CONSTITUTIONAL ISSUES IN THE SUPREME COURT, 1934 TERM

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During the current year public attention has been focussed upon the Supreme Court as perhaps never before in the century. From the first decision day of January, when the "hot oil" opinion¹ was delivered, hardly a Monday passed on which there was not a decision on some far reaching subject either handed down or expected. Gold, oil, milk, NRA, railway pensions, farmers' mortgages, railroad reorganization, Mooney, Scottsboro, Herndon—these are only the more spectacular of the numerous subjects dealt with in a term crowded with significance.

I

THE NEW DEAL

Naturally the New Deal legislation assumes first place in any consideration of the work of the Court. Some of this had been passed on at the preceding term. The Minnesota mortgage² and New York milk³ cases had upheld reasonable emergency legislation. Both these five-to-four divisions of the Court led to a certain amount of speculation on the power of the conservative judges to win over to their views one of the more liberal members. Actually this happened three times:⁴ In the *Railroad Pension Case*,⁵ in which Justice Roberts wrote for the majority, and in two cases lacking in public significance.⁶ There has, however, been surprising uniformity in most of the New Deal cases.

Gold

The *Gold Clause Cases*⁷ were outstanding, not only on account of the fundamental nature of the subject under review, but also for their dramatic

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1. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

2. *Home B. & L. Ass'n v. Blaisdell*, 290 U. S. 398 (1934). See Maurer, *Emergency Laws* (1935) 23 GEO. L. J. 671.

3. *Nebbia v. New York*, 291 U. S. 502 (1934).

4. See discussion by the author of the five-to-four decisions of the last five years, U. S. L. Week, July 2, 1935, at 2.

5. *Railroad Retirement Board v. Alton*, 295 U. S. 330 (1935).

6. *Atlantic Coast Line R. R. v. Florida*, 295 U. S. 301 (1935); *Dimick v. Schiedt*, 293 U. S. 474 (1935).

7. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935) (dealing with private contracts); *Nortz v. United States*, 294 U. S. 317 (1935) (dealing with gold certificates); *Perry v. United States*, 294 U. S. 330 (1935) (dealing with liberty bonds). In addition to the difference in character of the obligation in the last two cases, there was also the difference

interest to the public. Before the argument it had been generally assumed that the Court would uphold the administration.⁸ Yet some of the questions members of the Court asked while the argument was in progress had created enough uncertainty to affect sentiment and depress markets.⁹ Interest in the outcome was so great that the Chief Justice broke all precedent by authorizing announcements on several successive Saturdays that no decision had been reached.¹⁰ Early the next Monday, following the absence of any similar statement, the court room was crowded with expectant people.¹¹ When the result was announced the relief was almost audible. There could be no disagreement with the reasoning of the Court in the first case, the one dealing with private contracts; everyone felt it was a notable achievement. On the other hand, while many people had been prepared for the distinction between government and private contracts, the basis on which the Chief Justice upheld the inviolability of public credit yet denied relief to the holders of Liberty bonds, came as a surprise, even a shock. Justice Stone's solution of the problem¹² enlisted more support. The audience listened sympathetically, if not with agreement, to Justice McReynolds' extemporaneous philippic. Hearing his passionate pronouncements, of which the filed opinion¹³ gives only a partial reflection, echoes from ancient Rome, from English Parliaments, and from our own Senate of the time of Webster and Calhoun came to mind. It was evident to the listener that, no matter how often it has been denied, the governing considerations by which decisions such as these are determined are those not of law, but of policy.

that the certificates were called in before devaluation, while the bond became payable thereafter. For a list of discussions see notes 8, 14, *infra*. An interesting problem arises from the gold situation by the presentation abroad of bonds giving the holder an option of obtaining payment in specified foreign money. A divided court in New York has held that no greater rights were obtained by such presentation by American citizens. *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634, 280 N. Y. Supp. 494 (1st Dep't 1935). *Contra: McAdoo v. Southern Pac. Co.*, 10 F. Supp. 953 (N. D. Cal. 1935); *Anglo-Continental, etc. v. St. Louis Southwestern R. Co.*, unreported decision of Knox, J., S. D. N. Y., now under advisement by C. C. A. for 2d Circuit.

8. Barry, *Gold* (1934) 20 VA. L. REV. 263; Collier, *Gold Contracts and Legislative Power* (1934) 2 GEO. WASH. L. REV. 303; ELLIOT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935) 151; Hanna, *Currency Control and Private Property* (1933) 33 COL. L. REV. 617; King, *The Gold Clause—Can It Constitutionally Be Abrogated by Legislation* (1934) 2 GEO. WASH. L. REV. 131; Nebolsine, *The Gold Clause in Private Contracts* (1933) 42 YALE L. J. 1051; Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation* (1934) 44 YALE L. J. 53; Post and Willard, *The Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225; (1934) 48 HARV. L. REV. 133; (1934) 83 U. OF PA. L. REV. 88.

9. For a report of the arguments see U. S. L. Week, Jan. 15, 1935, at 3-5, 20-24; for an analysis of the questions see N. Y. L. J., Jan. 21, 1935, at 358. For the effect upon markets see N. Y. Times, Jan. 12, 1935, at 1; *id.*, Jan. 13, 1935, § 1, at 2; *id.*, Jan. 15, 1935, at 27; *id.*, Jan. 16, 1935, at 1; *id.*, Jan. 17, 1935, at 4; *id.*, Jan. 22, 1935, at 27; *id.*, Jan. 23, 1935, at 25; *id.*, Jan. 27, 1935, § 2, at 9; *id.*, Feb. 1, 1935, at 29; *id.*, Feb. 3, 1935, § 1, at 1; *id.*, Feb. 5, 1935, at 1.

10. See N. Y. Times, Feb. 3, 1935, at 1; *id.*, Feb. 10, 1935, § 1, at 1.

11. The account which follows is the personal recollection of the writer who was of counsel in the Scottsboro cases and, while waiting for the completion of the argument, happened to hear the opinions read. See also N. Y. Times, Feb. 19, 1935, at 14.

12. *Perry v. United States* 294 U. S. 330, 358 *et seq.* (1935).

13. *Id.* at 361 *et seq.* (1935).

So much has been written about these opinions¹⁴ that it would be superfluous to add more. Perhaps it should be noted that the minority objected less on the subject of basic constitutional power than on the true purpose of the Joint Resolution. They held this was not monetary in character, but intended "to destroy certain valuable contract rights"¹⁵ and to lessen the burden of debts, and that this could not be done without compensation. Dealing with the disaster which might be anticipated to follow from the acceptance of their views, they said: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling."¹⁶ And in his oral statement Justice McReynolds pronounced the Constitution dead. In spite of a good deal of agreement with the general sentiments of the minority there was much satisfaction that the Court had found a way to support the administration,¹⁷ a feeling which, as to the Liberty bonds, rested largely on the factor stressed by the Chief Justice, that there was no proof of loss of "buying power",¹⁸ that the holder had no claim to enrichment. Undoubtedly the absence of sudden increase in the cost of living influenced the decision. The Court left uncertain the result if the bonds should become payable at a time when further inflation may have sent prices soaring or when gold payments might have been resumed. The practical importance of this question was at once lessened by large scale calling of the bonds¹⁹ and it has now become largely academic by the adoption of the administration's proposal to limit the right to sue the United States for the damages claimed under these gold clause bonds.²⁰

Oil

The gold decisions perhaps misled the administration into a belief that the Supreme Court would continue to find a way to approve its enactments. It is difficult on any other theory to understand the unpreparedness of the

14. For comments after the decisions see Corwin, N. Y. Times, Feb. 24, 1935, § 2, at 1; Dawson, *The Gold Clause Decision* (1935) 33 MICH. L. REV. 647; Dickinson, *The Gold Decisions* (1935) 83 U. OF PA. L. REV. 715; DOMKE, LA CLAUSE "DOLLAR-OR" (1935); ELLIOT, THE NEED FOR CONSTITUTIONAL REFORM (1935) 159n.; Eder, *The Gold Clause Cases in the Light of History* (1935) 23 GEO. L. J. 359, 722; Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 98-107; Hart, *The Gold Clause in United States Bonds* (1935) 48 HARV. L. REV. 1057; Pennock, *The Private Bond Case as a Postponement of the Real Issue* (1935) 84 U. OF PA. L. REV. 194; (1935) 35 COL. L. REV. 441; (1935) 83 U. OF PA. L. REV. 682, 686, 687.

15. 294 U. S. at 372.

16. *Id.* at 381.

17. See N. Y. Times, Feb. 19, 1935, at 14, 16, 17; *id.*, Feb. 20, 1935, at 2, 3, 20; *id.*, Feb. 23, 1935, at 2; *id.*, Feb. 24, 1935, § 2, at 1; *id.*, Feb. 27, 1935, at 35; *id.* (editorial), Feb. 19, 1935, at 20.

18. 294 U. S. at 357. Hart, *supra* note 14, at 1097, n. 148, deplored the reference to this subject, which he said had occurred to none of the commentators who had discussed the subject prior to the decision. In his opinion it opened a field of controversy of which only bondholders with resources for litigation could take advantage.

19. See N. Y. Times, Feb. 24, 1935, § 2, at 11; *id.*, Mar. 15, 1935, at 1; *id.*, April 15, 1935, at 1; *id.*, April 22, 1935, at 1; *id.* (editorial), April 16, 1935, at 20. For amounts outstanding on June 27th see *id.*, June 28, 1935, at 2.

20. Pub. Res. No. 63, 74th Cong., 1st Sess. (1935) § 2, 31 U. S. C. A. § 773b (1935), abolishes the right to sue after January 1, 1936.

public for the impending NIRA decision. The foreshadowing by the "hot oil" case²¹ was generally dismissed as due to the particular ineptitude of the administrative orders there involved.²² Yet the words of the Chief Justice were plain: the statute under consideration was condemned because "it establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. . . . it gives to the President an unlimited authority. . . . The Congress left the matter to the President without standard or rule, to be dealt with as he pleased."²³ Justice Cardozo's dissent recognized the principle but evaluated the statute as so circumscribed as to be without danger.²⁴ So far as it was then under review, the law authorized the President to prohibit the flow of interstate commerce of oil produced in excess of state allowances, such being the so-called "hot oil." The oil code was not before the Court, although the same law provided for its establishment.

NRA

The growing number of lower court decisions holding the NRA unconstitutional when applied to local conditions were apparently ignored by the administration as wrongheaded.²⁵ Even when the government decided to abandon its appeal in the *Belcher Lumber Code Case*,²⁶ the confession of

21. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), (1935) 35 COL. L. REV. 280, 23 GEO. L. J. 487, 48 HARV. L. REV. 798, 83 U. OF PA. L. REV. 526.

22. N. Y. Times, Jan. 9, 1935, at 1, 18; *id.*, Jan. 10, 1935, at 2, 3.

23. 293 U. S. at 415, 418.

24. *Id.* at 433, 443.

25. For cases involving codes see *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16 (W. D. Ky. 1934), *rev'd on procedural grounds*, 74 F. (2d) 697 (C. C. A. 6th, 1934); *United States v. Mills*, 7 F. Supp. 547 (D. Md. 1934); *Irma Hat Co. v. Local Retail Code Authority*, 7 F. Supp. 687 (N. D. Ill. 1934); *United States v. Gearhart*, 7 F. Supp. 712 (D. Colo. 1934); *United States v. Eason Oil Co.*, 8 F. Supp. 365 (W. D. Okla. 1934); *United States v. Kinnebrew Motor Co.*, 8 F. Supp. 535 (W. D. Okla. 1934); *United States v. Rogles*, 9 F. Supp. 857 (E. D. Mo. 1935); *Acme, Inc. v. Besson*, 10 F. Supp. 1 (D. N. J. 1935); *United States v. Weirton Steel Co.*, 10 F. Supp. 55 (D. Del. 1935); *United States v. Riggen*, 10 F. Supp. 300 (S. D. Iowa 1935); *United States v. French*, 10 F. Supp. 674 (W. D. Mich. 1935).

For cases involving milk regulation under the A. A. A. see *Edgewater Dairy Co. v. Wallace*, 7 F. Supp. 121 (N. D. Ill. 1934); *Hill v. Darger*, 8 F. Supp. 189 (S. D. Calif. 1934); *Douglas v. Wallace*, 8 F. Supp. 379 (W. D. Okla. 1934); *United States v. Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398 (S. D. Ind. 1934); *United States v. Neuendorf*, 8 F. Supp. 403 (S. D. Iowa 1934); *Royal Farms Dairy, Inc. v. Wallace*, 8 F. Supp. 975 (D. Md. 1934); *Columbus Milk Producers Co-op. Ass'n v. Wallace*, 8 F. Supp. 1014 (N. D. Ill. 1934). *Contra*: *United States v. Shissler*, 7 F. Supp. 123 (N. D. Ill. 1934). See also *Sparks v. Mellwood Dairy*, 74 F. (2d) 695 (C. C. A. 6th, 1934) (grant of injunction reversed on procedural grounds).

For discussions of the whole subject see Black, *The Commerce Clause and the New Deal* (1935) 20 CORN. L. Q. 169; Boudin, *Is Economic Planning Constitutional?* (1933) 21 GEO. L. J. 253, 387; CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 38-51; ELLIOT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935) 160-181; Maurer, *Some Constitutional Aspects of N. R. A. and A. A. A.* (1934) 22 GEO. L. J. 207; Williams, *Does the Commerce Clause Give Power to Dominate All Industry?* (1934) 83 U. OF PA. L. REV. 23; Notes (1935) 48 HARV. L. REV. 798; (1934) 44 YALE L. J. 90.

26. *United States v. Belcher*, 294 U. S. 736 (1935). For comments see N. Y. Times, Mar. 26, 1935, at 1; *id.*, Mar. 31, 1935, § 4, at 10; *id.*, April 1, 1935, at 11; *id.*, April 2, 1935, at 39; *id.*, April 9, 1935, at 10; *id.*, April 16, 1935, at 20; *id.* (editorial) April 2, 1935, at 20.

