IV

DUE PROCEDURE AND EQUAL PROTECTION

A. Refunds of Processing Taxes

Even before the decision in United States v. Butler, Congress took precautions to protect the federal finances against a possible declaration that the Agricultural Adjustment Act was unconstitutional, by providing that processors, in order to obtain refunds of processing taxes, must show that they had actually borne the burden of the tax. After the Butler decision, the constitutionality of this provision was attacked by taxpayers seeking refunds, without attempting to prove that they had not shifted the tax. While this litigation was pending, Congress took further steps to fortify its position. The 1936 Act set up an administrative tribunal in the Treasury to try the incidence of the tax, created certain presumptions to aid in ascertaining whether the tax had been shifted and explicitly relieved collectors of liability for taxes collected by them and paid into the Treasury. The validity of this legislation was challenged in Anniston Manufacturing Co. v. Davis, and, at least as limited by the facts of that case, sustained.

The processor in the Anniston case attacked both substance and administrative detail of the statute. On the merits it argued that it had a vested right to recover the tax paid under an unconstitutional statute against the collector of the tax, of which it had been deprived in violation of the due process requirement of the Fifth Amendment. The arguments addressed to the administrative details of the statute were in general that the administrative procedure provided by the law did not provide for the full and fair trial of the processor's rights, which was required by due process.

The Court did not directly deny that a taxpayer has a vested right to recover an unconstitutional tax, but held that there was no deprivation of such a right if the taxpayer was given a fair administrative remedy against the government. Then it proceeded to examine the remedy furnished by the statute. The procedure was found satisfactory; there was an opportunity...
for a fair hearing, which was protected by adequate judicial review. As far as the merits of the statute were concerned, the Court said that a taxpayer who has paid an unconstitutional tax has not an absolute legal right to recover it back. His position is essentially equitable, and he may constitutionally be denied recovery if he has not borne the burden of the tax. There is, moreover, nothing unconstitutional in making the taxpayer sustain the burden of proving that he did not shift the tax.

To meet the precise contention of the plaintiff, however, the Court had to go further. Plaintiff had argued that it was impossible to prove who bore the burden of a processing tax, and that the statute by conditioning recovery upon proof of an impossibility had done more than shift the burden of proof; it had completely destroyed any chance of recovery. The Court contented itself with labelling this objection as premature. Only after the plaintiff had followed the prescribed statutory procedure and tried to prove that it had borne the burden of the tax could any question of impossibility of proof be legitimately raised. If it were shown in a given case that it was impossible to prove the actual incidence of the tax, then the statute might well be construed to allow recovery, in order to avoid any taint of unconstitutionality. With regard to the presumptions set up by the statute, which provide for tracing the incidence of the tax by a comparison of average margins during the period when the processing taxes were in force with average margins during stipulated periods before and after this time, the Court found that these presumptions bore some relation to the problem and were not conclusive, so that they could not be held unreasonable.

Although the majority failed to commit itself squarely, there is an intimation in Mr. Chief Justice Hughes' opinion that to deny recovery of a processing tax, where it is impossible to prove whether the tax has been shifted or not, would be unconstitutional. This appears more emphatically from the concurring opinion of Mr. Justice Stone and Mr. Justice Cardozo, who were careful to "reserve their vote as to the constitutional or statutory rights of the taxpayer in the event that it shall be impossible to ascertain whether there has been a shifting of the tax." While Justices Stone and Cardozo were perhaps willing to go even further than the majority in denying recovery of processing taxes, Mr. Justice McReynolds would not go even this distance. Without explicitly defining his reasons, he dissented.

B. Jurisdiction to Tax

There has been considerable speculation as to whether or not the Supreme Court would undertake to eliminate multiple state taxation of income. New York ex rel. Cohn v. Graves seems to negative any present intentions

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98. 31 U. S. at 357.
in that direction. New York imposed an income tax upon rentals received by a resident of that state from real estate which she owned in New Jersey, and upon interest which she received from mortgages upon New Jersey land. Over the dissent of Justices Butler and McReynolds, the Court held that these taxes were constitutional. Briefly, the Court reasoned that a state has jurisdiction to tax the receipt of income by a resident from foreign sources because of the personal protection afforded the taxpayer, even though the income is derived from land in another state. With respect to the tax on the interest from the mortgages, the Court brushed aside the objection that this could not be taxed by New York because it had acquired a business situs in New Jersey, by pointing out that the claim of a business situs was not substantiated by the record. In view of the Court's decision upholding the New York tax upon the rentals from New Jersey land, it is difficult to see that the taxpayer's case would have been materially advanced by establishing a business situs for the mortgages in New Jersey. New Jersey seems clearly entitled to tax the rentals from local lands. A business situs for the mortgages in New Jersey would simply establish that state's right to tax the interest from these investments. If New Jersey's power to tax the rentals did not exclude a tax by New York, why should its power to tax the interest from the mortgages affect the New York tax? The Pollock case, which has worried some of the state courts in connection with the problem of jurisdiction to tax income, did not disturb the Supreme Court. Whatever implications are found in that case to the effect that a tax upon income is a direct tax upon the source of the income are limited to the question of what is a direct tax requiring apportionment under the Federal Constitution.

Prior to the Cohn case, the Supreme Court had sustained state income taxes at the source of the income and at the domicil of the recipient. The only limitation which had been imposed was inferred from the apportionment cases, which, by restricting a unit assessment upon a nonresident's income to a proportion fairly allocable to the taxing state, seem to exclude the state of source from taxing income of a nonresident other than that produced at the source. The problem of a domiciliary tax upon rentals from foreign real estate had not been presented squarely to the Court. Any serious effort to restrict multiple taxation of income might well start here. Due to its physical immobility, land presents the simplest factual situation

100. N. Y. Cons. Laws (Cahill, Supp. 1935) c. 61, § 359.
102. The Court relied upon Maguire v. Trefrey, 253 U. S. 12 (1920), which seemed to have been discredited by Senior v. Braden, 205 U. S. 422 (1907). The Braden case was distinguished on the ground that it involved a property tax.
for imposing jurisdictional limitations, and there is a strong common-law tradition against multiple taxation of interests in land. The *Cohn* case is significant not only because of the narrow decision but because of the broader implication that the Court is not prepared to take any substantial steps in limiting state jurisdiction to tax income.

