River \& Cherry Creek Ditch Co.}\textsuperscript{176} Defendant sought to justify its acts under the compact between New Mexico and Colorado relating to water rights. The state court held the compact unconstitutional because it was based on a compromise of claims rather than on an adjudication of them.\textsuperscript{177} Mr. Justice Brandeis, for a unanimous Court, held this erroneous, pointing out that "resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent."\textsuperscript{178} He maintained, moreover, that water rights previously granted had become subject to such a compact as much as to a judicial decree; and the Court overruled the contention that vesting discretion as to the use of the water in the two state engineers was an unconstitutional delegation.

3. A territorial conflict\textsuperscript{179} was resolved in \textit{Collins v. Yosemite Park C. Co.}\textsuperscript{180} An operator of hotels and camps in Yosemite Park refused to comply with California's Alcoholic Beverage Act, particularly the payment of fees and taxes. Mr. Justice Reed ruled that the United States had the power to acquire lands for purposes other than those enumerated in Article I, Section 8, Clause 17 of the Constitution, and that its jurisdiction in such territory might be exclusive or partial, depending on the agreement arrived at. Construing the reservations contained in the applicable laws concerning the cession of the Park to the Federal Government, he held that the state had the right to levy taxes but not license fees and that it had no right to control the sale or

\textsuperscript{175} Mr. Justice Stone concurred in the dissent.
\textsuperscript{176} 304 U. S. 92 (1938).
\textsuperscript{177} First decision, 93 Colo. 128, 25 P. (2d) 187 (1933), appeal dismissed as not final, 291 U. S. 650 (1934); second decision, 101 Colo. 73, 70 P. (2d) 849 (1937).
\textsuperscript{178} 304 U. S. at 105.
\textsuperscript{179} Territorial conflicts involving the extent to which federal authority displaces state jurisdiction in ceded territory were considered in two five-to-four tax decisions. James v. Dravo Contracting Co., 302 U. S. 134 (1937); Silas Mason Co. v. Tax Comm., 302 U. S. 186 (1937). See also Atkinson v. State Tax Comm., 303 U. S. 20 (1938). For a complete discussion of these cases, see Lowndes, \textit{supra} note 15, 87 U. of Pa. L. Rev. at \textit{z8} of \textit{seq.}
\textsuperscript{180} 58 Sup. Ct. 1009 (1938).
use of alcoholic beverages. He rejected the argument that the Twenty-first Amendment had increased the state's jurisdiction on the ground that there had been no importation into the state—the Park, for such purposes, being under a distinct sovereignty. Mr. Justice McReynolds thought the decision should have been confined to a discussion of the right to tax and agreed that this had been reserved to the state.

VIII. MISCELLANEOUS FEDERAL CASES

1. In addition to the bankruptcy questions already considered under various heads, brief mention should be made of a contention raised in *Wright v. Union Central L. Ins. Co.* After foreclosure of a mortgage in a state court but before the expiration of the time allowed for redemption, the mortgagor filed a proceeding under the second Frazier-Lemke law. The Court held that this land was subject to the provisions of the law which extended the time for redemption, and that such provision was within the bankruptcy power of Congress and was not an invasion of the rights of the states to control property relations.

2. Earlier gold cases were reaffirmed and extended in *Smyth v. United States.* The Court held that a call for the redemption of Liberty Loan bonds stopped the running of interest. For the majority, Mr. Justice Cardozo, in the last opinion he ever wrote, ruled that no constitutional issue was involved since the bonds expressly authorized their redemption on notice. He said that, whatever remedy the bondholders may have had under the *Perry* case, they had failed to avail themselves of it. Mr. Justice Stone, concurring, believed that a constitutional question was necessarily involved. He said the Government had no right to call in the bonds if it intended not to pay them in gold unless such payment had been made unnecessary by the Joint Resolution of 1933. Mr. Justice Stone then reached the conclusion, left open in his concurrence in the *Perry* case, that there should be no difference in the effect of that resolution between private and public debts. Mr. Justice Black concurred with the majority opinion and expressly refrained from giving an opinion on the various devaluation laws.

Supported by Justices Butler and Sutherland, Mr. Justice McReynolds dissented on the ground that the decision "... gives effect to an act of bad faith and upholds patent repudiation."