The Court, on procedural grounds, refused to pass on the constitutionality of NIRA in *Spielman Motor Co. v. Dodge*, 295 U. S. 89 (1935); *Wilshire Oil Co. v. United States*, 295 U. S. 100 (1935).

weakness was explained as due to the peculiarities of that particular code. Then the Circuit Court of Appeals in New York in the *Schechter* case²⁷ accepted the government's argument that under modern economic conditions local business practices substantially affect interstate commerce to the extent that they bring about the shipment of inferior merchandise and depress the price of all merchandise. A majority of the court held otherwise as to regulation of the hours of work and the wages of employees engaged in the preparation of the fowls for sale.²⁸ The whole court upheld the administration on the delegation point, distinguishing the oil case by the statement that the President was limited by the declared policy of the law to bringing about increased consumption and to the preventing of destructive wage or price cutting; that the standard was broad because of the magnitude of the problem.²⁹ So the administration allowed itself to be rushed into an appeal in a case of which the interstate character was at best doubtful, partly motivated perhaps by the fact that in case of defeat Congress would be in session, and in a position to repair as much of the damage as might lie within its power.³⁰

The only surprising thing about the Supreme Court's decision³¹ was its unanimity. Even Justice Cardozo could find no justification for the delegation here:

"What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. . . . This is delegation running riot."³²

The Chief Justice, in the principal opinion, answered the arguments born of emergency:

"Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."³³

The law was criticized and condemned because, among other things, it set up neither any standards nor any appropriate administrative machinery by which such standards might be applied.

27. *United States v. A. L. A. Schechter Poultry Corp.*, 76 F. (2d) 617 (C. C. A. 2d, 1935).

28. *Id.* at 625.

29. *Id.* at 623.

30. Actually this was not done; the extended NRA is of a very limited character. See N. Y. Times, June 17, 1935, at 1.

31. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), 35 COL. L. REV. 934. See Comment (1935) 4 *FORDHAM L. REV.* 457; (1935) 49 *HARV. L. REV.* 297. On the subject of delegation see CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 140, 148, 223n. For criticism of the interstate commerce aspect of the decision as unnecessary, see Powell, *Commerce, Pensions and Codes* (1935) 49 *HARV. L. REV.* 1, 193; Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 *HARV. L. REV.* 68, 98-107.

32. 295 U. S. at 553.

33. *Id.* at 528.

On the interstate aspects of the case the Chief Justice declared that since the poultry had come completely to rest in New York before any of the practices condemned by the code were engaged in, the rules relating to products in a "flow" of interstate commerce had no application. He also held that the transactions did not "directly affect" interstate commerce so as to become subject to federal regulation.³⁴ The argument that the price structure was affected by the practices complained of, Chief Justice Hughes answered by stating that the Constitution does not permit the centralization of control which is the only means for remedying these evils. He concluded that it was thus unnecessary to consider objections to certain provisions of the code under the due process clause.

Railway Pensions

The due process clause had, however, resulted in the destruction of the Railway Pension Law.³⁵ Like so many decisions of like basis it embodies conceptions of policy rather than of law. Many of the statements in the majority opinion call to mind the warning of Holmes³⁶ that the Fourteenth Amendment³⁷ was not designed to perpetuate the principles of Herbert Spencer's *Social Statics*. Justice Roberts criticized various features of the Act as arbitrary, notably those extending the benefits of the system to former employees and requiring solvent carriers to make up demands on the insolvent. He characterized these provisions as "taking the property of one and bestowing it upon another"³⁸ and brought to mind that the carriers are still privately owned and operated. He distinguished cases such as the Oklahoma bank guaranty case³⁹ on the ground that there the levy was insignificant and the use public.

But he also declared the Act as a whole to be invalid as not within the power of Congress to regulate commerce, a conclusion he reached because he could find in the record no support for the contention that the scheme of the Act tended to improve either safety or efficiency of operation. In principle the law he said, "really and essentially related solely to the social welfare of the worker, and therefore was remote from any regulation of commerce as such";⁴⁰ it rests on the theory that the "fostering of a contented mind"

34. Citing *Southern Ry. v. United States*, 222 U. S. 20, 27 (1911); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310 (1925); *Local 167 v. United States*, 291 U. S. 293 (1934). The last case cited dealt with the same industry and held subject to federal control a conspiracy to prevent dealers from obtaining poultry when they resisted attempts at monopoly.

35. *Railroad Retirement Board v. Alton*, 295 U. S. 330 (1935), 35 COL. L. REV. 932; (1935) 4 FORDHAM L. REV. 498. See also *Legis.* (1935) 23 GEO. L. J. 285; *Comment* (1934) 44 YALE L. J. 292; (1935) 44 YALE L. J. 318. For criticism of the interstate commerce aspect of the decision as unnecessary, see Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 1; Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 98-107.

36. *Lochner v. New York*, 198 U. S. 45, 75 (1905).

37. And also, of course, the Fifth.

38. 295 U. S. at 350.

39. *Noble State Bank v. Haskell*, 219 U. S. 104 (1911).

40. 295 U. S. at 368.

is regulation of commerce. The Justice viewed with alarm the possible extension of the principle to provision for medical attendance, housing, even education, and considered it no answer that pensions were more closely connected with commerce. In other words, he rejected pensions because they produced contentment, for fear that other things, likewise productive of contentment, might be permitted by the logic of a contrary decision.

The Chief Justice, and Justices Brandeis, Stone and Cardozo dissented. The Chief Justice reviewed the unsatisfactory history of voluntary pension systems. He could see no distinction between compulsory pension laws and compulsory compensation acts. Retirement of workers because of incapacity due to age, he said, was as much an incident of employment as compensation for injury regardless of fault:

"This is recognized as especially fitting in the case of large industrial enterprises, and of municipal undertakings such as fire and police protection, where there are stable conditions of employment in which workers normally continue so long as they are able to give service and should be retired when efficiency is impaired by age. The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience."⁴¹

Considering then the specific objections to the law, the minority opinion held the pooling provision authorized by previous decisions.⁴² The Chief Justice agreed with the majority only with respect to the inclusion of former employees, but he thought this provision separable within the section of the law to that effect.⁴³

This decision will probably rank with *Lochner v. New York*⁴⁴ and *Adkins v. Children's Hospital*⁴⁵ as high-water marks of reaction. In effect the Court has said that nothing which affects workers in a way not merely physical may be charged upon industry. As the Chief Justice said: "The government's power is conceived to be limited to a requirement that the railroads dismiss their superannuated employees, throwing them out help-

41. *Id.* at 384.

42. *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1917), which approved pooling in workmen's compensation by classes of industries, was distinguished in the majority opinion because the railroads were not classified—although how they could be classified by industries is difficult to imagine. *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456 (1924), which upheld contribution of excess earnings from the strong carriers so that the Interstate Commerce Commission might make loans to the weak, was distinguished by the majority on the ground that the carriers were permitted to retain a fair return on capital—but the pension law was also not designed to deprive the roads of such return. *The New England Divisions Case*, 261 U. S. 184 (1923), which upheld a division of rates to the advantage of weaker roads, was distinguished on the ground that no carrier was required to carry for an unreasonable rate.

43. 48 STAT. 1283, 45 U. S. C. A. § 201 (Supp. 1934).

44. 198 U. S. 45 (1905).

45. 261 U. S. 525 (1923).

less, without reasonable provision for their protection.”⁴⁶ That such a result can be accomplished by the vote of any one man is eloquent testimony to the need of constitutional change. A suggested remedy that a two-thirds vote of the Court be required,⁴⁷ merely scratches the surface. What is needed is a complete redefinition of due process and similar concepts so that Congress and the various legislatures may be supreme in defining policy.⁴⁸

Milk

Attacks continued upon the New York Milk Control Act.⁴⁹ At the previous term, the Court had held the law to be constitutional, despite its fixing of minimum prices.⁵⁰ Now it was claimed that the minimum prices tended, in practice, to be maximum prices and that they were confiscatory. Justice Cardozo held the plight of the plaintiff was not due to the law but to competition, against which the Fourteenth Amendment was no protection.⁵¹ He pointed out that the price remained at the minimum because “efficient operators find that they can get along without a change.”⁵²

This law authorized the administrative board to permit dealers not having a “well-advertised brand” to sell at a lower price. Borden’s claimed this to be discriminatory. The majority of the Supreme Court expressed doubt concerning the validity of the provision in the absence of special justification, reversed the dismissal of the complaint and directed that the case go to trial.⁵³ What most disturbed the majority was the penalizing of lawfully-acquired economic advantage. The Chief Justice said: “With the notable expansion of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence so that conclusions shall not be reached without adequate factual support.”⁵⁴ Justices Stone and Cardozo concurred in the result.

46. 295 U. S. at 381.

47. U. S. L. Week, May 21, 1935, at 2; *id.*, May 28, 1935, at 2.

48. See CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 62-89; ELLIOT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935) 179, 180, 204; MORRIS R. COHEN, LOUIS B. BODIN and OSMOND K. FRAENKEL, *What to Do with the Supreme Court?* *THE NATION*, July 10, 1935, at 39, 40, 42. But see MAURER, *Due Process and the Supreme Court—A Revaluation* (1934) 22 *Geo. L. J.* 710; *cf.* Llewellyn, *The Constitution as an Institution* (1934) 34 *COL. L. REV.* 1, 33, 36.

49. N. Y. CONS. LAWS (Cahill, Supp. 1934) c. 1, §§ 325-330.

50. *Nebbia v. New York*, 291 U. S. 502 (1934). See Hale, *The Constitution and the Price System* (1934) 34 *COL. L. REV.* 401; Note (1934) 34 *COL. L. REV.* 1336.

51. *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934), 34 *COL. L. REV.* 1551.

52. 293 U. S. at 171.

53. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194 (1934), (1935) 35 *COL. L. REV.* 285. After trial before a special master a statutory court upheld the differential as reasonable. Judge Learned Hand said that if the reputation of plaintiff was founded on better quality the classification was proper as one of grades; if its milk was not of better quality the legislature had the right to redress the advantage obtained by unfair advertising. *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599 (S. D. N. Y. 1935). The case has been set by the Supreme Court for argument on January 6, 1936.

54. 293 U. S. at 210.

But the attempt of the law to impose the minimum price regulation on milk brought into the state was defeated by the unanimous Court on the ground that it was an interference with interstate commerce.⁵⁵ Justice Cardozo said in answer to the argument that the measure was one of sanitary protection:

"This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. . . . The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."⁵⁶

And, foreshadowing the NIRA decision: "Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movements between states."⁵⁷ And this principle is applicable though the milk had been removed from the cans in which it was imported and was bottled in New York, since "the importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."⁵⁸ Other decisions laying down a test of "original package"⁵⁹ were distinguished because the very purpose of this law was, in effect, to set up "a rampart of customs duties."

Mortgages

Attacks have continued also upon various laws passed to ameliorate the plight of mortgagors. Here again the Court had, at the previous term, laid down the general principle that a reasonable and temporary suspension of foreclosure would be permitted.⁶⁰ A Maryland law depriving the holder of less than twenty-five percent of a mortgage from foreclosing was upheld on the ground that since the consent to sale contained in the mortgage was in accordance with certain provisions of law "or any amendments" the amendment was not a violation of the contract clause.⁶¹

But Arkansas laws were condemned which so changed the system of collecting real property assessments as to impair the security of the bonds issued for street improvements.⁶² The chief objection to the laws arose

55. *Baldwin v. Seelig*, 294 U. S. 511 (1935), 35 COL. L. REV. 280, 48 HARV. L. REV. 1437.

56. 294 U. S. at 523.

57. *Id.* at 524.

58. *Id.* at 527.

59. *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827); *Leisy v. Hardin*, 135 U. S. 100 (1890).

60. *Home B. & L. Ass'n v. Blaisdell*, 290 U. S. 398 (1934). See Corwin, *Moratorium over Minnesota* (1934) 82 U. OF PA. L. REV. 311.

61. *United States Mortg. Co. v. Matthews*, 293 U. S. 232 (1934), (1935) 35 COL. L. REV. 440.

62. *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (1935).

from the delays and reduction of penalties which encouraged the property owner not to pay his assessment, and permitted him to remain in possession for four years without any provisions for the protection of the creditor. Justice Cardozo said that the changes in remedy had to be considered in their cumulative effect and that extensions were invalid "when so piled up as to make the remedy a shadow."

Finally, the Frazier-Lemke Act,⁶³ an amendment to the Bankruptcy Act, was in *Louisville Jt. Stock Land Bank v. Radford*⁶⁴ declared unconstitutional by a unanimous Court. In this case the contract clause was not the reason; the enactment was voided under the due process clause of the Fifth Amendment. Lower courts had very generally upheld this law.⁶⁵ In one of the cases⁶⁶ Judge Parker⁶⁷ declared the provisions of the law neither arbitrary nor unreasonable; considering the prostrate condition of agriculture, both the five year moratorium and the right of the debtor to be rid of his debt upon paying a valuation of his property were justifiable. Judge Parker even believed the latter provision to be of benefit to the creditor, for it assured him of receiving value fixed in a judicial proceeding. "If the creditor receives the value of the property, it is no concern of his who the purchaser may be; and as we have seen the act provides for the determination of value by the court in a judicial proceeding in which the creditor is given full opportunity to be heard"⁶⁸—a practice, he observed, similar to that prevailing in corporate reorganizations.

Not so, however, Mr. Justice Brandeis and the rest of the Supreme Court. To them the law was at best a taking of private property for public purposes without proper compensation: "If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."⁶⁹ The chief objection to the law lay in its requiring the mortgagee to surrender his lien without receiving full payment for his debt, a provision not contained in any of the prior laws, state or federal, which have sought at various times

63. 48 STAT. 1289, 11 U. S. C. A. § 203 (s) (Supp. 1934).

64. 295 U. S. 555 (1935), 35 COL. L. REV. 1136. See *Legis.* (1934) 23 GEO. L. J. 87; (1935) 83 U. OF PA. L. REV. 375. The amended law, P. L. No. 384, 74th Cong., 1st Sess. (1935) § 3002, likewise has been held unconstitutional. *In re Young*, 12 F. Supp. 30 (S. D. Ill. 1935); *Lafayette Ins. Co. v. Lowman*, 3 U. S. L. Week 216 (C. C. A. 7th, 1935); *In re Sherman*, 3 U. S. L. Week 217 (W. D. Va. 1935).

65. The instant case, 74 F. (2d) 576 (C. C. A. 6th, 1935); *Paine v. Capitol Freehold Land Co.*, 8 F. Supp. 500 (N. D. Tex. 1934); *In re Cope*, 8 F. Supp. 778 (D. Colo. 1934); *Bradford v. Fahey*, 76 F. (2d) 628 (C. C. A. 4th, 1935). *Contra: In re Payne*, 10 F. Supp. 649 (N. D. Tex. 1935).

66. *Bradford v. Fahey*, 76 F. (2d) 628 (C. C. A. 4th, 1935).

67. The same judge who was opposed for nomination to the Supreme Court in 1930 as being too conservative.

68. 76 F. (2d) at 636 (C. C. A. 4th, 1935).

69. 295 U. S. at 602 (1935).

in our history to alleviate the lot of mortgagors. This right to receive full payment is "of the essence of a mortgage." Justice Brandeis held that the supposed analogy with reorganizations failed. There, as in any other composition, courts enforced the will of the majority of the creditors, never the will of the bankrupt against the creditors. Whether Congress had power to enact such provisions as to future mortgages under the bankruptcy power of the Constitution the Court did not determine, because this law applied only to existing mortgages.