There is one part of the opinion, however, which should be pondered in connection with any broad generalization of this sort. The Court pointed out that it did not appear that the rentals in question had been subjected to an income tax by New Jersey. Oddly enough, as distinguished from the cases on jurisdiction to tax property and inheritance, in none of the cases on jurisdiction to tax income has it appeared in the record that the income in question was actually taxed by a state other than the one whose right to tax was in issue. It is barely possible that a record which showed double taxation rather than the potentiality of a double tax might move the Court to create somejurisdictional restrictions on state income taxes. As an offset against this possibility, however, one must bear in mind that the conventional thinking in this field has stressed the possibility of a double tax rather than double taxation in fact.

One of the advantages which it has been urged that domicil possesses over situs as a jurisdictional base is that it is capable of simpler and more exact ascertainment. This theory received a rude setback in the *Dorrance* cases,106 where it appeared that while a person may only have one domicil in law, he may have several in fact, or at least he may be treated as though he had. After disregarding the frantic appeals of the taxpayer in the *Dorrance* cases, there is a faint possibility that the Court is now preparing to do something about the problem of double domicil. At least in *Texas v. Florida*107 the Court granted a motion for leave to file a bill of complaint on behalf of one state, which claimed to be a taxpayer's domicil, against a number of other states asserting similar claims. Whether any real relief will be afforded by this device awaits the Court's action on the bill at the next term.108

Domicil has its vagaries, but there is no more amorphous term in the vocabulary of jurisdiction to tax than situs. When you reach "business situs", you confront confusion infinitely confounded. Two cases at the last term illustrate this admirably.

106. Upon Dr. Dorrance's death, both Pennsylvania and New Jersey claimed him as a domiciliary and proceeded to assess inheritance taxes on this basis. See Ohlander, *Double Inheritance Taxation* (1936) 14 Tax Mag. 387, 390, 448, for a concise history of the litigation in the state courts and before the Supreme Court by which Dr. Dorrance's representatives sought unsuccessfully to avoid one of these taxes.


108. In *New Jersey v. Pennsylvania*, 287 U. S. 580 (1933), a motion by New Jersey to file an original bill of complaint against Pennsylvania was denied. A similar bill by Pennsylvania against New Jersey was dismissed in *Pennsylvania v. New Jersey*, 288 U. S. 618 (1933).
First National Bank Stock Corporation v. Minnesota involved a Delaware corporation which was qualified to do business in Minnesota, where it had a business office and where, in fact, it transacted the bulk of its affairs. The corporation owned a controlling interest in a number of banks and other financial institutions. The certificates evidencing this ownership were kept in Minnesota, where dividends were received and disbursed and the meetings of stockholders, directors, and their executive committee were held. In connection with this enterprise the corporation maintained a wholly owned subsidiary which was organized in Minnesota and functioned there, rendering what was called a "compensated service" to the banks controlled by the parent corporation. This compensated service seems to have been an euphemism for the direction which the subsidiary exercised over the subscribing banks by dictating their practices and operations. Stripped of details, the essential facts of the case were that a Delaware holding corporation was operating a number of banks and the seat of these operations was in Minnesota. Part of the First National Bank Stock Corporations's assets consisted of stock in state banks of Montana and North Dakota. These shares were taxed by Montana and North Dakota and again by Minnesota. The corporation protested the Minnesota tax, but eight justices (Mr. Justice Butler did not participate in the decision of the case) found that it was constitutional.

Mr. Justice Stone, who wrote the opinion, sustained the Minnesota tax upon the double-barreled basis of commercial domicil and business situs. He did not attempt a rigorous analysis of either of these concepts, but he did make a remark in connection with situs which is worth remembering: "The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing without fully revealing those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of a tax." This forthright statement could be applied with equal force to "commercial domicil".

If speculation is licit about what the Court did not "fully reveal" in this case, it seems fairly clear that the justices are fed up with the corporation which incorporates in one state in order to escape the rigors of the law in another, where it actually conducts its affairs. The court thought that the corporation in the First National Bank Stock Corporation case should be taxed at the seat of its operations, as a matter of justice to the state where these operations were conducted and as a deterrent to this sort of corporate sleight-of-hand.

It is important, in attempting to evaluate the doctrines of business situs and commercial domicil, to bear in mind that they are but judicial symbols behind which there are persuasive considerations which are not fully revealed.

110. Id. at 240.
It is highly doubtful, for example, whether the doctrines of business situs and commercial domicil developed in connection with the proverbial Delaware corporation could be transposed to a tax directed against an individual. A commercial domicil, moreover, might be accepted for purposes of jurisdiction to tax corporate assets but not for other purposes, such as jurisdiction of a federal court based on diversity of citizenship.

*New York ex rel. Whitney v. Graves* 111 involved the doctrine of business situs in connection with an income tax. A partnership, all the members of which were domiciled in Massachusetts, owned a seat on the New York Stock Exchange in connection with which it received a "right" of one-fourth of a new membership. It was held that New York could tax the profit from the sale of this right upon the basis of a business situs. Although instead of buying and selling on the New York Exchange themselves the partners executed their orders through resident brokers at the lower rate charged members of the exchange, the right was localized in New York so that the profit from the sale could be taxed. "Localization", said the Court, "for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself." 112

The cases at the last term obviously raise the question of what has happened to the Supreme Court's campaign against multiple taxation of intangibles. As far as state jurisdiction to tax income is concerned, the *Whitney* and the *Cohn* cases would suggest that the campaign has bogged down entirely. However, the Court has never made any serious drive against multiple income taxation. By manifest extensions of the doctrine of business situs and the equally manifest invention of the concept of commercial domicil, is the Court subtly seeking to undermine the restrictions laid down against double taxation of property and inheritance? The answer to this problem remains in abeyance pending a direct holding that an intangible which has been taxed on the basis of a business situs may or may not be taxed elsewhere. A careful reading of the Chief Justice's opinion in *Wheeling Steel Corporation v. Fox*,113 the pioneer case to invoke the corporate domicil-business situs doctrine, leaves one with a vague impression that intangibles taxed on this basis are not taxable elsewhere. On the other hand, Mr. Justice Stone's opinion in the *First National Bank Stock Corporation* case carefully negatives any such implication. It may be important to recall in this connection that the Chief Justice espoused the Court's effort to eliminate double taxation of intangibles from the beginning. Mr. Justice Stone was one of the irreconcilables who, under the leadership of Justice Holmes, fought bitterly against it. With the pressing need for public revenue and a continued

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111. 299 U. S. 366 (1937).
112. Id. at 372.
drift in the Court toward the so-called "liberal" point of view, it is by no means impossible, nor even improbable, that double taxation of intangibles may again find judicial favor. It would certainly be rash to conclude that the issue is settled or that the Court may not again reverse itself, as it did at the beginning of the decade.