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181. See supra notes 63, 162, 174. See also McCollum v. Hamilton Nat. Bank, 303 U. S. 245 (1938) (state law of no importance in determining what claims might be set off against each other).
182. 58 Sup. Ct. 1025 (1938); see also supra note 162. The Court, however, held not subject to the law a foreclosed parcel as to which the time to redeem had expired before the bankruptcy proceedings.
186. Id. at 361.
187. 302 U. S. at 364.
cluded that no bona fide notice was given to pay the bond according to its terms.

3. The manner in which the President might exercise his veto power was newly defined in *Wright v. United States*.

The President vetoed a private bill which originated in the Senate. On the last day permitted by the Constitution, the Senate was in recess but the House was not. The veto message was delivered to and received by the Secretary of the Senate. When the Senate reconvened the message was laid before it and referred to committee. No further action was taken. Although the Court unanimously held that the bill had been properly vetoed, there was disagreement among its members in their reasoning.

The majority, by the Chief Justice, rested their decision on the fact that delivery to an appropriate officer of the House within which the bill originated was sufficient since the purpose of the constitutional provision was to give Congress an opportunity to act on the bill after it had been vetoed. Mr. Justice Stone, with whom Mr. Justice Brandeis concurred, thought that the recess of the Senate should be construed as an "adjournment" within the meaning of the Constitution. The difference rested largely on an interpretation of the words "the Congress". To the majority this meant both Houses, especially since elsewhere in the same clause great care had been taken to differentiate between the two Houses. Mr. Justice Stone pointed out, nevertheless, that the Court had often avoided a literal construction of the Constitution. He referred particularly to the due process clause and the Sixteenth Amendment.

The minority relied largely on language in the *Pocket Veto* case to the effect that a bill could not be returned to a House not in session and that delivery to an official of the House was not authorized. There is much force in the further argument of the minority that no authority now exists in any official to receive vetoed bills since Congress actually once refused to give this power. In the *Pocket Veto* case the Court had feared the consequences of delivery of a veto message during a long period, with possible attempts to repass it over the veto later; in the instant case the shortness of the recess (three days, as allowed in the Constitution) removed any difficulties which might have existed in the minds of the majority on that score.

The different points of view were not really material to the facts of the *Wright* case. They would have been so, had Congress repassed the bill here involved over the veto. The majority recognizes its right

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188. 302 U. S. 583 (1938), 51 Harv. L. Rev. 1103.

189. U. S. Const. Art. I, § 7, Cl. 2. A bill becomes law if not returned ten days after passage, Sundays excepted, "unless the Congress by their adjournment" prevent its return.


191. In 1868. Id. at 686.

to do this. The minority rejects it. The view of the majority has support in practical considerations since, as the Chief Justice pointed out, the contention of the minority would prohibit repassage if the veto message were delivered on the last day just after the House had recessed for the day. On the other hand, under the view expressed by the Chief Justice, the President might lose the right to veto a bill if the House in which it originated should adjourn for a longer period than the three day period approved in this case. Only a complete abandonment of the doctrine in the Pocket Veto case would remove this "no man's land". There is really no basis for the fear expressed by the Chief Justice that a relatively long adjournment of the House might result in confusion. As Mr. Justice Stone said:

"If I am wrong in my conclusion that the President did not in this case return the bill to the Senate by returning it to its secretary during adjournment, then adjournment did not prevent its return, the President's veto became effective, and there is no occasion for the Court to indulge in an academic discussion of what may in other circumstances be the effect of an adjournment alone of the house in which a bill originates, which actually prevents such a return." 193

In order to remove all difficulties, Congress should make explicit provision for the return of bills while either House has adjourned without the other, whether for the permitted three days or for any longer period.

4. In United States v. Stevens 194 the Court unanimously avoided some of the difficulties inherent in federal power by upholding a contract compelled by Act of Congress on the ground that it was in conformity with the law of the state in which the contract was made. The contract was by a disabled veteran; it was exacted as a condition of his admission to a National Home; it operated to give all his property to the Home, subject to being reclaimed within five years by legatee or heir. Mr. Justice Black did not clearly indicate to what extent the decision might have been otherwise had state law not recognized such a contract. Since ordinarily a federal court may not interfere with the administration of estates, 195 it is difficult to understand the basis of the judgment rendered which enjoined the administratrix from asserting any claim. The judgment should merely have upheld the claim of the Government, leaving enforcement to the state court.