Insolvencies.

The Court did, however, uphold the power of Congress in relation to the reorganization of corporations.⁷⁰ A railroad, having filed a petition under Section 77, sought to restrain banks from selling collateral which they held for notes on which the railroad was about to default, claiming that the value of the collateral was in excess of the loans but that a forced sale might result in a deficiency. Most of the collateral consisted of bonds of the debtor and its subsidiaries. The District Court found that the sale would delay and obstruct the presentation of the plan of reorganization contemplated by the statute and enjoined the sale, although some of the noteholders were not within its territorial jurisdiction. Mr. Justice Sutherland discussed the general constitutionality of the section, although this had not been assailed. By historical study he concluded that the power to enforce compositions had never been questioned and that no more was embraced by Section 77. A bankruptcy law was no less such because the proceedings taken stopped short of a declaration of bankruptcy.⁷¹ The Fifth Amendment was not violated by depriving the banks of the right to sell given by the notes, the Court held, because the bankruptcy power necessarily involves some impairment of contract rights. Other questions, such as that of the jurisdiction of the Court over non-residents, were all decided in favor of the railroad company. But the Court stated that the injunction should continue only if the reorganization plan were pushed forward with great diligence.

In *Doty v. Love*,⁷² Justice Cardozo upheld a Mississippi law which permitted the reopening of a closed bank with permission of seventy-five per cent of its creditors and with the approval of the Superintendent of Banks and the state court. The law authorized the repayment of debts in such a case over a three-year period. On its surface, said Justice Cardozo, this law does no more than change the method of liquidation: "If debts are thereby swollen or assets made to shrink, the outcome is an unlooked for incident of a method of administration conceived to be more efficient than present sale and distribution." Nor was it an impairment of contract that the stat-

70. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry.*, 294 U. S. 648 (1935), 48 HARV. L. REV. 1430, 83 U. OF PA. L. REV. 913.

71. Citing *Canada Southern Ry. v. Gebhard*, 109 U. S. 527 (1883); *Hanover Nat. Bank v. Moyses*, 186 U. S. 181 (1902).

72. 295 U. S. 64 (1935). See Note (1935) 48 HARV. L. REV. 1414.

utory liability of stockholders who contributed capital to the reopened bank was released to the extent of half their statutory liability, the local court having held this amount larger than might have been collected by judgment. The release was under such circumstances a compromise rather than a surrender. And preference for claims under \$5.00 was upheld as saving book-keeping expenses in connection with dividend payments.

Conclusions

To summarize: the Court has upheld the power of the states to legislate for emergencies but has confined the exercise of that power to the reasonable and the temporary. It has denied both to Congress and the states the right to compel a creditor to surrender a lien, even though the price he is to receive will be fixed by a court. It has upheld the power of Congress to regulate money, even if the consequence be the impairment of private contracts, but not if it be the destruction of a governmental pledge. It has approved the delegation to the President of the regulation of money since the limits and purposes of such regulation were defined by the Congress, but has condemned such delegation to approve and make codes because no standard had been provided by the legislative body by which the codes might be measured. It has reminded the country of the essentially federal nature of our government by denying to Congress any regulatory power over wholly intrastate conditions of employment or practices of industry. Finally it has restricted the area of regulation, even in public service industries, by denying Congress the right to require a pension system for railroad employees.

Other problems of the New Deal remain unsolved by the Supreme Court. Chief among these is the control of agriculture. The processing taxes of the A. A. A. have, in a number of cases,⁷³ been condemned by lower

73. The decisive case is the *Hoosac Mills* case, originally decided in favor of the Government under the name of *Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552 (D. Mass. 1934), *rev'd* sub nom. *Butler v. United States*, 78 F. (2d) 1 (C. C. A. 1st, 1935) now awaiting decision in the United States Supreme Court. There has been a flood of cases seeking injunctions against the collections of these taxes, with varying decisions. Thus, in *Gold Medal, Inc. v. Landy*, 11 F. Supp. 65 (D. Minn. 1935) a temporary injunction was issued without passing on the constitutionality of the law. In *Penn v. Glenn*, 10 F. Supp. 483 (W. D. Ky. 1935) the law was declared unconstitutional and an injunction issued. In *Fisher Flouring Mills Co. v. Vierhus*, 78 F. (2d) 889 (C. C. A. 9th, 1935), and *Escalante v. Fontenot*, 79 F. (2d) 343 (C. C. A. 5th, 1935), injunctions were refused. But the Supreme Court, despite the 1935 amendments prohibiting the use of injunctions (P. L. No. 320, 74th Cong., 1st Sess. (1935) § 30) issued injunctions pending an appeal over the dissent of Justices Brandeis, Stone and Cardozo. *Rickert Rice Mills, Inc. v. Fontenot*, 80 Law Ed. Adv. 143 (1935). Other cases have been collected in Note (1935) 49 HARV. L. REV. 109.

The production tax of the Bankhead Cotton Control Act, 48 STAT. 598, 599, 7 U. S. C. A. § 704 (Supp. 1934), is also before the Supreme Court for decision, after having been upheld in *Moor v. Texas & N. O. R. Co.*, 75 F. (2d) 386 (C. C. A. 5th, 1935). It is probable that the Court will not decide the merits in that case because the lower court decided that equitable relief was unnecessary. The same question will come before the Court later, however, in the original suit instituted by the State of Georgia.

In some of these cases suit for a declaratory judgment was used as a method of passing on the constitutionality of the law. They have been collected in Note (1935) 44 YALE L. J. 1451. The further use of this method has been prohibited by the Revenue Act of 1935. P. L. No. 407, 74th Cong., 1st Sess. (1935) § 405.

courts, both because of improper delegation of power to the Secretary of Agriculture⁷⁴ and as being beyond the power of Congress to regulate interstate commerce.⁷⁵ The government's operations in the Tennessee Valley have been upheld;⁷⁶ its right to condemn property for low-priced housing projects has been denied.⁷⁷ Appeals in these cases will be decided in the Supreme Court at the current term.⁷⁸ The passage of the National Labor Relations Act will bring labor problems to the fore, although it is doubtful whether any case arising thereunder will come before the Supreme Court this term. The decisions of these questions should prove conclusively whether it is possible for the federal government to accomplish without constitutional amendment the indispensable minimum regulation of modern business and agriculture.

II

TAXATION

*The Due Process Clause*⁷⁹

In *Senior v. Braden*⁸⁰ the majority of the Court denied to the State of Ohio the right to levy on transferable certificates in trusts of real estate a property tax on investments, measured by income. Four of the parcels were in Ohio, three in other states. All had been subjected to the usual real estate tax. Justice McReynolds held that an interest in such a trust was not a chose in action, but created an equitable title to the land itself and, therefore, Ohio had no power to tax the certificates representing land outside its borders.⁸¹ By some process of reasoning not adequately disclosed in the

74. On the authority of the "hot oil" and Schechter cases discussed *supra* pp. 348-350.

75. On the authority of the Child Labor cases: *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922); *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

76. *Tennessee Valley Authority v. Ashwander*, 78 F. (2d) 578 (C. C. A. 5th, 1935), *rev'd* 8 F. Supp. 893 (N. D. Ala. 1934), *cert. granted*, Oct. 14, 1935; s. c., 9 F. Supp. 800, 9 F. Supp. 965 (1935), 35 COL. L. REV. 1134. Note (1935) 48 HARV. L. REV. 806 (lower court). See also Note (1934) 44 YALE L. J. 326 (*re* regulation and taxability of T. V. A. by the states). See Welch, *Constitutionality of the Tennessee Valley Project* (1935) 23 GEO. L. J. 389.

77. *United States v. Certain Lands in the City of Louisville*, 78 F. (2d) 684 (C. C. A. 6th, 1935), *cert. granted* Oct. 28, 1935. See also *Duke Power Co. v. Greenwood County*, 12 F. Supp. 70 (W. D. S. C. 1935) (denying power of Congress to loan money to a county for erection of a power plant to sell power locally). *Contra*: *Kansas Gas, Elec. Co. v. City of Independence*, 79 F. (2d) 32 (C. C. A. 10th, 1935). See Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131.

78. Arguments have been concluded in all these cases except the housing case.

79. For discussions of cases on this subject during recent terms see Fraenkel, *The Supreme Court and the Taxing Power of the States* (1934) 28 ILL. L. REV. 612, 627; Fraenkel, *The Supreme Court and the Taxing Power of the States—1933 Term* (1934) 4 BROOKLYN L. REV. 123, 132.

80. 295 U. S. 422 (1935), 35 COL. L. REV. 1151, 49 HARV. L. REV. 159.

81. Following *Brown v. Fletcher*, 235 U. S. 589 (1915). *Maguire v. Trefry*, 253 U. S. 12 (1920), was distinguished because it relied on *Blackstone v. Miller*, 188 U. S. 189 (1903), which had been overruled in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930), and because the tax there involved had resulted in no double taxation of trustee and beneficiary.

majority opinion,⁸² the judgment of the state court was reversed also as to the trusts of land wholly within the state.

Justice Stone, with whom Justices Brandeis and Cardozo concurred, pointed out that the Supreme Court was in no way concerned with this question and that nothing could "excuse the abuse of power involved in our reversing its [the state supreme court's] judgment on state grounds."⁸³ Considering the other question, the minority attacked the conceptions of "situs" and "jurisdiction to tax" which have confused so many recent decisions on the subject.⁸⁴ They interpreted these to mean "no more than . . . the legal interests of ownership [which] enjoy the benefit and protection of the laws of that state"⁸⁵ and of that state alone. But Justice Stone contended that different legal interests might exist with regard to the same property and be protected by the laws of different states. Therefore they might be taxed by all the states concerned without violation of the Fourteenth Amendment. Thus a state could tax its residents on shares of stock, though the only property of the corporation was real estate situate and taxable in another state,⁸⁶ or upon a contract for the purchase of such property,⁸⁷ or upon a mortgage on foreign land.⁸⁸ The right to tax incomes from whatever source derived had, he said, been upheld by the recent decision of *Lawrence v. State Tax Comm.*⁸⁹ Analyzing the trust certificates he concluded they were similar in character to shares of stock, since the holders had no rights whatever against the land, but only against the trustee. These rights, Justice Stone concluded, were protected by the laws of Ohio.⁹⁰

The problem was somewhat complicated in the *Senior* case because the tax, though measured by income, was laid on the property. While, in the *Lawrence* case, the Supreme Court upheld an income tax derived from a business carried on in another state, it has never passed on the right of one state to tax to its residents income derived from foreign real estate. An opportunity of deciding this question was lost at the term just ended when a writ of certiorari was dismissed because the federal question did not suffi-

82. There was only reference to a concession of counsel that the state had no power to tax lands within its borders in the manner provided by this law.

83. 295 U. S. at 440 (1933).

84. For recent discussions see Brown, *Multiple Taxation by the States—What Is Left of It?* (1935) 48 HARV. L. REV. 407; Buchanan and Myers, *The Administration of Intangibles in View of First National Bank v. Maine* (1935) 48 HARV. L. REV. 911; Fraenkel, *supra* note 79, 28 ILL. L. REV. at 612, 4 BROOKLYN L. REV. at 123; Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628; Merrill, *Jurisdiction to Tax—Another Word* (1935) 44 YALE L. J. 582; Rodell, *A Primer on Interstate Taxation* (1935) 44 YALE L. J. 1166.

85. 295 U. S. at 434 (1935).

86. *Darnell v. Indiana*, 226 U. S. 390 (1912).

87. *Citizens Nat. Bank v. Durr*, 257 U. S. 99 (1921).

88. *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879).

89. 286 U. S. 276 (1932).

90. In fact, however, the trustee was, as to two of the three foreign parcels, not a resident of Ohio. See *Senior v. Braden*, 128 Ohio St. 597, 193 N. E. 614 (1934).

ciently appear.⁹¹ The Appellate Division in New York had denied the right of the state to tax such income;⁹² in its opinion the court had not stated that the denial rested upon the Fourteenth Amendment, although the cases relied upon were all decisions of the United States Supreme Court dealing therewith.⁹³ The Supreme Court refused to consider the merits, since the decision might have rested on provisions of the state constitution. The Chief Justice said: "Jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record."⁹⁴

The decision in the *Senior* case, while casting doubt upon the position of the Court with regard to an income tax on foreign rents, is by no means decisive. It must not be forgotten that the Court has laid down very broad rules in considering income taxes, that they are imposed because of the protection afforded a person by the state in which he lives, that the purpose of the graduated tax would, to a considerable extent, be defeated were the state unable to include all sources of income—not, it must be admitted, that the existence of tax exempt government and municipal securities does not already mar the consistency of a graduated tax. It is in any event to be hoped that when the question is properly presented to the Court it will follow the implications of the *Lawrence* case, rather than those of the *Senior* case.⁹⁵

Other aspects of due process were considered in upholding the right of Pennsylvania to tax pictures loaned to a museum in Philadelphia by a resident of New York⁹⁶ and denying to a Georgia city the right to assess a street railway company for street paving which would not benefit the company.⁹⁷ The decision in the first case was unanimous and rested on the fact that the owner of the pictures had set no time for their return to his home in New York and had done nothing to effectuate an intention to have them returned. In the second case Justices Brandeis, Stone and Cardozo dissented on the ground that the adoption by the city of the paving ordinance created a presumption of benefit not rebutted by evidence the company offered. According to the minority this evidence was no more than that the paving would be of no advantage to the company in the operation of its railway, that the

91. *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934). Attention was called to the fact that no effort had been made to get the New York court to amend its remittitur to show the actual basis of the decision. This was attempted later, without success. *Matter of Pierson v. Lynch*, 266 N. Y. 431 (1934).

92. *Matter of Pierson v. Lynch*, 237 App. Div. 763, 263 N. Y. Supp. 259 (3d Dep't 1933), *aff'd without opinion*, 263 N. Y. 533, 189 N. E. 684 (1933).

93. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895); *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83 (1929); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930).

94. 293 U. S. at 54.

95. For further discussion of this problem, see Fraenkel, *Taxation of Income Derived from Real Property Located Outside of State*, N. Y. L. J., May 1, 1933, at 2600.

96. *City Bank Farmers Trust Co. v. Schnader*, 293 U. S. 112 (1934) (involving the Clarke collection), (1935) 20 CORN. L. Q. 252, (1935) 23 GEO. L. J. 340, (1935) 83 U. OF PA. L. REV. 389.

97. *Georgia Ry. & Elect. Co. v. Decatur*, 295 U. S. 165 (1935).

old pavement was "good enough." Justice Sutherland, on the other hand, held that the proof showed an arbitrary abuse of power by the city and should therefore have been heard by the trial court; his summary of the offer includes the statement that "the pavement in question added nothing in value to the street-railway property"; but this seems to be a conclusion drawn merely from the absence of added advantage in operation. If this is the case, the decision of the majority makes it almost impossible ever to assess a street railway company for paving between its tracks.