C. Chain Store Taxes

What conceivably may be a fatal blow was struck at the national chain by the Supreme Court when it sustained the ingenious Louisiana chain store tax,\textsuperscript{114} popularly attributed to the fertile genius of the late Senator Huey Long. The principle of the Louisiana tax is simple. A license tax is imposed upon each chain store in Louisiana. The rate of this tax is determined, however, not by the number of units in the chain within the state, but by the total number of units everywhere. The Great Atlantic & Pacific Tea Company, for example, has one hundred and six stores in Louisiana and fifteen thousand and eighty-two stores in the United States, Canada and elsewhere. While only the one hundred and six stores in Louisiana are subject to the tax, the rate of the tax is computed on the basis of the total number of units in the chain. An added severity of the Louisiana tax is that all the stores which are taxed are taxed in the maximum bracket. For example, the tax is ten dollars a store for a chain of not more than ten stores. It is five hundred and fifty dollars a store for a chain of more than five hundred stores. If a chain has five hundred and one stores, ten of these will not be taxed at ten dollars each, one at five hundred and fifty dollars, and the others at the rates of the intermediate brackets, but every store subject to the tax will be taxed five hundred and fifty dollars.

In \textit{Great Atlantic & Pacific Tea Co. v. Grosjean},\textsuperscript{115} the company contested the validity of the Louisiana tax on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment. Dividing by a margin of four to three,\textsuperscript{116} the Court upheld the Louisiana legislation. The statutory scheme of classification was reasonable, said Mr. Justice Roberts, because the units outside the state added to the economic strength and taxable ability of the chain and therefore justified a higher rate. Moreover, there was nothing extraterritorial about the tax, because the units beyond the borders of the taxing state were not taxed, nor used to measure the tax, but simply determined its rate. Justices Sutherland, McReynolds and Butler, who dissented in the first case\textsuperscript{117} sustaining a chain store tax,

\textsuperscript{115} 301 U. S. 412 (1937).
\textsuperscript{116} Justices Van Devanter and Stone did not participate in the decision.
\textsuperscript{117} \textit{State Board of Tax Comm'rs v. Jackson}, 283 U. S. 527 (1931).
not unnaturally dissented again, damning the Louisiana legislation for creating an unreasonable and arbitrary classification.

An interesting aspect of the Court's decision is its reaffirmance of the distinction between rate and measure and its apparent approval of Maxwell v. Bugbee, a five to four decision, which held that a New Jersey inheritance tax, which used extraterritorial elements to determine the rate of tax upon a local subject, was constitutional. The principle of Maxwell v. Bugbee might easily be extended beyond a tax on chain stores. An interesting possibility would be a state income tax upon the income of a nonresident derived from the taxing state, at a rate determined by the entire income of the taxpayer. This is a logical development of the ability-to-pay ideal behind an income tax. Coupled with the indifference recently exhibited by the Supreme Court toward multiple state taxation of income, however, it presents a rather appalling prospect.

The most surprising feature of the Great Atlantic & Pacific Tea Co. case is found not in the case itself, but by contrast with an earlier decision at the same term on the Iowa chain store tax.

A few years ago in Stewart Dry Goods Co. v. Lewis the Supreme Court held that a Kentucky license tax measured by gross sales was unconstitutional. The tax in that case was not limited to chain stores. In Valentine v. Great Atlantic & Pacific Tea Co. an Iowa tax on chain stores based upon gross receipts was invalidated upon the authority of the Stewart decision. It is quite obvious, of course, that gross receipts are not an infallible index of profits or of actual ability to pay a tax. A concern may do a heavy volume of business and still show a net loss. However, the number of retail outlets, which is the basis for the normal chain store tax, is not an infallible criterion of taxable ability either. It is difficult to believe that the volume of business done is not a more reliable index of ability to pay a tax than the number of places where the taxpayer transacts business. The Stewart case seemed to be possibly explicable on the theory that the tax was not limited to chain stores. The decision in the Valentine case lacks even that slim foundation. The logical step for the large chains in view of the Valentine and Grosjean cases would be to shift from small units to supermarkets. It will be interesting to see whether the reasoning in the Stewart Dry Goods Co. and the Valentine cases will be able to survive the test of this transition.

118. 250 U. S. 525 (1919).
122. 299 U. S. 32 (1936).
123. Iowa Laws 1935, c. 75, § 4 (b).
THE SUPREME COURT ON TAXATION

D. Retroactive Taxes

The extent to which a retroactive tax will be tolerated under the Federal Constitution is complicated by the fact that not a syllable in that document deals explicitly with the problem. Consequently, the courts are thrust back upon the large uncertainties of due process or equal protection, or more infrequently, in connection with federal taxes, the prohibition against direct and unapportioned taxation. The confusion engendered in this process appeared clearly in Binney v. Long.\(^\text{124}\)

Binney v. Long involved the constitutionality of the application of a Massachusetts succession tax to three trusts. The first, about whose tax-ability the Court agreed, was an irrevocable trust created by the intestate, Mrs. Cunningham, in 1877 before the passage of any succession tax. Under this trust Mrs. Cunningham reserved a life interest and created contingent remainders, which could not vest before her death. Upon her death in 1931, after the passage of the tax, the remaindemen were taxed upon their shares in the trust, to which were added the value of the property which they received directly from the intestate, to increase the rate of tax for each beneficiary. The Court held that this did not, as the taxpayers contended, deprive them of due process, but was constitutional. Coolidge v. Long,\(^\text{125}\) where a strikingly similar tax had been held unconstitutional, was distinguished upon the ground that the remainders in that case had vested before the enactment of the taxing act, while here they did not vest until the statute had been passed. The conclusion from this distinction was that vesting after the passage of the tax was a transfer which would sustain the tax, so that it was not really retroactive. At this point the Court had no difficulty in taking the next step and holding that the provision for aggregating the interests received under the trust with the other interests received from the intestate was constitutional.