5. In Helvering v. National Grocery Co., 196 the Court upheld an undistributed profits tax on a business concern owned wholly by a single individual. Mr. Justice Brandeis ruled that the tax did not constitute an interference with the state's control of corporations.

193. 302 U. S. at 604.
194. 302 U. S. 623 (1938), 38 Col. L. Rev. 519; see supra note 150.
196. 304 U. S. 282 (1938).
6. We have already noted that the Eleventh Amendment forbade an attempt to avoid double inheritance tax liability by invoking the Federal Interpleader Act. The Court distinguished a similar case on the ground that the point had not there been raised. It is unfortunate that no method exists to avoid the hardship which results from situations such as that in the Dorrance case where payment to two states resulted, but the Eleventh Amendment is clear and further exceptions to it should not be encouraged.

7. Finally there is the Electric Bond & Share case involving the obligation to register under the Public Utility Holding Company Act. The company vainly sought a challenge of the entire law. The Chief Justice held this to be unnecessary because of the express separability clause in the statute and the practicability of separate enforcement. The applicability of the law to the particular company was rather summarily dealt with; the carrying out of its service contracts involved continuous and extensive use of the instrumentalities of interstate commerce. The Chief Justice rejected the contention that registration transcended Congressional power since the information required was appropriate as a basis for regulation. Nor was the penalty—exclusion from the mails and interstate commerce—beyond the power of Congress. Here the Court was merely applying well established principles. It is astonishing that there should have been any dissent, and hardly surprising that Mr. Justice McReynolds wrote no opinion.

IX. Questions of Practice

1. In two cases the Court unanimously refused to pass on a constitutional issue raised by the parties because it was not necessary to decide it. In one of these the Court avoided the question by so construing the statute as to make it inapplicable; in the other it ruled that the facts required no consideration of the contention.

2. In a number of cases the Court, also unanimously, refused to pass on the constitutional issue raised on the ground that the person raising it had no standing to do so. Thus the Court rejected various futile attempts to challenge the legality of Mr. Justice Black's appointment.

199. See Boudin, Government by Judiciary (1932), for criticism of the rule which permits an evasion of the Amendment by suing individual officers and challenging their power to act under state laws.
204. Ex parte Levitt, 302 U. S. 633 (1937), 37 Col. L. Rev. 1212; Ex parte Kelley, 302 U. S. 634 (1937). The contention was that, as a member of Congress which passed...
The Court also refused to consider challenge by power companies of the right of P. W. A. to lend money to municipalities for the construction of power plants. Mr. Justice Sutherland pointed out that financial loss from lawful competition was not a right against which the power companies could protest. Since the use of the money by the municipality was clearly lawful, the company could not challenge the legality of the loan. The rule that a person cannot question the use of money authorized by Congress merely because of his interest as a taxpayer was thus reaffirmed.

In two criminal cases the Court held that one who cheats the government cannot question the validity of the laws under which were conducted the operations which led to the conviction.

4. Other cases, all unanimous, require only brief mention. The Court rejected claims that certain proceedings had become moot. Attempts to review state decisions were dismissed; in some instances because the state decisions rested on adequate non-federal grounds and the complaining parties had not availed themselves of all possible state remedies; in another instance, because the decision was not final.

In two cases the Court construed the recently adopted amendment to the Judicial Code, which requires the convening of a three judge court when an action is brought to enjoin the enforcement of a law whose constitutionality is challenged and permits a direct appeal to the Supreme Court. The Court held that, if the question is not substantial no three judge court should be convened, and that this is also the rule if the suit challenges the constitutionality of a law invoked as a defense. Although in the second of these cases the appeal had been the Retirement Act, 50 Stat. 24, 28 U. S. C. A. § 375a (1937), he had profited by it and was, therefore, ineligible to succeed Justice Van Devanter under Art. I, § 6, Cl. 2 of the Constitution.


207. United States v. Kapp, 302 U. S. 214 (1937) (a case under the A. A. A.); Kay v. United States, 303 U. S. 1 (1938) (a case under the H. O. L. C.). See also supra note 140.


212. California Water Serv. Co. v. Redding, 304 U. S. 252 (1938). The issue was that involved in the P. W. A. cases; see supra note 205.

213. International L. G. W. U. v. Donnelly Garment Co., 304 U. S. 243 (1938). This was a labor injunction case in which plaintiff attacked the constitutionality of the
improperly taken directly to the Supreme Court, that Court, instead of dismissing the appeal, reversed the judgment for want of jurisdiction of the court that rendered it.