*Equal Protection*⁹⁸

The Court reversed an injunction against the collection of a tax on railway property, because no proof had been produced of discriminatory assessment; overvaluation due to mere error of judgment was not sufficient basis for relief.⁹⁹

A statutory court of three judges declared that the West Virginia chain store license tax as applied to gasoline filling stations violated the equal protection clause of the Fourteenth Amendment, and also that such stations were not stores within the meaning of the law.¹⁰⁰ With both conclusions the Supreme Court disagreed in *Fox v. Standard Oil Co. of N. J.*,¹⁰¹ by a five-to-four vote. Justice Cardozo, for the majority, concluded that by statutory definition¹⁰² "store" included every place where any kind of merchandise was sold. For that reason the understanding of the "common man", relied on by the lower court, was held of no consequence. Legislative history was drawn on in aid of this construction, since an amendment aimed at the exclusion of gasoline stations had been rejected. This, said the Court, though not conclusive was to be taken into consideration.

The constitutional question the Court considered from two aspects: whether gasoline stations in chain ownership were properly subject to a tax different from that imposed on unitary ownership, and whether the tax was oppressive in its exactions. On the first point a majority in the lower court had agreed with the contentions of the state, and the Supreme Court could see no reason to reject this conclusion, resting as it did on its own earlier

98. For decisions at recent terms see Fraenkel, *supra* note 79, 28 ILL. L. REV. at 624.

99. *Rowley v. Chicago & N. W. Ry.*, 293 U. S. 102 (1934).

100. *Fox v. Standard Oil Co. of N. J.*, 6 F. Supp. 494 (S. D. W. Va. 1934).

101. 294 U. S. 87 (1935), 44 YALE L. J. 619. In a similar case, *Fox v. Gulf Refining Co.*, 295 U. S. 75 (1935), the additional contention was made that filling stations operated by licensed dealers were not taxable to the gasoline company within the meaning of the statute. The District Court, following its decision in the *Standard Oil* case, did not pass upon this point. The judgment was, therefore, reversed and the case remanded to the District Court for further consideration. Thereupon the District Court held that in view of the amount of control exercised by the Oil Company the stations operated by licensed dealers were properly included in determining the total number of stations for which the Oil Company was chargeable under the tax. *Gulf Refining Co. v. Fox*, 11 F. Supp. 425 (S. D. W. Va. 1935). See also *Ashland Refining Co. v. Fox*, 11 F. Supp. 431 (S. D. W. Va. 1935).

102. W. Va. Laws, Extra Sess. 1933, c. 33, § 8.

decisions dealing with chain store taxes.¹⁰³ As proof of the power of the chain, Justice Cardozo instanced the eagerness of independents to borrow its insignia in order to share in its popularity. Regarding the oppressive incidence of the tax, he recalled Justice Sutherland's statement made during the last term in the *Magnano* case¹⁰⁴ to the effect that the extent of the burden was beyond the control of the courts unless the law was not a taxing statute at all. The fact that gasoline chains, owing to the number of their units, had to pay in the upper brackets was not the fault of the law, but of the business. The minority contented themselves with expressing agreement with the opinions rendered in the court below, one of which had accepted the company's contention that gasoline stations could not be treated as though they were regulation chain stores.

But in a six-to-three decision, *Stewart Dry Goods Co. v. Lewis*,¹⁰⁵ the majority of the Court reached a different conclusion in considering the Kentucky tax on gross sales graduated between \$400,000 and \$1,000,000. Justice Roberts held that this law was a denial of equal protection since there was no relation between gross sales and capacity to pay, or profits. He could find no economic difference between the first and the thousandth sale of the year which would justify a different rate of tax. He characterized it as no less arbitrary than would be a tax on cattle or lands graduated according to the number owned by the individual taxpayer.

The contention of the state that the tax was an excise justified by a relation between volume and profits was denied because it was admitted there was no such "constant" relation. The argument that it was more convenient to administer than an income tax, because of its simplicity and economy of collection, saving both to the taxpayer and the state in preparation and review, was rejected as merely an excuse: "It is difficult to be just and easy to be arbitrary."¹⁰⁶ Justice Roberts called attention to the fact that because of the tax one large taxpayer had done business in the state at a loss and declared it immaterial that this taxpayer was not one of the parties to the suit. But he was careful to state that the Court was not condemning the levy on the sole ground that it was excessive. He held inapplicable many earlier decisions which apparently led to a contrary result;¹⁰⁷

103. *State Tax Comm. v. Jackson*, 283 U. S. 527 (1931); *Louis K. Liggett Co. v. Lee*, 288 U. S. 517 (1933). Fraenkel, *supra* note 79, 28 ILL. L. REV. at 625.

104. *Magnano Co. v. Hamilton*, 292 U. S. 40, 44, 46 (1934). See Fraenkel, *supra* note 79, 4 BROOKLYN L. REV. at 135.

105. 294 U. S. 550 (1935), 35 COL. L. REV. 606, 48 HARV. L. REV. 1434, 83 U. OF PA. L. REV. 1024.

106. 294 U. S. at 560.

107. *Clark v. Titusville*, 184 U. S. 329 (1902), which upheld a license fee varied according to the volume of business done in the preceding year, was distinguished because there the percentage decreased with increased volume. *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61 (1913), which upheld a larger license fee for theatres selling higher priced tickets, was distinguished on the ground that there was "a natural relation between the price of admission and revenue."

and distinguished the chain store cases because of the advantages incident to the conduct of multiple stores: ". . . a small difference in the method of conducting business may be availed of by government in imposing different taxes."¹⁰⁸

Justices Brandeis, Stone and Cardozo could accept none of these arguments. Volume, said Justice Cardozo, has a natural relation to profits because larger sales are sought for by business "with avidity."

"They [larger sales] are not the products of whim and fancy. They represent a conception of probabilities and tendencies confirmed by long experience. The conception is no more arbitrary in the brain of a government official than it is in the mind of a company director."¹⁰⁹

Using a wealth of reference, he pointed out that, within certain limits, efficiency is related to size; the law in setting both lower and upper limits recognized these facts of economic life. A graduated tax based on volume was fairer, he argued, than a flat property tax; the law had been enacted, he reminded, at a time when the constitutionality of a graduated chain store tax was still in doubt; he accepted the state's arguments as to the advantages of a gross receipts tax over an income tax. The Justice pointed out also that many students of economics preferred the graduated to the flat sales tax as being less likely to be passed on to the consumer, and thereby more efficient "as an instrument of social justice." The choice could not be deemed irrational, and should, therefore, not be condemned by the Court.

Justice Cardozo went further even than this, in quoting statistics of the Harvard Bureau of Business Research¹¹⁰ which showed that gross sales have a direct percentage relation to profits—authority which, while not unchallenged, at least served to justify legislative discretion. In refutation of the fear that the tax might be increased to the point of actual loss he answered that the Kentucky constitution, as interpreted by its courts¹¹¹ prevented this result. He cited numerous cases supporting the conclusion of the minority, in particular, *Pacific American Fisheries v. Alaska*,¹¹² which upheld a graduated tax on salmon, the rate increasing with the number of cases. How the wind of reality blows through this dissent, in contrast with the majority's arid analogy of a tax increasing with the number of cattle or of parcels of land! Yet every landlord knows how important to his profits are diversity and quantity of ownership.

108. 294 U. S. at 565 (1935).

109. *Id.* at 572.

110. Bulletins 74 (1928); 78 (1929); 83 (1930); 85 (1931).

111. *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296 (1909).

112. 269 U. S. 269 (1925).

*Interstate Commerce*¹¹³

At this term familiar principles were reaffirmed. The question left open at a recent term in the first *Detroit Bridge Case*,¹¹⁴ whether the operation of an international bridge constituted foreign commerce, was forced upon the Court by an amendment to the charter of the company depriving it of the right to do anything else, a right which, even though not exercised, had sufficed to uphold the tax when first challenged.¹¹⁵ The Court finally held in the second case¹¹⁶ that on the authority of *Henderson Bridge Co. v. Kentucky*¹¹⁷ the foreign business was conducted by the persons who used the bridge, not by its owners.

A Pennsylvania tax on the sale or delivery of liquid fuel was approved,¹¹⁸ although shipments were made to the purchaser from outside the state, because there was no requirement in the sales contracts that this be done and there had been no appropriation of particular fuel to the contract. The law taxed only sales made in the state; that was where these sales had been made. A Montana excise tax imposed on telephone instruments used both for interstate and local messages was declared a burden on interstate commerce,¹¹⁹ since it was impossible to allocate the tax solely to the intrastate business of the company, and it was impossible for the company to discontinue its intrastate activities without at the same time withdrawing from its interstate operations. But a Georgia license fee exacted of vehicles was, under equally well settled principles, held to be no such burden.¹²⁰ The distinction evidently rests upon the fact that in the latter case the money went into a fund for the upkeep of the highways used by the taxed vehicles.¹²¹ Other objections to this Georgia tax, based on exemptions,¹²² were held unavailing, one of them on the ground that the point had not been raised in the state court. And a property tax on a domestic corporation was approved¹²³ though all of its property was intangible and was used in interstate commerce only, because the effect upon such commerce was "at most indirect and incidental."¹²⁴

113. For decisions at recent terms see Fraenkel, *supra* note 79, 28 ILL. L. REV. at 618, 4 BROOKLYN L. REV. at 124.

114. *Detroit Internat. Bridge Co. v. Corporation Tax App. Board*, 287 U. S. 295 (1932).

115. See Fraenkel, *supra* note 79, 28 ILL. L. REV. at 620.

116. 294 U. S. 83 (1935).

117. 166 U. S. 150 (1897).

118. *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169 (1935), 83 U. OF PA. L. REV. 795.

119. *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935).

120. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm.*, 295 U. S. 285 (1935).

121. See *Clark v. Poor*, 274 U. S. 554 (1927).

122. See *Continental Baking Co. v. Woodring*, 286 U. S. 352 (1932); *Hicklin v. Coney*, 290 U. S. 169 (1933).

123. *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15 (1934), (1935) 23 GEO. L. J. 338.

124. 293 U. S. at 21.

Conflicting Sovereignities

It is fundamental to our federal system that neither the states nor the central government may tax the instrumentalities of the other.¹²⁵ The application of this principle has caused the Supreme Court much concern, leading in recent years to the rejection of some earlier views.¹²⁶

At this term the Court decided that the same principle applied to the territories, not for constitutional reasons, as in the case of the states, but because "the dependency may not tax the sovereign."¹²⁷ Puerto Rico attempted to tax the capital of the branch of the National City Bank located there. The bank claimed this form of tax was prohibited by Act of Congress; ¹²⁸ this by its terms referred only to states, but the Court declared territories included, both by statute ¹²⁹ and decision.¹³⁰ A similar result had been reached by the Supreme Court of the Philippine Islands.¹³¹

An attempt to obtain exemption in the case of the owner of land seized by the federal government for liquor violations failed.¹³² The Court held that the land remained subject to local taxes because the judgment of forfeiture obtained by the United States had never been carried out, the owner having released the land by furnishing a bond for the penalties due.

Another case is pertinent to this discussion, though it involves federal, not state taxes. The trustees of the Boston Elevated Company, appointed by the Governor of Massachusetts to manage the property during a limited period of public operation, claimed that they were state officials and need pay no income tax on their compensation. The Court overruled the contention.¹³³ The Chief Justice, following earlier liquor tax cases,¹³⁴ declared that the federal taxing power extends to all state activities "which constitute a departure from usual governmental functions",¹³⁵ that the form of organization is immaterial, and that employees, however described or selected, can claim no exemption, since their compensation, in whatever manner paid, "can have no quality . . . superior to that of the enterprise."¹³⁶

125. *M'Culloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

126. See Fraenkel, *supra* note 79, 28 ILL. L. REV. at 623, 4 BROOKLYN L. REV. at 127; Boudin, *Taxation of Governmental Instrumentalities* (1933) 22 GEO. L. J. 1.

127. *Domech v. National City Bank*, 294 U. S. 199 (1935).

128. 13 STAT. 99, III-III2 (1864), 12 U. S. C. A. § 548 (1927).

129. 39 STAT. 954 (1917), 48 U. S. C. A. § 734 (1927).

130. *Talbott v. Silver Bow County*, 139 U. S. 438 (1891).

131. *National City Bank v. Posados*, Phillip. Sup. Ct., Sept. 21, 1934, *cert. granted*, Oct. 14, 1935.

132. *Motlow v. Missouri ex rel. Koeln*, 295 U. S. 97 (1935).

133. *Helvering v. Powers*, 293 U. S. 214 (1934), (1935) 35 COL. L. REV. 301.

134. *South Carolina v. United States*, 199 U. S. 437 (1905); *Ohio v. Helvering*, 292 U. S. 360 (1934).

135. 293 U. S. at 225.

136. *Id.* at 227.

III

CRIMINAL LAW

Notable decisions were rendered in the field of criminal law. Chief among them is that in the *Mooney* case.¹³⁷ Here the concept of due process, which has been so slowly applied in the protection of liberty¹³⁸ in contrast with the quick march of its protection of property,¹³⁹ was extended to attack a conviction based on perjured testimony, in the procuring of which the prosecution connived. The memorandum of the Court stated: "It is a requirement that cannot be deemed satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."¹⁴⁰ A new trial did not, however, follow, because the Court wished to give the state courts an opportunity of affording this relief. While the lower courts of California failed to take advantage of the opportunity,¹⁴¹ the supreme court of that state has now granted a writ.¹⁴² The question remains as to what the United States Supreme Court will do if the state court should dismiss on the facts.

In part, that question was answered by *Norris v. Alabama*,¹⁴³ the second *Scottsboro* decision. There the state courts had refused to find the fact urged by the defense, that discrimination had been practiced against negroes in the selection of juries.¹⁴⁴ They accepted as sufficient the denials of jury commissioners of improper action. But the Supreme Court refused to accept the bald denials in the face of testimony strongly indicating the contrary. The Chief Justice said: "For this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate."¹⁴⁵ Prior to this decision, statements had been made to the effect that the Court would examine the facts where a constitutional issue was presented.¹⁴⁶ But in none of these

137. *Mooney v. Holohan*, 294 U. S. 103 (1935), 35 COL. L. REV. 282, 48 HARV. L. REV. 1024. See Note (1935) 35 COL. L. REV. 404.

138. See Fraenkel, *How Far Will the Supreme Court Reverse State Convictions?* (1935) 6 FED. JUROR 7.

139. See 2 BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) 116, 117, § 1; Fraenkel, *supra* note 79, 28 ILL. L. REV. at 613, 614, 617, 618. Cf. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 80.