The taxes on the other two trusts in Binney v. Long were attacked from the angle of an unreasonable classification amounting to a deprivation of equal protection. Although obscured behind a complicated factual set-up, the legal considerations were fairly simple. Under the Massachusetts statutes in effect at the intestate's death, the exercise or nonexercise of a power of appointment created prior to September 1, 1907 (the date of the first Massachusetts tax on lineal succession) was taxed\(^\text{126}\) as a succession from the donee of the power, regardless of whether the power was created inter vivos or by will. The exercise or nonexercise of powers created after September 1, 1907, however, was taxed as a succession from the donor of the power, while there was no tax at all in connection with such a power created inter vivos.

\(^{125}\) 282 U. S. 582 (1931).
Mrs. Cunningham was a life beneficiary and held powers of appointment in connection with a trust created by her father in 1862 and another created by her mother in 1891. The trust from her father had been established by an inter vivos arrangement with an insurance company. The trust from her mother had been set up by her mother’s will. Upon Mrs. Cunningham’s death without exercising either of these powers the beneficiaries who followed her under the trusts were taxed upon these interests, which were aggregated with the other property they received from her to increase the rate of tax.

If the powers in question had been created after September 1, 1907, the beneficiaries would not have been taxed at all upon the interests they took in the trust established by Mrs. Cunningham’s father. Moreover, in connection with the trust created by her mother they would have been taxed upon the theory of a succession from the donor of the power, so that these interests would not have aggregated with the other property which they received from the intestate. A majority of the Court felt that the Massachusetts statutes therefore created an unreasonable classification and that the application of the tax to these trusts was unconstitutional. The fact that the powers in question were created before a certain date was not a sufficient reason for taxing them so differently from powers created after that date. Justices Cardozo and Brandeis did not feel that the classification was so unreasonable that it violated equal protection. In the case of powers created after the enactment of the 1907 act, said Mr. Justice Cardozo,\textsuperscript{127} the state could safely impose a tax upon the theory of a succession from the donor of the power and collect the tax from the executors of the donor’s estate. But where the power was created prior to 1907, the executors of the donor’s estate were not forewarned of the tax and would usually have been discharged. It might be so difficult to go back later and collect the tax from the donor’s estate that the state was justified in treating the succession as one from the donee and collecting it out of his estate. The difficulty suggested by Mr. Justice Cardozo may be real or it may be largely imaginary. Presumably upon the death of the donee the property subject to the power can be reached by the state. Even though the power was created prior to 1907, it is a little hard to see why the state could not have taxed on the theory of a succession from the donor of the power, and collected the tax out of the property or the appointee, without worrying about the executors of the donor’s estate. Certainly Mr. Justice Cardozo’s argument does not justify the statutory discrimination in favor of powers created inter vivos after the enactment of the 1907 act. Nor does his attempted explanation that equal protection does not require perfect classification and the legislature is not held to foresee every injustice which

\textsuperscript{127} 299 U. S. at 295.
may arise seem much more satisfactory. A discrimination may doubtless be so trivial or unusual that it will not invalidate an otherwise reasonable classification. It is difficult to fit the Massachusetts legislation into that category.

Although the portions of the opinion dealing with classification are of no great doctrinal significance, the decision with respect to the 1877 trust raises a serious question of the validity of the so-called "recall" theory of the constitutionality of retroactive death taxation. Briefly, this theory is that since nothing in the Federal Constitution explicitly forbids a retroactive tax, if such a tax is invalidated it must be because it is so unfair that it offends due process. There is such unfairness where a taxpayer makes a tax-free disposition of his property and is later taxed with respect to it. If the taxpayer is forewarned of the possibility of a tax,\textsuperscript{128} or if after the enactment of the taxing act he can recall the transfer and avoid the tax,\textsuperscript{129} then it is not unjust to tax him. But if he had no warning and the transfer was irrevocable, so that it cannot be recalled, a retroactive tax is unconstitutional.\textsuperscript{130}

It is obvious that, tested by this standard, it would be impossible to uphold the tax on the 1877 trust in Binney v. Long. True, the remainders vested after the passage of the taxing act. But from the point of view of the transferor the transaction had gone beyond her power of recall before any tax was provided for. What, then, is the effect of the Binney case? Does it overrule the recall theory of retroactive death taxation? It must be remembered that it involved a succession tax, where theoretically the incidence of the tax is upon receipt, rather than transmission. It is arguable that the constitutionality of a retroactive succession tax is to be tested by the situation of the transferee rather than that of the transferor, and that if there is a substantial change in the transferee's position after the enactment of the taxing act, the fact that the control of the transferor ceased long before is immaterial. Viewed in this light the case would be restricted to a succession tax, a restriction which it may be reasonable to infer, because the Supreme Court has so recently affirmed the recall theory in connection with a retroactive transfer or estate tax.\textsuperscript{131} This would satisfactorily distinguish it from Nichols v. Coolidge,\textsuperscript{132} the leading case which laid down the recall test in connection with an estate tax. It is very difficult, however, to reconcile

\textsuperscript{130} Nichols v. Coolidge, 274 U. S. 531 (1927); Coolidge v. Long, 282 U. S. 582 (1931). A case which is difficult to fit into this pattern, however, is Third Nat'l Bk. & Trust Co. v. White, 287 U. S. 577 (1932).
\textsuperscript{132} 274 U. S. 531 (1927).
The Court’s distinction is far from appealing. If the constitutionality of a retroactive succession tax is to be determined by the existence of a change in the transferee’s position after the enactment of the taxing act, it would seem that a change which would sustain a prospective tax should be sufficient to remove any taint of unconstitutionality from a retroactive tax. In *Coolidge v. Long* there was a transfer after the passage of the tax, which would sustain a prospective tax. Yet the existence of this taxable transfer after the enactment of the tax did not make the tax constitutional. Unless the *Binney* case tacitly overrules *Coolidge v. Long*, then due process in connection with a retroactive succession tax will be determined not by any broad considerations of private right and public interest, but by the artificial conceptions of the medieval conveyancer. The existence of a taxable transfer after the passage of a succession tax will not satisfy the requirements of due process of law unless accompanied by the element of a technical vesting, which seems to have no possible relation to the substantial justice of the situation. If, furthermore, it does not overrule *Coolidge v. Long*, there is the added difficulty that that case rejected any distinction as far as retroactivity was concerned between a succession tax and a transfer tax. It would seem to follow that the doctrine of the *Binney* case is applicable to a transfer tax as well as a succession tax, and not only will the validity of a retroactive succession tax be determined by the niceties of the conveyancer, but the validity of a retroactive transfer or estate tax will be tested in the same arbitrary fashion.