In *Oklahoma ex rel. Johnson v. Cook* 214 following numerous precedents, the Chief Justice ruled that a state could not maintain an original suit in the Supreme Court if it was acting, not as sovereign, but for the benefit of private persons. The suit which thus failed was one to enforce the statutory liability of a stockholder of a failed bank; the ultimate beneficiary of any recovery would be the creditors of the bank, not the people of the state.

**CONCLUSION**

Four years ago, when the writer prepared the first of these annual reviews of decisions on constitutional issues, the dominating influence in the Court was that exerted by its bloc of conservative members. These voted together solidly in almost all cases of importance. Actual decisions were determined by the Chief Justice and Mr. Justice Roberts, and they often voted on separate sides. It seemed, for a time, as if Mr. Justice Roberts had determined that the conservative bloc should rule. And as a result, decisions from which three or four of the Justices dissented became very numerous.

Today this alignment is entirely changed, for the conservative group has dwindled away. To what extent this decline was due to the President's proposal to enlarge the Court, no outsider may venture to say. Yet it is clear that, even before Mr. Roosevelt appointed his first Justice, the battle for supremacy was to the liberal elements. Now, with the appointment imminent to fill the vacancy caused by Mr. Justice Cardozo's death, the President's appointees will soon form the largest group in the Court. And the probabilities are great that, as so constituted, the Court will be predominantly progressive in its viewpoint. Need for constitutional amendment seems, therefore, less urgent than at any time in the recent past.

Yet the pendulum will in due course swing again, if only because what ten years ago seemed a liberal position may not be such ten years hence; some of the new judges, moreover, may disappoint their sponsors. For more than one such reason it would be well, therefore, to take advantage of the present, relatively progressive trend in the country and amend the Constitution in a fashion which would limit the harm future judges who might be deaf to the recurring need for social change might do. Many proposals to this end have been put forward. The abolition of the power of judicial review, the simplification of the Norris-LaGuardia Act, relied on by defendants as a bar to the action. Thereafter an injunction was denied. 23 F. Supp. 998 (W. D. Mo. 1938).

214. 304 U. S. 387 (1938).
amendment process, the redefinition of grants and limitations of power—these are some of them.

In considering possible constitutional change we should keep in mind two objectives: the power of the states and the National Government to meet social and economic needs must expand; the rights of individual freedom must be preserved. No democracy can endure which shackles the power of government on the specious plea that only thus can industry function. Yet in acquiring the power needed to curb the abuses of speculation and monopoly—even, perhaps, to create a socialist economy—government must not deprive individuals of their right to disagree with it. To take from the courts the power of judicial review may result in destroying the civil liberties of minorities as well as safeguarding the social reforms the majority desires. And the easier method, that of amending the Constitution, could be used in times of sweeping hysteria by bigots, to restrict liberty.

A safer way of constitutional reform would be the redrafting of the Bill of Rights so as to strengthen those of its provisions which protect personal rights, with the restoration of the due process clause to its original, purely procedural, meaning. Elsewhere the writer deals with some of the points this proposal would involve. Here it must suffice to indicate that a rewritten due process clause should prevent the invalidating of social legislation, while preserving existing protection against arbitrary action by officers of government, executive or judicial. A modernized Bill of Rights should at least extend some protection to labor, guarantee the place of minority parties on the ballot and prohibit any forms of discrimination due to race, religion or political or economic beliefs. It should broaden and strengthen existing guarantees of freedom of expression; it should ensure supremacy of civil authorities and prevent the denial of habeas corpus by the device of declaring martial law.

We must realize, however, that written words create no freedom; they merely provide freedom with a friendly atmosphere. Only constant struggle will preserve rights, however solemnly guaranteed. And, unless the people really cherish these rights, they cannot survive in any case. Nor can there be any certainty that rewording of familiar phrases will accomplish what was desired by the drafter. Judges are likely to continue to be swayed by prejudices of one kind or another and to try to find ways of accomplishing their desires, whatever the words of the Constitution. Nevertheless, words well-chosen in the Constitution can make it more difficult for judges successfully to mask their prejudices. The task of finding such words is no easy one. But it may prove of great importance in the future development of our democracy.

215. In an article entitled, One Hundred and Fifty Years of the Bill of Rights, to be published shortly in the Harvard Law Review.