140. 294 U. S. at 112 (1935).

141. See N. Y. Times, April 20, 1935, at 3; *id.*, May 15, 1935, at 21.

142. *Id.*, June 18, 1935, at 3.

143. 294 U. S. 587 (1935), 35 COL. L. REV. 776.

144. *Norris v. State*, 229 Ala. 226, 156 So. 556 (1934).

145. 294 U. S. at 597.

146. *Creswill v. Grand Loge*, 225 U. S. 246, 261 (1912); *Northern Pac. Ry. v. North Dakota*, 236 U. S. 585, 593 (1915); *Ward v. Love County*, 253 U. S. 17, 22 (1920); *Davis v. Wechsler*, 263 U. S. 22, 24 (1923); *Fiske v. Kansas*, 274 U. S. 380, 385 (1927); *Ancient Egyptian Arabic Order v. Michaux*, 279 U. S. 737, 745 (1929).

cases was actual testimony disregarded as having insufficient weight. That was done for the first time in this case. Of the testimony of the jury commissioners the Court said: "If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement."¹⁴⁷ A similar result was reached in *Hollins v. Oklahoma*.¹⁴⁸

Accordingly, if Mooney must again appeal to the Supreme Court because the state court accepts as true a bare denial by Fickert, the District Attorney, of his complicity in the use of perjured testimony, it may be that the Court will reject such denial as lacking in substance.

IV

INSOLVENCY

In *Clark v. Williard*¹⁴⁹ the Court had, at the preceding term, held that the Iowa liquidator of a corporation of that state must, because of the full faith and credit clause, be allowed the right to sue to recover its property situate in Montana, since he was the successor to the corporation rather than a mere custodian. The case was remanded to the state court to determine if local policy permitted priority to local creditors. The state court then concluded that attachments and executions could be levied though the result was inequality of distribution.¹⁵⁰ This decision was affirmed.¹⁵¹ Justice Cardozo stated: "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts."¹⁵² Imposition upon the title of the liquidator of the liens created by local proceedings violated no constitutional principle. Choice of policy among the states was uncontrolled by the Constitution.

The respective jurisdiction of state and federal courts was involved in a group of Pennsylvania cases. In one,¹⁵³ receivers were appointed by a federal court at the instance of a stockholder of a corporation subject to the State Banking Department. The Secretary of Banking then sought to take

147. 294 U. S. at 598. The Court also reviewed the evidence bearing upon the claim of defendant that the names of six negroes appearing on one of the jury rolls were forgeries, and the finding of the trial court overruling this contention was reversed.

148. 295 U. S. 394 (1935). The companion Scottsboro case, *Patterson v. Alabama*, 294 U. S. 600 (1935), was decided on technical issues which are discussed hereafter, pp. 383-384.

149. 292 U. S. 112 (1934).

150. *Mierx v. Federal Surety Co.*, 97 Mont. 503, 34 P. (2d) 982 (1934).

151. *Clark v. Williard*, 294 U. S. 211 (1935), 35 COL. L. REV. 604, 23 GEO. L. J. 545. See Albertsworth, *Advisory Functions in Federal Supreme Court* (1935) 23 GEO. L. J. 643, 658-660; Legis. (1935) 48 HARV. L. REV. 835.

152. 294 U. S. at 213.

153. *Pennsylvania v. Williams*, 294 U. S. 176 (1935), 83 U. OF PA. L. REV. 687. See also *Gordon v. Ominsky*, 294 U. S. 186 (1935).

possession in order to liquidate under the state law. In another case¹⁵⁴ an insurance company was involved. Proceedings were had in both state and federal courts, in each of which injunctions were issued, with the result that liquidation became impossible. The Pennsylvania Supreme Court held that the federal court had no jurisdiction.¹⁵⁵ In a third case, *Gordon v. Washington*,¹⁵⁶ the Secretary of Banking had taken possession of a bank which held, as fiduciary, two "mortgage pools." Under local law, these were to be held by the Secretary as a receiver, with the right on the part of any certificate holder to apply to court for the appointment of a substitute fiduciary. Suits were then brought in the federal court seeking the appointment, not of a new fiduciary, but of a receiver. Receivers having been appointed, the Secretary refused to turn the property over, and was enjoined from doing so by the state court.

In all these cases the Supreme Court held that when it appeared that the proper state official could protect all private rights the federal court should have relinquished jurisdiction to him.¹⁵⁷ Nevertheless, the determination of the state court in the second of these cases was reversed because the federal court had first acquired the right to control the property by the prior filing of a bill followed by the service of process. The Supreme Court directed that this be exercised without prejudice to the right of the Commissioner of Insurance to conduct the actual liquidation. As Justice Stone said: "In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the district court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer."¹⁵⁸ So the right of the state to liquidate was upheld without impairment of the dignity of the federal court. In the last case the Supreme Court decided that the complaint was insufficient because no relief was sought other than the appointment of receivers; therefore the federal court should not have exercised its jurisdiction.

A number of cases relating to ancillary receivers have been discussed elsewhere.¹⁵⁹

V

PUBLIC UTILITIES

Every year the Court is confronted with problems which arise out of the regulation of utilities. The only one of these cases in the 1934 term

154. *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189 (1935).

155. *Commonwealth v. Penn General Casualty Co.*, 316 Pa. 1, 173 Atl. 637 (1934).

156. 295 U. S. 30 (1935).

157. *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189 (1935).

158. *Id.* at 197.

159. Fraenkel, *The Opinions of the United States Supreme Court for the 1934 Term—General Issues* (1935) 4 *FORDHAM L. REV.* 416, 450.

which lay down a far-reaching new principle was *West v. Chesapeake & Potomac Tel. Co.*¹⁶⁰ In determining the present value of a plant, a state commission, instead of making a physical appraisal, had translated the original cost by use of commodity indices. This, said Justice Roberts for the majority, was inappropriate, partly because the indices "were not prepared as an aid to the appraisal of property",¹⁶¹ partly on account of wide variation in results according to which index was used, and also on account of the necessity of arbitrarily weighting the indices. More fundamental was the further objection that by this method "the result is affected by sudden shifts in price level."¹⁶² As such a plant is not by its very nature subject to quick conversion into cash, valuations should not be based on precipitate rises or falls in price level. The Court recognized, however, that in valuing specific property, price levels were suitable, as, for example in fixing the value of steel rails by comparing present prices with those prevailing at the time of acquisition. While the injunction against the rates fixed by the commission was affirmed, the Supreme Court held that the District Court should not have attempted itself to value the property, and that the basis of its valuation, cost less depreciation, was as arbitrary as that made by the commission.

Justices Brandeis, Stone and Cardozo dissented on the ground that the complainant had not sustained the burden of proving that the rates fixed by the commission were confiscatory. Justice Stone criticized the opinion of the majority for in no way meeting that issue, and for deciding the case on a point not raised in the record or considered by the lower court. He cited the recent *Los Angeles* case¹⁶³ as requiring proof of confiscation before the Court would condemn the method used by a commission in reaching its result. The majority in justification concluded that where the method was wrong "its use necessarily involved unjust and inaccurate results."¹⁶⁴

Justice Stone pointed to the fact that the use of indices had not been objected to at the hearing, that it was adopted to save time and money and that the company itself made no effort to prove values by appraisal. He argued that the recent case of *Clark's Ferry Bridge Co. v. Public Service Comm.*¹⁶⁵ had authorized the use of indices as preferable to appraisals. The proof the company offered was analyzed in the minority opinion and found wholly wanting:

160. 295 U. S. 662 (1935). See Note (1935) 49 HARV. L. REV. 397. For an extended discussion of this case see Sleff, *The Supreme Court Aids the Utilities* (Oct 2, 1935) 141 THE NATION 373.

161. 295 U. S. 669.

162. *Id.* at 672.

163. *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 304 (1933).

164. 295 U. S. at 675.

165. 291 U. S. 227, 236 (1934). Justice Roberts had cited this case as merely maintaining that indices were proper elements to be considered with appraisals. The perplexities of the subject are shown by the fact that different members of the Court interpreted so differently a decision of the previous year. An outsider can only read as he runs and hope his interpretation of the Court's meaning will be accepted. To this writer the opinion of the minority seems the more plausible one.

"It is unnecessary to discuss other defects of appellee's proof so extreme as to discredit it. Its reliance here upon its own proof is at most perfunctory. It seeks only to sustain the conclusions of the court below, which this Court rejects." ¹⁶⁶

Salutary words compose this dissent:

"In assuming the task of determining judicially the present fair replacement value of the vast properties of public utilities, courts have been projected into the most speculative undertaking imposed upon them in the entire history of English jurisprudence. . . . Such a property has no market value, because there is no market in which it is bought and sold. Market value would not be acceptable, in any event, because it would plainly be determined by estimates of future regulated earnings. . . . When we arrive at a theoretical value based upon such uncertain and fugitive data we gain at best only an illusory certainty. No court can evolve from its inner consciousness the answer to the question whether the illusion of certainty will invariably be better supported by a study of the actual cost of the property adjusted to price trends, or by a study of the estimates of engineers based upon data which have never existed and never will." ¹⁶⁷

Answering the criticisms in the majority opinion of the use of price indices, Justice Stone said that the record showed these to be less variable and more trustworthy than engineer's estimates:

"For a period of twenty years or more of rising prices, commissions and courts, including this one, have regarded price variations as persuasive evidence that present fair value was more than cost. I see no reason for concluding that they are of less weight in times of declining prices." ¹⁶⁸

One is reminded of Justice Brandeis' warning in the *Southwestern Telephone* case,¹⁶⁹ that the utilities might come to regret their insistence upon cost of reproduction as the basis of rate regulation.

Rate regulation has been badly handled in this country,¹⁷⁰ and for this the Supreme Court must bear a large part of the blame. Too often it has

¹⁶⁶ 295 U. S. at 688.

¹⁶⁷ *Id.* at 689. See Bonbright, *The Problem of Judicial Valuation* (1927) 27 COL. L. REV. 493; Hale, *Value and Vested Rights* (1927) 27 COL. L. REV. 523; Hale, *What is a "Confiscatory" Rate?* (1935) 35 COL. L. REV. 1045; Richberg, *Value—by Judicial Fiat* (1927) 40 HARV. L. REV. 567; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 818.

¹⁶⁸ 295 U. S. at 692.

¹⁶⁹ *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U. S. 276, 302, 303, and see especially footnote 16 (1923). The discussion of the whole subject is one of Justice Brandeis' greatest. In this, by a specially concurring opinion, Justice Holmes alone joined.

¹⁷⁰ Barnes, *Federal Courts and State Regulation of Utility Rates* (1934) 43 YALE L. J. 417; Bauer, *The O'Fallon Case—The Decision and What it Portends* (1929) 18 NAT. MUN. REV. 458; BAUER, *EFFECTIVE REGULATION OF PUBLIC UTILITIES* (1925) 64-138; Bauer, *Can Government Leadership Cut the Valuation Tangle?* (1934) 23 NAT. MUN. REV. 601; Beutel, *Valuation as a Requirement of Due Process of Law in Rate Cases* (1930) 43 HARV. L. REV. 1249; Beutel, *Due Process in Valuation of Local Utilities* (1929) 13 MINN. L. REV. 409; Clay, *Control of Public Utility Rates and the Supreme Court* (1930) 64 U. S. L. REV. 464;

shown itself motivated by theoretical considerations not adapted to the peculiar nature of the problem. As a result there has been not only wasteful and time-consuming litigation,¹⁷¹ but a good deal of fleecing the public by rates temporarily supported by injunction and never altogether refunded.¹⁷² There are even those who trace to the decisions of the Supreme Court much of the dizzy financing indulged in by holding companies in the period before the crash.¹⁷³ It is time this matter received careful study by Congress, so that the experience of other countries¹⁷⁴ may be put at our disposal.

In two cases arising in Ohio the Court held that confiscation had been established by a return of only about 4.5 percent on investment. In one,¹⁷⁵ the local commission, passing on a 1929 schedule several years after that date, based its determination on estimated earnings and refused to consider the actual experience of the intervening years. This, said Justice Cardozo, was arbitrary, because "prophecy, however honest, is generally a poor substitute for experience." The argument that lower prices might, by increasing volume, enhance the return, he judged was unavailing for lack of proof: "Present confiscation is not atoned for by merely holding out the hope of a better life to come."¹⁷⁶ In the other case¹⁷⁷ objections to particular items were considered: reductions made by the commission of allowances for loss of gas by leakage and of expenses for new business, on the ground that such items could have been lessened, were deemed arbitrary for lack of proof that the company had acted negligently or inefficiently; adoption of a particular method of spreading over several communities the costs of superintendence was condemned because the company had been given no opportunity to meet the issue; especially because, in the companion case, a different method had been used, both times to the disadvantage of the company; and the expenses

J. H. Cohen, *Confiscatory Rates and Modern Finance* (1929) 39 YALE L. J. 151; Collins, *Trend of United States Supreme Court Decisions Affecting Rates of Public Utilities* (1934) 20 A. B. A. J. 535; GLAESER, *OUTLINES OF PUBLIC UTILITY ECONOMICS* (1927) 455-480; Groninger, *Discontent with Public Utility Rate Regulation* (1929) 4 IND. L. J. 248; HENDERSON, *Railway Valuation and the Courts* (1920) 33 HARV. L. REV. 902, 1031; Lilienthal, *Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379; Lilienthal, *Regulation of Public Utilities During the Depression* (1933) 46 HARV. L. REV. 745; Manton, *Rate Making and Judicial Review* (1930) 4 ST. JOHN'S L. REV. 230; Rosenbaum, *Rate Planning—a Departure From Fair Return on Fair Value Methods* (1933) 7 U. OF CIN. L. REV. 1; Willis, *Has Government Regulation of Utilities Proven a Failure?* (1930) 6 IND. L. J. 111; Note (1930) 40 YALE L. J. 81.

171. Bauer, *supra* note 170, 18 NAT. MUN. REV. at 463, 23 *id.* at 602; Beutel, *supra* note 169, 13 MINN. L. REV. at 423, 43 HARV. L. REV. at 1279; Lilienthal, *supra* note 169, 46 HARV. L. REV. at 754, 768, 775; Note, 40 YALE L. J. 81, 87. See also FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) 106.

172. Note (1930) 40 YALE L. J. 81, 87, 88; N. Y. Times, June 28, 1935, at 14.

173. Cf. Cohen, *supra* note 170, 39 YALE L. J. at 179, 180, 186; RIPLEY, *MAIN STREET AND WALL STREET* (1927) 337; Willis, *supra* note 169, 6 IND. L. J. at 116.