It seems probable that despite the attempted distinction *Binney v. Long* really overrules *Coolidge v. Long*, and lays down a “transfer” test for retroactive succession taxes without impairing the “recall” test in connection with retroactive transfer taxes. This is not, however, what the case said that it did. The whole subject of retroactive death taxation is shot through with such uncertainty that a dogmatic statement of the effect of the *Binney* case would be either superficial or disingenuous. It is doubtful whether even the justices themselves know what the precise impetus of the decision will be.

There was another case involving a retroactive tax at the last term which fitted more easily into a conventional pattern. *United States v. Hudson* involved the constitutionality of the Silver Purchase Act, which, although passed on June 19, 1934, imposed a tax of fifty per cent upon the profits from transfers of silver bullion on or after May 15, 1934. The respondent Hudson purchased silver bullion on May 3, 1934, which he sold at a profit on May 23 and 29 of the same year. After paying the tax he sued for a refund in the Court of Claims, which held that the retroactive applica-

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133. 282 U. S. 582 (1931).
tion of the tax was unconstitutional. The Supreme Court, however, reversed this decision. Since the tax was imposed only where there was a profit, this was, according to the Court, a special income tax which could constitutionally be made retroactive for a reasonable time. The time here was reasonable, since there had been agitation for the tax for some months prior to its passage, and the President's message advocating the tax came on May 22, while the bill imposing it was introduced on May 23. Retroactive income taxes have never seemed to bother the Court. By deciding that the tax was one on income, it practically foreclosed the constitutional question. It is interesting to notice the effect of the choice of legal labels here, which may or may not have been influenced by a feeling that the taxpayer should pay a tax upon profits really referable to the government's activity in the silver market. By denominating the tax as a transfer tax analogous to a gift tax, the Court could with equal propriety have reached a diametrically different decision.

V. The Federal Income Tax

As usual, a substantial portion of the Court's time was taken up with the federal income tax. A cursory account of the cases, although slurring their finer detail, may serve to indicate the range of the problems which were reviewed.

An interesting inquiry was undertaken into the nature of taxable income in Helvering v. Midland Life Insurance Co. A mortgagee bid in mortgaged property at foreclosure sales. The amount of the bids, which were made without reference to actual values in order to protect the mortgagee in case of redemption, equalled principal plus accrued interest. Over the dissent of Mr. Justice McReynolds, the Court held that the mortgagee had realized income to the extent of the accrued interest. Excluding evidence of the real value of the property, the Court refused to hear the taxpayer's argument that all that it had received was property worth less than even the principal amounts of the mortgage debts. Valuation is always speculative and administrative convenience forbids going behind the mortgagee's bid. For the purpose of the federal income tax, the situation is precisely the same as it would be if the property had been bid in for the same amount by a third person and this amount paid to the mortgagee in cash. The taxpayer will be treated as having received full value for the amount of its bid, regardless of what it received in fact.

Although income may be realized so that it can constitutionally be taxed, Congress may prefer not to impose a tax. The tax exempt exchanges under

138. In Untermeyer v. Anderson, 276 U. S. 440 (1928), it was held that a gift made while a gift tax was pending in Congress could not constitutionally be subjected to the tax after its enactment.
the reorganization provisions of the various income tax acts are conspicuous
e~amples of legislative restraint in this direction which lead to continuous
litigation. In Helvering v. Tex-Penn Oil Co.\textsuperscript{140} certain oil leases in which
both the Tex-Penn Company and its stockholders owned interests were trans-
ferred to the Transcontinental Oil Company. Tex-Penn received Transcon-
tinental stock and $350,000 in cash to pay off its debts. The Board of Tax
Appeals made an “ultimate finding”\textsuperscript{141} that cash as well as stock had been
paid to Tex-Penn on this exchange and that therefore there was not a tax-
exempt reorganization under the 1918 Act.\textsuperscript{142} The decision of the Board of Tax
Appeals was reversed by the Circuit Court of Appeals,\textsuperscript{143} and the Su-
preme Court affirmed its judgment, saying that the “ultimate finding” of the
Board was a conclusion of law or at least a determination of a mixed ques-
tion of law and fact, which, as distinguished from findings of “primary, evi-
dentiary, or circumstantial facts”,\textsuperscript{144} was subject to judicial review, where
the Court might substitute its judgment for that of the Board. Pursuing
this review, the Court determined that Tex-Penn had not received any cash
for the transfer of its assets, since the $350,000 paid to it by Transcon-
tinental really represented a part of the purchase price for the individual lease-
hold interests of Tex-Penn’s stockholders and had been deducted from the
consideration paid to them. As a second ground for the decision, the Court
pointed out that a taxable gain was not realized from the exchange between
Tex-Penn and Transcontinental because the Transcontinental stock, due to
its highly speculative character and a restrictive agreement which made sale
impossible, did not have a fair market value when it was acquired by the tax-
payer.\textsuperscript{145}

The method by which income is computed plays an important part in
determining the amount of taxable income. Two cases at the last term raised
the question as to when a broker who buys and sells securities on his own
account is entitled to the special treatment with respect to inventories which is
 accorded a “dealer in securities”. In Schafer v. Helvering\textsuperscript{146} a partnership,
which was engaged in buying and selling stock for others, also bought and
sold stock on its own account. The Court held that the partnership was not
a “dealer in securities” within the purview of the federal income tax.\textsuperscript{147} On
the other hand, in Helvering v. Fried\textsuperscript{148} a brokerage firm which bought and

\textsuperscript{140} 300 U. S. 481 (1937).
\textsuperscript{141} 28 B. T. A. 917 (1933).
\textsuperscript{142} See § 202 (b), 40 Stat. 1060 (1919).
\textsuperscript{143} 83 F. (2d) 518 (C. C. A. 3d, 1936).
\textsuperscript{144} 300 U. S. at 491.
\textsuperscript{145} Mr. Justice Cardozo concurred in the second ground of the opinion. Mr. Justice
Roberts did not participate in the decision of the case.
\textsuperscript{146} 299 U. S. 171 (1936).
\textsuperscript{147} Section 22 (c) of the Act of 1928, 45 Stat. 797 (1928), as supplemented by U. S.
Treas. Reg. 76, Art. 195, relating to “Inventories by dealers in securities”.
\textsuperscript{148} 299 U. S. 175 (1936).
sold large amounts of thirteen stocks in which it was a "specialist", was held to be a "dealer in securities" with respect to these stocks. The Court drew the line between brokers who buy on their own account solely in expectation of a rise in the market and brokers who buy to create a stock of securities to take care of future buying orders in excess of selling orders. Obviously in both cases the broker hopes to buy cheap and sell dear. However, the distinction is between one who buys and sells stock for investment or speculation and one who deals in certain stocks as a merchant.

In computing the profit from a sale, usually the most obdurate factor is the basis of the asset which is sold. In *Elmhurst Cemetery Co. v. Commissioner of Int. Rev.* the Commissioner tried unsuccessfully to introduce a novel method for determining the basis of cemetery plots. A cemetery association purchased a tract consisting of one hundred and thirty-seven acres in 1909. Prior to March 1, 1913, thirty-seven acres were improved and divided in plots, some of which were sold in 1926, 1927 and 1928. To determine the profit from the sale of the lots in these years it was necessary to fix the March 1, 1913, value of the improved acreage. The Cemetery Company presented figures showing that the average price for which the lots were sold from March 1, 1912, to March 1, 1913, was 76.6 cents per square foot, and this figure was adopted by the Board of Tax Appeals as the basis for the March 1, 1913, valuation. The Commissioner contended, however, that the selling prices in 1912 and 1913 should be discounted for the time it would take to dispose of all the lots and fixed the March 1, 1913, value as 23.96 cents per square foot. The Circuit Court of Appeals adopted the Commissioner's view and reversed the Board of Tax Appeals, but the Supreme Court reinstated the decision of the Board. The Court said that the Board based its finding on substantial evidence and the action of the Circuit Court of Appeals was an "unwarranted substitution of the Court's judgment concerning facts for that of the Board". The Board's valuation was based on actual sales and "comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing buyer to a willing seller, neither being obligated to buy or sell". In other words the concept of fair market value consists not only of an ideal buyer and an ideal seller but also of an ideal time for the sale,—not the probable period which it will actually take to dispose of the commodity in question.

Because of the progressive feature of the income tax, it may make a considerable difference *to whom income is taxed*. Several cases at the last

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149. 300 U. S. 37 (1937).
150. 83 F. (2d) 4 (C. C. A. 7th, 1936).
151. 300 U. S. at 40. Why was this not an "ultimate finding" for which the court could substitute its judgment for that of the board? Cf. Helvering v. Tex-Penn Oil Co., 300 U. S. 481 (1937).
152. 300 U. S. at 39.
term presented the problem of whether, when there had been an assignment, income was properly taxable to the assignor or the assignee. In *Blair v. Commissioner of Int. Rev.* a father who was the life beneficiary of an Illinois trust assigned interests in the trust income to his children. The Commissioner contended that the income paid to the children in 1923 was taxable to the assignor. This contention was denied by the Board of Tax Appeals but sustained by the Circuit Court of Appeals on the ground that under the Illinois law the trust was a spendthrift trust and the assignments were invalid. The trustees then asked an Illinois court for a construction of the will creating the trust. The state court ruled that the trust was not a spendthrift trust and that the assignments were valid. At this time proceedings were pending before the Board of Tax Appeals with respect to the taxation of the income from the trust for the years 1924, 1925, 1926 and 1929. In view of the state court's decision, the Board held that the income was taxable to the assignees rather than the assignor. The Circuit Court of Appeals again reversed the Board on the ground that, since only an interest in income, as distinguished from an interest in corpus, had been assigned, the income was not subject to the disposition of the assignees until it was received by them, and therefore remained taxable to the assignor. The Supreme Court reversed the Circuit Court of Appeals with directions to affirm the ruling of the Board of Tax Appeals. Briefly, the Court reasoned that the question was not res judicata because of the decision of the Circuit Court of Appeals with respect to the 1923 income, since the intervening decision of the state court interpreting the local law had created a new situation. The federal courts are bound by a state court's interpretation of the local law as to whether or not a trust is a spendthrift trust and an attempted assignment of a beneficiary's interest valid. When this has been ascertained, however, the determination of whether income is taxable to the assignor or the assignee is a federal question. Blair did not merely assign a chose in action, but conveyed part of his title and estate in the trust property. It follows that the income paid to the assignees was paid to them as beneficiaries of the trust and was taxable to them rather than to the assignor.

*Thomas v. Perkins* also involved the taxability of income where there had been an assignment. Oil leases were assigned in consideration of a stipulated sum which was to be paid out of one-fourth of the oil produced on the leased property. The assignee was under no obligation to produce any oil. His only liability was to pay if oil was produced, and this obligation ran against the lease rather than the assignee personally, since if he in turn made

154. 31 B. T. A. 1192 (1935).
155. 83 F. (2d) 655 (C. C. A. 7th, 1936).
an assignment he incurred no further liability, but it was up to his assignee to make payments out of any oil which he might produce. The question was whether under this agreement, which did not explicitly reserve any lien for the payment of the purchase price to the assignor, one-fourth of the oil was taxable as the income of the assignor. The majority of the Court thought that it was. The Court said that it did not need to decide whether the assignee acquired the technical title to all of the oil, since the agreement as a whole showed that the assignors intended to retain one-fourth of the oil until that equalled the stipulated consideration for the assignment. Mr. Justice Stone and Mr. Justice Brandeis, on the other hand, dissented on the ground that the title to all of the oil passed to the assignee and was his income "and not any the less so because he agreed to apply a part to payment of the purchase price and gave an equitable lien to secure the payment".