174. See Dougall, *Railway Rates and Rate-Making in France Since 1921* (1933) 41 J. POL. ECON. 289; MORGAN, *THE REGULATION AND THE MANAGEMENT OF PUBLIC UTILITIES* (1923) 331-336.

175. *West Ohio Gas Co. v. Public Utilities Comm.* (No. 1), 294 U. S. 79 (1935).

176. *Id.* at 83.

177. *West Ohio Gas Co. v. Public Utilities Comm.* (No. 2), 294 U. S. 63 (1935).

of the rate litigation were held a proper item of cost, to be spread over the life of the ordinance attacked. Since the items so allowed as expenses would have reduced the return to 4.53 percent, the majority of the Court held the rates to be confiscatory, partly because two of the years considered were before the depression. Justice Stone disagreed with the conclusion as to the cost of procuring new business, which he believed should be treated as a capital expense. With that item eliminated, the return would be 4.91 percent, not, in his opinion, too low.

Questions of a different order came up in *Nashville, Chattanooga & St. L. Ry. v. Walters*¹⁷⁸ and *Panhandle Eastern Pipe Line Co. v. State Highway Comm.*¹⁷⁹ In the first of these cases a railroad company objected to being required to pay half the cost of building an underpass under a proposed highway; in the second a pipe line company objected to being compelled on account of highway construction to re-lay pipes without compensation. In each instance the Court sustained the position of the company. The railroad based its contention on the changed economic conditions due to motor competition, which the highway, constructed with the aid of federal funds, was designed to foster. Justice Brandeis believed all the factors such as to require their consideration by the state court. Justices Stone and Cardozo found no evidence of arbitrary action. The pipe line company contended that its property was being taken without compensation; the state contended that, like a railroad company, the pipe line company could be compelled to remove obstructions to highways. Justice McReynolds, in accepting the views of the company, pointed out that the railroad was required to eliminate grade crossings in the interests of public safety¹⁸⁰ and that there was no proof that public safety was impaired by pipe lines buried under ground. He called attention to a case which had held invalid a Pennsylvania law forbidding the mining of coal under streets in such a way as to cause the subsidence of dwellings.¹⁸¹

VI

MISCELLANEOUS CONSTITUTIONAL PROBLEMS

Federal

Twice the Supreme Court ruled on the power of lower federal courts with respect to jury trials; five times on the powers of Congress; once on the removal power of the President, and, at the instance of Huey Long, on the immunity of Senators. The late Senator from Louisiana moved to set aside the service upon him of a summons in a libel action on the ground that while attending a session of Congress he was immune from process. Justice

178. 294 U. S. 405 (1935), 44 YALE L. J. 1259.

179. 294 U. S. 613 (1935), 35 COL. L. REV. 938.

180. *Chicago B. & Q. Ry. v. Chicago*, 166 U. S. 226, 250, 252 (1897); *Erie Ry. v. Public Utility Com'rs*, 254 U. S. 394 (1921).

181. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413, 415 (1922), opinion by Holmes, J.

Brandeis in *Long v. Ansell*¹⁸² overruled his contention on the ground that the Constitution granted immunity only from arrest. No more, he said, had ever before been claimed by either house of Congress and immunity from process had consistently been denied both by the courts of the District of Columbia¹⁸³ and by those of the several states.¹⁸⁴

Qualifying its recent decision in *Myers v. United States*,¹⁸⁵ the Court in *Rathbun v. United States*¹⁸⁶ denied to the President the right to remove William E. Humphrey from his post on the Federal Trade Commission on the ground that he was appointed for a stated term, removal was limited by act of Congress to certain specified grounds, and such limitation was valid. Justice Sutherland said that in view of the non-partisan and quasi-judicial nature of the Commission, the existence of specified grounds in the law¹⁸⁷ precluded arbitrary removal even though the law did not provide that these causes were the only grounds for removal.¹⁸⁸ Congress, he noted, had intended the Commission to be free from political domination or control. In the *Myers* case the President's right to remove a postmaster had been upheld by a divided Court even though the law required the consent of the Senate to any removal, on the ground that the chief executive had such inherent power to remove his aides as could not be curbed by Congress. The majority opinion in that case contained such broad language by Chief Justice Taft, that Justice McReynolds, in his dissent, protested it was inclusive enough to cover the case of a member of one of the important commissions such as the Federal Trade Commission.¹⁸⁹ Now the Court has confined the authority of that case to the removal of executive officers only. The Federal Trade Commission, said Justice Sutherland, was an administrative body bound to perform the duties imposed upon it by Congress "without executive leave." The same principle is applicable also to members of the Interstate Commerce Commission and to judges of the Court of Claims. To assure independence of judgment Congress has power to fix terms and limit the right of removal:

"For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

182. 293 U. S. 76 (1934), (1935) 23 GEO. L. J. 316.

183. Citing *Merrick v. Giddings, McArth. & M.* 55, 67 (D. C. 1879); *Howard v. Citizens' Bank & Trust Co.*, 12 App. D. C. 222 (1898).

184. See cases cited in 293 U. S. at 82, n. 2.

185. 272 U. S. 52 (1926).

186. 295 U. S. 602 (1935), 35 COL. L. REV. 936, 49 HARV. L. REV. 330.

187. 38 STAT. 717 (1914), 15 U. S. C. A. § 41 (1926).

188. The case of *Shurtleff v. United States*, 189 U. S. 311 (1903), was distinguished, because, although there also specified grounds for removal were contained in the statute, no term was fixed and it was not to be supposed that Congress intended minor employees to have life terms.

189. 272 U. S. at 181.

The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.”¹⁹⁰

The power of Congress was upheld in all but one of these miscellaneous cases. In that case, *Stewart v. Keyes*,¹⁹¹ the unanimous Court held unconstitutional an act of Congress which purported to revive a cause of action in favor of an Indian even though the Statute of Limitations had already run prior to the enactment of the law. By so doing, said Justice Van Devanter, Congress in effect attempted to transfer property from one person to another in violation of due process of law. But in *Central Vermont Transportation Co. v. Durning*,¹⁹² Justice Stone upheld the constitutionality of a statute which declared that a corporation was not to be deemed a citizen of the United States unless the controlling interests therein were owned by American citizens, even though applied to an American corporation previously in existence, on the ground that the amendment was but in pursuance of a long established policy of restricting coastwise shipping to American nationals.

In *Detroit Trust Co. v. The Thomas Barlum*,¹⁹³ the question was whether admiralty courts could be given jurisdiction to foreclose mortgages on a ship, especially where the proceeds had in part, at least, been used for non-maritime purposes. The Supreme Court decided that the Ship Mortgage Act of 1920 imposed no conditions as to application of proceeds and that, although before the enactment of the law it had been held that admiralty had no jurisdiction to foreclose a ship mortgage,¹⁹⁴ Congress could constitutionally give the courts such jurisdiction. The Chief Justice reviewed the history of admiralty and the various changes which had been made by Congress and concluded that, as this law had been enacted to encourage investments in shipping and shipping securities, it was within the power granted by the Constitution.

The power of Congress to control federal receivers and to punish for contempt of its own processes was upheld. The precise point in the first of these cases¹⁹⁵ was whether a receiver might continue to engage in business without procuring a license required by state law. Since, under the express provisions of the Judicial Code,¹⁹⁶ receivers were bound to comply with state laws in the same manner as the original owner would have had to comply with them, Justice McReynolds held that Congress had full power to regu-

190. 295 U. S. at 629.

191. 295 U. S. 403 (1935).

192. 294 U. S. 33 (1935).

193. 293 U. S. 21 (1934).

194. *The J. E. Rumbell*, 148 U. S. 1, 15 (1893).

195. *Gillis v. California*, 293 U. S. 62 (1934), 35 COL. L. REV. 124.

196. 24 STAT. 554 (1887), 28 U. S. C. A. § 124 (1926).

late the activities of federal receivers and the duties of District Courts in relation thereto.

The contempt case ¹⁹⁷ grew out of the investigation of air mail contracts. William P. MacCracken, Jr., attorney for one of the parties under investigation, permitted one of their representatives to examine files which the Senate had subpoenaed him to produce. The representative took out some of the papers and attempted to destroy part of them. The Senate then cited the attorney for contempt. He resisted, claiming that the Senate had power only to compel production of testimony still available, not to punish for an act wholly completed. Justice Brandeis rejected so narrow a conception; he recalled many occasions on which this power had been exercised. He overruled also the contention that since the refusal to produce the papers had been made a criminal offense, it could not be punished as a contempt. The further argument that the missing papers had been recovered went, said Justice Brandeis, to the questions of guilt and punishment, questions with which the Court was in no way concerned.

The cases dealing with the power of the court in jury trials arose on account of the provision of the Seventh Amendment preserving the right to trial by jury in accordance with the common law. In one case the judge granted a new trial unless the defendant consented to an increase in the verdict; in the other case the judge, having reserved decision on a motion to dismiss the complaint, denied the same, but the Circuit Court, although finding the ruling erroneous, held it had power to grant a new trial only, not to dismiss. The Supreme Court held that both decisions were wrong. In the second of these cases, *Baltimore & Carolina Line v. Redman*,¹⁹⁸ Justice Van Devanter held that the practice of reserving decisions on motions for a dismissal or for a directed verdict had become well established prior to the adoption of the Amendment, that it was salutary because it shortened litigation, and that it carried with it the power to dispose of the case in the manner required by the final decision of the legal question presented by the motion. Therefore, said the Justice, the Circuit Court should have dismissed the complaint. In so far as *Slocum v. New York Life Ins. Co.*¹⁹⁹ appeared to hold otherwise it was overruled; actually the decision was not in conflict, because in that case decision on the motion had not been reserved. Technical though this distinction may be, it rests on plausible grounds; consent to the reservation may be construed as a waiver to any further trial, absence of the reservation precludes the inference of consent. In practice, however, it leaves the matter wholly in the hands of the trial judge, for by refusing to reserve the question he can insure a new trial. Unfortunately,

197. *Journey v. MacCracken*, 294 U. S. 125 (1935), 48 HARV. L. REV. 848, 83 U. OF PA. L. REV. 390 (lower court), 695.

198. 295 U. S. 654 (1935), 45 YALE L. J. 166 (1935).

199. 228 U. S. 364 (1913).

the *Slocum* decision, resting as it does on constitutional grounds, makes any ready correction impossible; at least the Court has now gone as far as it could without a complete repudiation of that case.

The other jury case raised a very perplexing problem, one so troublesome, indeed, that the decision turned on the vote of a single judge. In *Dimick v. Schiedt*,²⁰⁰ the majority of the Court reached the conclusion that the practice of reducing excessive verdicts in tort cases²⁰¹ did not justify the practice of increasing insufficient ones, though in either case the party penalized was given the option of a new trial. The distinction, said Justice Sutherland, lay in the fact that in the one situation the jury had found a verdict which included within its limits the lesser sum to which the judge was contingently reducing it; such was not the case when the verdict was increased above any amount found due by the jury. He reviewed the old English cases, found that the right to increase verdicts had been exercised only in cases of mayhem, and that this practice had become obsolete when our Constitution was adopted and had never been accepted in the United States either before or after that time.²⁰² In England even the right to direct reduction is now denied.²⁰³ Justice Sutherland remarked that were that question now before the Court for the first time, it might be decided otherwise; but that the practice would probably not be disturbed after a hundred years of acceptance. In discharge of the duty of upholding the Constitution, however, the Court "ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land."²⁰⁴ The vice of the practice attempted by the trial court was that it deprived plaintiff of the right to a trial at which the jury might find damages in excess of the sum fixed by the court; the consent of defendant to such proceeding is alone not sufficient. In final support of the result Justice Sutherland called attention to the fact that practice such as this had never previously been attempted in federal courts, though in many instances verdicts had been set aside as inadequate and new trials granted.

The Chief Justice and Justices Brandeis, Stone and Cardozo dissented. Justice Stone argued that the Seventh Amendment was not intended to preserve any particular procedure and that the Supreme Court had approved variations in procedure not known to the common law.²⁰⁵ He believed

200. 293 U. S. 474 (1935), 83 U. OF PA. L. REV. 684. See Note (1935) 20 CORN. L. Q. 342. On the lower court decision see (1934) 34 COL. L. REV. 1551; (1934) 48 HARV. L. REV. 333; (1934) 44 YALE L. J. 318.

201. Northern Pac. Ry. v. Herbert, 116 U. S. 642, 646, 647 (1886).

202. Citing in opposition *McCoy v. Lemon*, 11 Rich. 165 (S. C. 1856).

203. *Watt v. Watt*, [1905] A. C. 115.

204. 293 U. S. at 485.

205. Such as the appointment of auditors, *Ex parte Peterson*, 253 U. S. 300 (1920); the direction of a verdict on facts found, though the jury may have rendered a contrary general verdict, *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593 (1897); the limiting of a new trial to the question of damages, *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U. S. 494 (1931).

that when increasing, as when reducing, a verdict, the judge was doing no more than deciding the upper and lower limits of a permissible verdict; that only the party penalized by the change need consent. He rejected the ruling that the question had to be decided by the state of the common law at the time of the adoption of the Constitution, especially on account of the scant record of the practice; he insisted that in other fields the Court had taken a broader view.²⁰⁶ The common law, he said, was "something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it."²⁰⁷ He could see no reason of principle which upheld the right to decrease and denied that to increase; it was an "indefensible anachronism." The Justice also commented, with some sarcasm, on the fact that in this case an appeal had been allowed from the denial of a motion for a new trial, though the reason for the denial was a good one, when for centuries such ruling had been regarded "so much a matter of discretion that it is not disturbed when its only support may be a bad or inadequate reason."²⁰⁸ He hoped, at least, that the decision would have the result of changing this illiberal rule and subjecting to appellate review a denial when the motion was based on inadequacy or excessiveness. It is very doubtful, however, whether the Court will accept this suggestion; the contrary rule is too firmly embedded in federal practice.²⁰⁹

State Cases

Four of these cases dealt with regulation: of motor trucks, of foreign casualty companies, of dental advertising and of compensation for injuries occurring outside the state. Two dealt with procedure: limitation of action and service of process. In all of these cases the laws under attack were upheld.

An Iowa statute permits service on any agent employed in a county other than the one in which the principal resides.²¹⁰ Service was made upon a sales manager employed by an individual non-resident of Iowa. Justice McReynolds could see no objections to the service; defendant had voluntarily established an office in Iowa knowing that the business was subject to regulation.²¹¹ There is an intimation in the opinion that the statute as

206. Cf. *Funk v. United States*, 290 U. S. 371 (1933).

207. 293 U. S. at 495.

208. *Id.* at 497.

209. See *New York C. & H. R. R. v. Fraloff*, 100 U. S. 24, 31 (1879); *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 540 (1926).