Passing from income to deductions, a highly significant decision at the last term was Old Colony Trust Co. v. Commissioner of Int. Rev. A trustee was directed to pay certain annuities and authorized to make charitable contributions which would not in its judgment jeopardize the payment of the annuities, when for a period of one year the trust yielded an income equal to twice the amount of the annuities. For a number of years the income from the trust was more than twice the amount of the annuities. On January 1, 1931, the income account showed an unexpended balance of $187,999.43. During that year current income yielded $164,339.39 and the trustee expended and charged against income $212,862.80, of which $190,000 went to charity. In its 1931 return the trustee claimed deductions for charitable contribution up to the amount of the year's income. The Supreme Court held that the deduction should be allowed. The objections urged against it were that only payments to charity which a trustee is directed to make and not those about which he has a discretion are deductible; and even then such payments must be made out of current income. The Court said, however, that the statute merely required that payments be made "pursuant to" the trust deed, and those which a trustee is authorized, though not commanded, to make are paid "pursuant to" the trust instrument. Moreover, the statute only requires charitable contributions by a trust to be made out of income in order to be deductible. It does not specify that they must be made or earmarked out of current income for the year during which they are paid.

Helvering v. Illinois Life Insurance Co. also involved a deduction claimed by a taxpayer. An insurance company issued certain policies under which part of the premium went into a "survivorship investment fund".

158. Id. at 914.
159. 301 U. S. 379 (1937).
160. Id. at 383. This requirement is found in 45 Stat. 838 (1928), 26 U. S. C. A. § 162a (1935).
the insured survived for a period of twenty years, he became entitled to a part of this fund proportionate to his contribution, which he could take in the form of a cash settlement or paid up insurance. The Supreme Court, in reversing the decisions of the Board of Tax Appeals and the Circuit Court of Appeals, held that the company could not deduct four per cent of the mean reserve maintained for this fund under the 1928 Act, which allows insurance companies to deduct four per cent of the mean of reserve funds "required by law". The Court said that the reserve "required by law" with respect to which the deduction is allowed must be one connected with life insurance risks. The right of the insured to participate in this fund was not dependent upon his death, nor would the company's liability be affected by his death, since it is bound in any event to pay the full amount of the contributions plus the stipulated rate of interest to the surviving policy holders at the end of twenty years. Therefore this reserve was not connected with life insurance risks and was not one "required by law" with respect to which a deduction was allowable.

Different classes of taxpayers are treated differently under the federal income tax, and it is frequently a difficult task to fit a taxpayer into his proper category. Lewis & Co. v. Commissioner of Int. Rev. raised the recurrent problem of the distinction between a trust and an association taxable as a corporation. Minerva S. Melidones, in order to subdivide and sell a tract of land which she owned, conveyed it to a trust company in trust for herself and A. A. Lewis. Under an agreement attached to the trust indenture Lewis, an experienced real estate operator, was appointed exclusive selling agent for the land. He was to manage the property for purposes of sale, make the sales, and organize and maintain at his own expense a selling force. His only compensation was the commissions on the parts of the property which he sold. The trust company merely collected and distributed the payments made by the purchasers of the land after the initial payments, and executed the contracts and deeds necessary to consummate the sales, when called upon by Lewis to do so. The trust instrument also provided for the issuance of transferable certificates of beneficial interest, although none in fact were ever issued. The Court held that this arrangement was taxable as a trust rather than as an association. Pointing out that if it had not been for the intervention of a trust it would simply have constituted an appointment of an agent to subdivide and sell land, the Court said that there could not be an association, because there were no associates and nothing "analogous to a corporate organization".
There were several interesting cases at the last term which involved the application of equitable principles to suits for refunds. *Stone v. White*¹⁶⁷ may do some violence to statutory language, but it is a sensible solvent for the situation created by *Helvering v. Butterworth.*¹⁶⁸ In the *Stone* case a man had bequeathed his wife the income from a trust fund, which she elected to take in lieu of dower. Several Circuit Courts of Appeals had held¹⁶⁹ that payments to a widow from a trust created for her in lieu of dower represented an annuity which she had purchased with her dower rights, with respect to which she was not taxable until she had received an amount equal to the value of her dower interest. Accordingly the trustees paid an income tax upon the sums paid to the widow, and she paid nothing. In *Helvering v. Butterworth,* however, the Supreme Court decided that these payments to the widow really represented income received by the beneficiary of a trust and were therefore properly taxable to the widow rather than to the trustee. In view of this decision the trustees in *Stone v. White* sued for a refund of the taxes which they had paid. The government interposed against this claim its own claim for the taxes due from the beneficiary, which exceeded the taxes paid by the trustees. The claim of the government against the beneficiaries was barred by the statute of limitations, while that of the trustees against the government was not. The trustees consequently contended that the government’s defense should not be allowed. The Court held, however, that the trustees could not recover. The right of a taxpayer to sue for a refund, the Court pointed out, is equitable in its nature. Since anything recovered by the trustee would accrue to the beneficiaries, it would be inequitable to allow the action. The Court found further that the statutory inhibitions against setting off in a suit by a taxpayer a claim for taxes due from the taxpayer, which is barred by the statute of limitations, did not apply here since “it would be an unreasonable construction of the statute, not called for by its words, to hold that it is intended to deprive the government of defenses based on special equities establishing its right to withhold a refund from the demanding taxpayer.”¹⁷⁰

The facts in *United States ex rel. Girard Trust Co. v. Helvering*¹⁷¹ were similar to those of *Stone v. White,* except that the Board of Tax Appeals had determined that the amounts paid by the trustee were overpayments, and the latter sought by mandamus to compel a refund. The Supreme Court affirmed the decision of the Circuit Court of Appeals¹⁷² denying the trustee’s petition on the merits, but it differed from it as to whether or not man-

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¹⁶⁷. 301 U. S. 532 (1937).
¹⁶⁸. 290 U. S. 365 (1933).
¹⁷⁰. 301 U. S. at 538.
¹⁷¹. 301 U. S. 540 (1937).
damus was an appropriate action to try the trustee's rights. The Court pointed out that the taxpayer could have sued the Commissioner for a refund after the decision of the Board of Tax Appeals, and that the Commissioner therefore had a discretion under the circumstances as to whether he would pay the refund or wait to be sued and thresh the question out in court. There being consequently no clear duty to make the refund, mandamus was not an appropriate action.