210. IOWA CODE (1931) § 11079.

211. *Doherty & Co. v. Goodman*, 294 U. S. 623 (1935), 48 HARV. L. REV. 1433, 83 U. OF PA. L. REV. 921.

to service might not be valid, if the business could not have been made the subject of regulation.²¹² A compensation statute of Washington was amended after the injury in suit had been sustained, so as to cut down the time allowed for reopening claims. No reasonable limitation statute, said Justice Roberts, deprives any one of due process.²¹³ An Indiana statute prohibited insurance corporations not organized in that state from inserting in their policies any period of limitation shorter than three years.²¹⁴ The majority of the Court held that the mere fact that domestic companies were not subjected to a similar regulation did not violate the equal protection clause of the Fourteenth Amendment; there must be proof in the record that there were no differences between domestic and foreign corporations engaged in this line of business, which could justify the difference in laws.²¹⁵ Justice Stone suggested that reasons might be found: "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."²¹⁶ Justices Van Devanter, McReynolds, Sutherland and Butler dissented on the authority of numerous cases.²¹⁷ The ruling of the majority is salutary; it is difficult, however, to reconcile it with the decision of the Court in cases such as the gross sales tax case.²¹⁸

The other decisions were unanimous. In *Semler v. Oregon State Board of Dental Examiners*²¹⁹ an attempt was made to prevent the enforcement of a statutory regulation restricting dental advertising and prohibiting the employment of advertising solicitors. Plaintiff contended that the statements he made were truthful and that he had entered into contracts calling for advertisements of a type forbidden by the new law. Chief Justice Hughes held that his contracts were subject to proper regulation of the conduct of the profession, that there was nothing arbitrary in the fact that other professions were not similarly restricted, and that the restrictions had a reasonable basis: "The community is concerned with the maintenance of professional standards which will injure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief."²²⁰ That the particular dentist who attacked the law was telling the truth about his capacities could not affect the power of the legislature to deal with the general evil.

212. 294 U. S. at 627.

213. *Mattson v. Department of Labor*, 293 U. S. 151 (1934).

214. IND. ANN. STAT. (Baldwin, 1934) c. 57, § 9572.

215. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580 (1935), 23 GEO. L. J. 874.

216. *Id.* at 584.

217. The most recent being *Power Mfg. Co. v. Saunders*, 274 U. S. 490 (1927).

218. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935), cited *supra* note 105.

219. 294 U. S. 608 (1935).

220. *Id.* at 612.

The Court refused to disturb a Maine statute prohibiting the use of highways by trucks which charged for the carrying of merchandise unless they obtained a certificate of public convenience and necessity.²²¹ One feature of the law, attacked as violating both the due process and equal protection clauses, was its requirement that such certificates be granted to all carriers which had provided satisfactory service since March 1, 1932. This distinction, said the Court, constituted a proper exercise by the legislature of "permissible discretion."

More important in its consequences is the decision in *Alaska Packers Ass'n v. Industrial Acc. Comm.*²²² A foreigner was employed in California by a corporation doing business in that state, to work in Alaska. The contract included a provision that the man should be transported back to California at the end of his working season, and stipulated that the Alaska Compensation statute should apply. The employee, having been injured, on his return applied for compensation to the California Commission. This was awarded him on the authority of the California statute which forbade exemption from its provisions by contract and an interpretation which made the law applicable to aliens.²²³ Justice Stone concluded that the due process clause did not prevent a state from legislating with reference to a contract made within its borders, though performance was to take place elsewhere. The telegraph cases²²⁴ were distinguished as attempts to control the consequences of a tort; liability for compensation was not founded in tort. Recognizing that circumstances might exist which could make the application of the California law arbitrary, the Court held the facts of this case negated any such contention. Justice Stone stressed the fact that the employees were only temporarily in Alaska, would probably never have been able to apply there for compensation, and would be without remedy unless protected by the California law. California had an interest in the matter because of the possibility that the injured workmen might become public charges.

The next question considered in this case was whether the California court had violated the full faith and credit clause of the Constitution in refusing to allow the Alaska law to be set up as a defense; in other words, whether, even if the proceedings could be maintained in California, the provisions of the Alaska law should have been applied. The Court recognized that by Congressional enactment the laws of the territories as well as of the states were within the provision of the Constitution.²²⁵ Justice Stone pointed out that in considering statutes, this provision could not be literally

221. *Stanley v. Public Util. Comm.*, 295 U. S. 76 (1935).

222. 294 U. S. 532 (1935). On the case in the lower court see Note (1935) *COL. L. REV.* 751; (1935) 44 *YALE L. J.* 869.

223. See *Quong Ham Wah Co. v. Industrial Acc. Comm.*, 184 Cal. 26, 192 P. 1021 (1920), *writ of error dismissed*, 255 U. S. 445 (1921).

224. *Western Union Tel. Co. v. Brown*, 234 U. S. 542 (1914).

225. 2 *STAT.* 298, 299 (1804), 28 U. S. C. A. §§ 687, 688 (1928).

enforced; as that "would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." The problem for the Court is one of appraising "the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."²²⁶ Since compensation liability was properly part of the status of employer and employee, the statute of the state in which the relationship was created should control. Justice Stone called attention to the fact that this rule had been applied where suit was brought in the state in which the injury had occurred.²²⁷

The full faith and credit clause was applied in a different manner, however, in *Broderick v. Rosner*.²²⁸ The New York Superintendent of Banks sued in New Jersey to recover from stockholders of the Bank of United States the assessment he had levied under New York law. He was met by a New Jersey statute which denied the right to maintain such action unless all the creditors and stockholders were brought before the court, a requirement which, in the particular case, would have involved substituted service of several hundred thousand persons at prohibitive cost. Justice Brandeis ruled that the liability sought to be forced was contractual; that by becoming members of a New York corporation the residents of New Jersey had, as to assessments, subjected themselves to the laws of New York; therefore no policy of New Jersey could permit its residents to escape the duty imposed as the result of their own voluntary act. He held it to be immaterial that the assessment had been made by administrative action rather than by court proceedings; the basis of the obligation was statutory; and statutes were within the full faith and credit clause. Therefore the suit should be entertained. Justice Cardozo dissented without opinion.

In two cases the attack was not upon any statute, but upon administrative action; in one of these the Court held the action proper, in the other it ruled that no state agency had been concerned. This was *Grovey v. Townsend*,²²⁹ the third of the cases dealing with the persistent attempt of the Democratic party in Texas to disfranchise Negroes. Originally, the discrimination had been attempted by a statute which expressly provided that no Negro should be eligible to vote in any primary election. In *Nixon v. Hurd*,²³⁰ the Court declared the statute to be in violation of the Fourteenth Amendment. Texas then vested control over party membership in the party—not in its proper convocation by convention, but in its executive committee. Therefore, said the Court in a five-to-four decision, *Nixon v.*

226. 294 U. S. at 547 (1935).

227. *Bradford Electric Light & Power Co. v. Clapper*, 286 U. S. 145, 153 (1932).

228. 294 U. S. 629 (1935). On the case in the lower court see (1935) 44 YALE L. J. 707.

229. 295 U. S. 45 (1935), 35 COL. L. REV. 608, 48 HARV. L. REV. 1436, 83 U. OF PA. L. REV. 1027. See Albertsworth, *supra* note 153, at 656-658.

230. 273 U. S. 536 (1927). See Hale, *Force and the State* (1935) 35 COL. L. REV. 149, 192 *et seq.*

Condon,²³¹ the legislative hand was still responsible for the barring of Negroes. It was clearly intimated, however, that but for this statute the decision would have been otherwise. Texas took the hint and withdrew all provisions regulating party membership, although leaving statutory provisions for the holding of primary elections. The Court now unanimously ruled that although petitioner, a Negro, had been refused a ballot by the state officer in charge of such an election, the refusal was not state action. A political party, free from statutory control as to choice of membership, was a private organization; the refusal of the ballot was the result of such organization's choice rather than of any state action, hence not an act reviewable by the Court. The fact that the primary election was required by state law Justice Roberts held immaterial, because the expenses of the election were paid by the party and the votes counted by its representatives. Furthermore, the view had been taken by the Texas courts that the state had no power to interfere with the free right of citizens to decide with whom they wished to associate in forming political parties.²³² The argument that the Democratic primary in Texas is in practical fact the election was dismissed with the comment that "So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold public office."²³³ Deplorable as this decision must seem,²³⁴ it rests on principles which have been accepted by the Court in numerous cases arising since the adoption of the Amendment.²³⁵ That a more liberal interpretation of that Amendment would more fully have carried out one of its chief reasons for existence cannot be gainsaid. By this recent decision, however, the Court has shown in unmistakable language that it does not intend to deviate from its earlier course. That the decision was delivered on the same day on which the Court reversed the Scottsboro convictions²³⁶ merely adds to its dramatic implications.

In *Roberts v. New York City*,²³⁷ the receiver of the Manhattan Railway Company, owner of a spur of the elevated railway running from Third Avenue in New York City to Park Avenue, claimed that a condemnation award was so inadequate as to violate the Fourteenth Amendment. The Company's franchise was disregarded, as of no value; the structure itself

231. 286 U. S. 73 (1932).

232. *Bell v. Hill*, 123 Tex. 531, 74 S. W. (2d) 113 (1934).

233. 295 U. S. at 55 (1935).

234. And it has been severely criticized by liberal opinion. (May 1, 1935) 140 THE NATION 497.

235. The Civil Rights Cases, 109 U. S. 3 (1883), denied to Congress the right to legislate with regard to non-political matters. Segregation laws passed by the states have been upheld where substantial equality of accommodations was possible, as in *Plessy v. Ferguson*, 163 U. S. 537 (1896), dealing with railroads, and *Berea College v. Kentucky*, 211 U. S. 45 (1908), dealing with schools; they have been condemned when they interfered with the right to dispose of or acquire property, as in *Buchanan v. Warley*, 245 U. S. 60 (1917).

236. See *supra* pp. 365-366; *infra* pp. 383-384.

237. 295 U. S. 264 (1935). On the case in the lower court see Notes (1935) 20 CORN. L. Q. 358, (1934) 48 HARV. L. REV. 293.

was valued nominally, as scrap; certain easements which had been acquired from private owners when the structure was erected were valued at the price which had been paid for them then. Justice Cardozo stated the applicable rule:

" . . . when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error." ²³⁸

Considering first the easements, he reviewed the litigation which had half a century ago engrossed the courts of New York,²³⁹ and determined that the railroad had acquired merely the right to conduct its operation without hindrance from the property owners, but obtained no easement in the usual sense separate from its franchise. The argument of the company that the easements must be valued as though for the first time acquired at the time of the condemnation of the spur, was rejected as fantastic. Indeed, Justice Cardozo inclined to the belief that the easements had no value at all, apart from the franchise. In any event, the decision of the state court allowing the amount originally paid,²⁴⁰ was not open to attack by the company: "Excess is not an error of which the owner may complain." ²⁴¹ A further contention, that the easements should be valued at the sums the abutting owners might pay to be rid of them, was examined without accepting its correctness in law, and found lacking in factual basis. There was no evidence from which it might be supposed that they would pay more than the amount fixed in the award. The other objections were rejected in view of all the facts: "Substantial prices are not paid for the privilege of conducting a business at a loss." ²⁴²

Finally there is the military training case, *Hamilton v. Regents of University of California*.²⁴³ Certain students objected to taking a prescribed course in military tactics and military science on account of their religious objections to war. The Regents refused to make an exception and suspended them from the university. These courses were established by the Regents in 1931 pursuant to provisions in the state constitution ²⁴⁴ and the law establishing the university.²⁴⁵ Both these were based upon conditions Congress had imposed in 1862 in granting public lands for agricultural colleges in which military

²³⁸. 295 U. S. at 278.

²³⁹. *Story v. New York Elev. R. R.*, 90 N. Y. 122 (1882); *Powers v. Manhattan Co.*, 120 N. Y. 178, 24 N. E. 295 (1890).

²⁴⁰. *Matter of City of New York*, 265 N. Y. 170, 192 N. E. 188 (1934).

²⁴¹. 295 U. S. at 282.

²⁴². *Ibid.*

²⁴³. 293 U. S. 245 (1934), (1935) 83 U. OF PA. L. REV. 529. See Colby, *Military Training in Land Grant Colleges* (1934) 23 GEO. L. J. 1.

²⁴⁴. CAL. CONST. art. 9, § 9, which placed the University under the control of the Regents with a special requirement that the proceeds of land grants made by Congress be used to support an agricultural college at which there should be taught, among other things, military tactics.

²⁴⁵. Cal. Stats. 1867-8, p. 248, which, in section 5, declared that all male students should receive instruction in military tactics to such extent as the Regents should prescribe.

tactics should be taught.²⁴⁶ Justice Butler first considered the objection that no state action was involved and overruled it because the university had been defined by California courts as a department of the state government;²⁴⁷ the order of the Regents was, therefore, to be reviewed as though a statute. He dismissed from consideration the contention that the state was bound by Congress to make the course compulsory and pointed out that in Wisconsin and Minnesota it was elective.

Justice Butler called to mind that the "privileges" guaranteed by the Fourteenth Amendment against abridgment were only such as rested on federal, as distinguished from state, citizenship. Since the right to attend the university was a privilege granted by the state it was not protected by the Fourteenth Amendment. Nor could the requirement that students study military science be deemed a denial of due process. The students, he commented, were not "drafted" to attend the university. They had no right to insist on an education free from the institution's requirements. Justice Butler supported his conclusion on the pacifist naturalization cases,²⁴⁸ and on a recent case in Maryland.²⁴⁹ He said:

"Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies."²⁵⁰

Justice Cardozo wrote a separate opinion with which Justices Brandeis and Stone concurred. He wished to make clear that the case did not involve any question concerning the power of the government to exact military service in time of peace. In no way could it be urged that the course required by the university, unaccompanied by any pledge of actual military service, interfered with the freedom of conscience or religion. He reviewed the history of Quakers and other conscientious objectors during war time, pointing out that they had been required to give aid in other ways: "For one opposed to force the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service." And he concluded by saying: "One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."²⁵¹

246. 12 STAT. 503 (1862), 7 U. S. C. A. §§ 301-308 (1927).

247. *Williams v. Wheeler*, 23 Cal. App. 619, 623, 138 P. 937, 939 (1914); *Wallace v. University of California*, 75 Cal. App. 274, 277, 242 Pac. 892, 893 (1925).

248. *United States v. Schwimmer*, 279 U. S. 644 (1929); *United States v. Macintosh*, 283 U. S. 605 (1931).

249. *University of Maryland v. Coale*, 165 Md. 224, 167 A. 54 (1933), *app. dismissed for want of a substantial federal question*, 290 U. S. 597 (1933).

250. 293 U. S. at 262.

251. 293 U. S. at 268.

VII

PRACTICE

An interpretation of the Constitution was involved in the decision of the Court in *United States v. West Virginia*,²⁵² dismissing a suit originally brought in the Supreme Court to enjoin the construction of a dam under state authority. The complaint was held insufficient because no controversy was set forth between the United States Government and the State of West Virginia. The mere existence of a controversy with the other defendant, said Mr. Justice Stone, did not, under the Constitution, permit the United States Government to bring an original suit in the United States Supreme Court.

The decision of constitutional questions was avoided in a number of cases on various procedural grounds.²⁵³

In one of the Scottsboro cases, *Patterson v. Alabama*,²⁵⁴ the Court found a way to avoid a technical decision. Haywood Patterson was convicted on December 1st, 1933, for the third time. Immediately afterwards, at the trial of Clarence Norris, the state court received, by stipulation, the testimony taken at Patterson's trial on the subject of unconstitutional discrimination in the selection of jurors; and no other testimony on that subject was received at Norris' trial. Both defendants were sentenced on the same day, December 6th. In each case the identical testimony dealing with the discrimination was included in a bill of exceptions approved by the trial judge. In the *Patterson* case, but not in the *Norris* case, the bill was stricken as having been filed too late.²⁵⁵ It should have been filed within ninety days from the date of judgment. The defense claimed, on the basis of a written statement the state had itself filed in court, that judgment had been entered on December 6th, at the time of sentence. The state court held that this had occurred at the time of conviction, December 1st. The state then contended that the United States Supreme Court was without jurisdiction to review, since the

252. 295 U. S. 463 (1935).

253. In *Spielman Motor Co. v. Dodge*, 295 U. S. 89 (1935), the Court refused to consider the constitutionality of the NIRA in an action brought to enjoin the enforcement of criminal penalties, on the ground that not more than a single prosecution was contemplated, and that plaintiff would have ample opportunity upon such prosecution to raise all constitutional questions. In *Wilshire Oil Co. v. United States*, 295 U. S. 100 (1935), the Court refused to answer questions certified by the Circuit Court of Appeals on an application for a preliminary injunction on the ground that it would be desirable to have such questions determined after hearing rather than upon a complaint and affidavits. A similar ruling in *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194 (1934), has already been discussed. *Supra* p. 352. It has likewise also been noted that the Court refused to pass on the right of New York to tax income from lands situated in another state because it did not sufficiently appear from the opinion of the state court that its decision rested solely in the federal question. *Supra* pp. 358-359. See to the same effect *Kagarise v. Railroad Comm.*, 293 U. S. 527 (1934). In *Abrams v. Van Schaick*, 293 U. S. 188 (1934), the Court refused to consider an attack upon the New York mortgage emergency legislation on the ground that it was premature, since the action was brought before the Superintendent of Insurance had promulgated a plan.

254. 294 U. S. 600 (1935).

255. *Patterson v. State*, 229 Ala. 270, 156 So. 567 (1934).

state court had decided the case solely on a state question. The defendant contended that the refusal to pass on the federal question had rested on grounds so unfair that the Supreme Court should review them. The Court accepted neither position. It concluded that the decision of the Alabama court striking the bill of exceptions had rested on the assumption that its decision in the *Norris* case against the claim of unconstitutional discrimination was correct, and that, had it realized *Norris* was going to have a new trial by reason of the testimony originally taken at Patterson's trial, it might have ruled otherwise in his case. "We are not convinced," said the Chief Justice, "that the court, in the presence of such a determination of constitutional right, confronting the anomalous and grave situation which would be created by a reversal of the judgment against *Norris*, and an affirmance of the judgment of death in the companion case of Patterson, who had asserted the same right, and having regard to the relation of the two cases and the other circumstances disclosed by the record, would have considered itself powerless to entertain the bill of exceptions or otherwise to provide appropriate relief."²⁵⁶ The Court made clear that it was not reviewing the decision of the state court upon a non-federal question, but merely recognizing a change which had occurred in the situation since the state decision.²⁵⁷ So the judgment was vacated and the case remanded. Upon the withdrawal by the Attorney-General of his motion to strike the bill, the state court then placed both cases on an equality and ordered new trials²⁵⁸—a notable victory for justice over the form and pitfalls of the law.

But the majority of the Court took a different attitude in the case of *Herndon v. Georgia*.²⁵⁹ Angelo Herndon had been convicted in Georgia for inciting to insurrection. The trial court charged the jury, as requested by defendant's counsel, that they must find that his acts presented a clear and present danger of insurrection. On appeal Herndon's counsel argued that the evidence was insufficient to justify conviction under the standard as laid down. The Georgia Supreme Court disregarded the question so presented; instead it held the evidence sufficient under a standard altogether different,²⁶⁰ a standard, which, by petition for rehearing, Herndon challenged as violating his right of free speech as guaranteed by the Fourteenth Amendment. On rehearing the Georgia court modified the test previously laid down, but without removing the features considered objectionable.²⁶¹ On appeal to the

256. 294 U. S. at 606.

257. Citing *Gulf, Colorado & Santa Fe Ry. v. Dennis*, 224 U. S. 503, 507 (1912); *Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 21 (1918); *Dorchy v. Kansas*, 264 U. S. 286, 289 (1924); *Missouri ex rel. Wabash Ry. v. Public Service Comm.*, 273 U. S. 126, 131 (1927).

258. Unpublished orders of the court.

259. 295 U. S. 441 (1935), 35 COL. L. REV. 1145, 49 HARV. L. REV. 150, 84 U. OF PA. L. REV. 256. Cf. *Frankfurter and Hart, supra* note 14, at 93.

260. *Herndon v. State*, 178 Ga. 832, 174 S. E. 597 (1934).

261. *Herndon v. State*, 179 Ga. 597, 176 S. E. 620 (1934).

United States Supreme Court the state argued that jurisdiction was lacking because Herndon had failed to urge any federal question at his trial. This contention, as so formulated, was rejected. Justice Sutherland ruled that presentation of the question by petition for rehearing was timely, provided the adverse ruling made by the state court on appeal could not have been anticipated. He held that it should have been anticipated because, after Herndon's conviction, but before final submission of his motion for new trial, the state Supreme Court had, in *Carr v. State*,²⁶² upheld the same law on grounds other than those accepted by the trial court in its charge. He concluded, therefore, that Herndon "was bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below."²⁶³

Justices Brandeis, Stone and Cardozo dissented. The latter pointed out that in the *Carr* case the Georgia Court had not been required to pass upon the precise question urged by Herndon, that the decision had merely upheld an indictment on demurrer, and that the trial judge had not thought that an earlier, similar *Carr* decision²⁶⁴ required the rejection of the "clear and present danger" rule enunciated by decisions of the Supreme Court.²⁶⁵ Justice Cardozo maintained there had been no unequivocal rejection of that test, "which had been made the law of the case" by the trial judge, and that Herndon "was not under a duty to put before his judges the possibility of a definition less favorable to himself, and make an argument against it, when there had been no threat of any change, still less any forecast of its form or measure. He might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion of his constitutional immunities. . . . It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements."²⁶⁶ He remarked: "Defendants charged with crime are as slow as are men generally to borrow trouble of the future."²⁶⁷

On petition for rehearing Herndon's counsel vainly²⁶⁸ called to the Supreme Court's attention the impossibility, under Georgia practice, of presenting on appeal any contention not arising from the record and the rulings of the trial judge. How indeed, might this have been done? It would have been no less than impertinent to suggest to the trial judge that he should grant a new trial because he had himself misinterpreted the law too favorably

262. 176 Ga. 747, 169 S. E. 201 (1933).

263. 295 U. S. at 446.

264. *Carr v. State*, 176 Ga. 55, 166 S. E. 827 (1932). For dissenting opinion see 176 Ga. 63, 167 S. E. 103 (1933).

265. *Schenck v. United States*, 249 U. S. 47, 52 (1919); cf. *Schaefer v. United States*, 251 U. S. 466, 482 (1920); *Gitlow v. New York*, 268 U. S. 652, 672 (1923); *Whitney v. California*, 274 U. S. 357, 374 (1927); *Fiske v. Kansas*, 274 U. S. 380 (1927).

266. 295 U. S. at 452, 453 (1935).

267. *Id.* at 448.

268. *Herndon v. Georgia*, 80 L. Ed. at 121 (1935) (application for rehearing denied).

to the defendant. It is elementary that assignments of error can be urged only for errors committed by the trial court.²⁶⁹ Under the majority decision, however, lawyers will have to burden every record with contingent constitutional arguments lest they be confronted later with the announcement that some current decision had laid down a rule which, they should have anticipated, could have been applied to their case. Up to the present it has been sufficient for lawyers to object to adverse rulings. Will they from now on have to except to favorable ones also? Particularly discouraging is the fact that this illiberal decision has blocked consideration of an important constitutional question, one especially important and timely on account of the rising tide of persecution for unpopular opinion.²⁷⁰ For of this nature is the case of this young Communist, sentenced to twenty years on the chain gang merely for the possession of radical literature.²⁷¹

CONCLUSION

A survey of these decisions on constitutional issues raises numerous questions. Many of the opinions reflect great learning and industry on the part both of counsel and of the members of the Court. The words in which they have been embodied are often eloquent and moving; indeed, merely as specimens of prose these opinions are remarkable in their quality. With most of the decisions there can be no reasonable disagreement. Nevertheless, reservations come to mind. Not only does there remain the natural and perhaps inevitable problem of the points left undecided; members of the Court even differ on points supposedly decided in earlier cases. Obviously, the usefulness of a tribunal is impaired if its own members show inability to agree on the meaning and applicability of their own recent pronouncements. Although some of the restrictions imposed by recent decisions on governmental power, both state and federal, have provoked widespread dissatisfaction it must be remembered that at all times in its history the Court has been subject to violent attack due to particular interpretations of the Constitution.²⁷²

269. *Dunaway v. Gore*, 164 Ga. 219, 138 S. E. 213 (1927); *West v. Standard Accident Ins. Co.*, 176 Ga. 54, 166 S. E. 761 (1932).

270. See *REPORT OF AMERICAN CIVIL LIBERTIES UNION* (1935) 4, 12-14, 24-26.

271. The Georgia Court inferred incitement from defendant's duties, which included the distribution of literature, and from his possession of nine membership books of the Communist Party and of a number of pamphlets. There was no proof of the distribution of any of these. The Court, holding that the literature advocated force, said: "The establishment of the 'Black Belt' by peaceful and through lawful process could not have been reasonably anticipated"—in other words that the likelihood of forcible opposition to proposed changes makes the changes illegal. *Herndon v. State*, 178 Ga. 832, 867, 174 S. E. 597, 615 (1934).

It may be added that Herndon has been released on \$8000 bond in a ruling by Judge Hugh M. Dorsey of the Georgia Superior Court, on habeas corpus, on the ground that the sedition legislation under which he was convicted was too vague and indefinite, and thus violated the Fourteenth Amendment and the corresponding provision of the Georgia constitution. *N. Y. Times*, Dec. 8, 1935, at 1.

272. 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (Rev. ed., 2 vols., 1926) 96-100, 494-496, 514-530, 552-559, 637-641; 2 *id.* at 209, 224, 302-309, 359-361, 492-494, 525, 526, 531, 532, 581-583, 699-705, 713.

While the Supreme Court has constantly borne in mind that the Constitution was designed to serve a growing nation, an expanding economy, nevertheless issues have from time to time arisen which it has found itself unable to solve within the framework of the existing document. Slavery was such an issue; the regulation of private dominion over our economic life appears to be another. In the one case, perhaps because of geographical sectionalism, the needed amendments became possible only after a civil war. The issues of the present, the extension of power not only of the central government, but of all government, should be soluble without recourse to force.

Undoubtedly the Supreme Court will play an important role in defining the form any new amendments must take. If it retains any considerable part of its present veto power over legislation and administrative action, it will play a decisive part in the success of the imminent experiment. Greater statesmanship than has consistently been manifest in the past will be required; mindful of the influence of its decisions upon the future²⁷³ the Court must develop skill in prophecy. To enable it to meet this obligation the Court should find it possible to call to its assistance all the pertinent knowledge available from governmental and academic as well as from specifically interested sources without being restricted to the record alone.²⁷⁴ Fewer cases to hear and longer consideration given each case will be essential, as will also the lapse of much less time between the origin of controversies and their presentation to the Court. Questions so far-reaching as some of those recently decided deserve more than a few hours' argument and a few weeks' deliberation. More frequently, perhaps, the Court will find it wise to restore cases for further argument.²⁷⁵

What now prevents the Supreme Court from having enough time to give to fundamental constitutional problems is the pressure of business arising out of its performance of a dual function. It constitutes both final interpreter of the Constitution and court of last resort of a constantly expanding judiciary. Might it not be possible to divide these aspects of the Court's work? Might there not be a Court of Appeals vested with all the non-constitutional functions of the present Court? Such a tribunal would be charged with finally deciding issues in the many fields of law that come within the jurisdiction of the federal courts and would resolve the conflicts

273. See Cohen, *supra* note 167, at 841, 842. Mr. Cohen's paper presents in masterly fashion the new attitude toward the law.

274. The conception that the Court should decide only particular cases has often had unfortunate restrictive results. While it would be undesirable for the Court to render advisory opinions, it should be possible for it to explore to the fullest possible extent the subject under consideration. On the extent to which the Court now exercises advisory functions see Albertsworth, *supra* note 151.

275. In effect the procedure suggested would resemble rather than that of a legislative committee than that now associated with appellate argument. Until the Court is satisfied that a case has been fully considered by it from all aspects, it should not be decided.

between the circuits in the interpreting of federal statutes.²⁷⁶ The Supreme Court would pass only on issues of real constitutional import, issues to which it could devote an attention commensurate with their seriousness. In the one court, learning in the law would be an essential requirement; in the other knowledge of the movements of history and of the social sciences would be indispensable. To the one should be called those judges who elsewhere have shown their outstanding qualities; to the other, men and women of wide vision regardless of their judicial experience—and even, perhaps, regardless in some instances, of their orthodox legal training.²⁷⁷

What lasting benefits to the nation such a change might accomplish, cannot be easily foretold. Some idea of the material which would be dealt with respectively by these two courts may be gathered, perhaps, from the division made by the author in his two articles ²⁷⁸ dealing with the work of the present Court during the past term.

276. Presumably the decisions of this new Court would be binding on the Supreme Court, just as now the decisions of state courts are binding in their interpretation of their own statutes. The Supreme Court would be called upon to interpret federal statutes only when the newly proposed Court may not already have done so.

277. The capacity to sit upon such a tribunal of men like Charles A. Beard and Morris R. Cohen, for instance, could hardly be challenged.

278. The non-constitutional decisions of the Court of the 1934 term were considered in the article cited *supra* note 159.