American Propellor & Manufacturing Co. v. United States\(^{173}\) shows that the taxpayer as well as the government may invoke equitable considerations. In this case the petitioner sued the United States for an amount due it on certain contracts. The government counterclaimed for back taxes. It was found that on June 14, 1924, when the taxes were assessed, the government was indebted to the petitioner in the sum of $119,413.04, and the petitioner owed the government $82,701.29. The Court of Claims, however, allowed interest upon the taxes due the United States under Section 250 (e) of the 1918 Act\(^{174}\) which brought the amount of the counterclaim up to $141,308.93 and resulted in a judgment against the petitioner for $21,895.89. Shocked by this conclusion, the Supreme Court reversed the decision of the Court of Claims, disallowing any interest upon the government's tax claim, and directing a judgment for the petitioner in the sum of $36,711.75. The Court said that under the 1918 Act a demand for payment by the collector was necessary to start interest running, and no such demand had been shown. Nor would the Court order a new trial to ascertain whether there had been such a demand in fact, because of the obvious inequity of the government's claim for interest under the circumstances of the case.

There was one other case involving a refund where perhaps the Court was unduly harsh to the taxpayer. Welch v. Obispo Oil Co.\(^{175}\) involved the problem of judicial review in connection with a special assessment made by the Commissioner under Sections 327 and 328 of the 1918 Act\(^{176}\). In making the assessment to determine the amount of the petitioner's excess profits tax, the Commissioner took as the petitioner's income for the year in question $1,476,330.52, the net income previously assessed to it for that year. The taxpayer later sued for a refund of its income tax, contending that the amount of its income had been assessed erroneously. The Supreme Court held, however, that the District Court had no jurisdiction to entertain the suit. "... the taxpayer's true net income", said the Court, "is an essential factor in the determination of his liability under §§ 327 and 328; and it

\(^{173}\) 300 U. S. 475 (1937).
\(^{175}\) 301 U. S. 190 (1937).
\(^{176}\) 40 Stat. 1093 (1919).
follows that the making of the special assessment precludes review by a Court of the income tax determined".177

VI

FEDERAL STAMP TAXES

Two decisions at the last term resolved disputes in the lower federal courts in connection with the federal stamp tax. *Founders General Corporation v. Hoey* 178 involved the federal stamp tax on stock transfers imposed by the 1926 Act.179 In this case, which really involved three cases and a complicated factual set-up, the issue briefly was whether, when A, who is entitled to stock about to be issued by X corporation, directs that this stock be issued to his nominee B, there is a taxable transfer between A and B. Admittedly a tax is due upon the issue of the stock to B and upon any further transfers by B. But is there also a taxable transfer between A and B? The Court, speaking through Mr. Justice Brandeis, held that there was. Pointing out that the statute taxed the transfer of the "right to receive stock" 180 and made no explicit exception where the transfer was to a nominee, the Court refused to look behind the language of the act and held that the fact that the transaction did not involve any transfer of beneficial interest was immaterial.

*Dupont v. United States* 181 involved the stamp tax on sales of products or merchandise for future delivery. The 1926 Act imposes a stamp tax upon "each sale, agreement of sale, or agreements to sell (not including so-called transferred or scratch sales) . . . at, or under the rules or uses of, any exchange . . . for future delivery".182 The petitioners were a firm of brokers who purchased cotton futures on behalf of a customer. In order to transfer this account to other brokers, they delivered a "sold" memorandum to the transferees, who in turn delivered a "bought" memorandum to the petitioners. Since the account was transferred at their request, the petitioners did not charge any commission on this transaction. The customary method of transferring a customer's account, in order to record the transfer with the exchange, was to use these bought and sold memoranda in the form employed by members of the exchange in the purchase and sale of cotton for future delivery. The petitioners affixed the proper amount of stamps to the sold memorandum, but later sued for a refund on the theory that they had not made a taxable sale by transferring the account. The Court held, however, that the tax had been improperly imposed. This was not a "transferred or scratch sale" which was exempt under the statute.183 Even if it were not

177. 301 U. S. at 196.
178. 300 U. S. 268 (1937).
181. 300 U. S. 159 (1937).
183. Ibid.
As a matter of fact, however, it was a real sale. When the petitioners purchased the future contracts on the exchange for their customer, they became bound as principals. The only way to escape this obligation was by selling the futures to a substituted broker, who in turn became obligated as a principal. This was a real sale, even though the purpose of the transaction was to transfer a brokerage account.\(^{185}\)

**CONCLUSION**

Although the 1936 term was one of tremendous legal and political significance, it is easy to exaggerate what actually transpired. Oddly enough, when the Supreme Court decides a case, it decides a case. It does not fix the pattern of future judicial conduct through the ages. The "implications of a case" are at most merely intelligent guesses about what the Court may do later. They are not objective projections of necessary paths of future conduct. Lawyers frequently are so anxious to forecast the decisions of the

184. 300 U. S. at 153.

185. There were several other tax cases at the last term which are not discussed in the text, but which should be referred to for the sake of completeness. Missouri v. Ross, 299 U. S. 72 (1936), held that under Section 64 of the Bankruptcy Act, 44 Stat. 666 (1926), 11 U. S. C. A. § 104 (Supp. 1936), tax claims of a state and a city are of equal rank and both are in the sixth of the orders of priority specified by paragraph (b) of Section 64.

In Barwise v. Sheppard, 299 U. S. 33 (1936), the appellant leased oil land for a royalty of one-eighth of the oil produced by the lessee, which was to be delivered by the lessee to certain pipe lines "free of cost". At that time Texas imposed a gross production tax on the lessee alone as the active producer. In 1933 however, the tax was amended to apply ratably to royalty owners. The appellants sued to recover tax payments made on their behalf by the purchaser of the oil on the grounds that (1) the tax was imposed upon the production of oil and violated due process of law by including royalty owners, who are not producers; and (2) that it impaired the contract between the appellants and their lessee. The court held, however, that the tax was constitutional: it was an excise on the production of oil and did not operate unfairly against the royalty owner, who was a party engaged in a mutual venture to produce oil. Nor did the tax impair the contract to deliver the oil "free of cost". "Free of cost" does not necessarily mean free of taxes. Even if it does, such a contract is entered into subject to the taxing power of the state and cannot circumscribe that power.

In Wainer v. United States, 299 U. S. 92 (1936), the petitioners sought reversal of their conviction for conducting a wholesale liquor business without a license, on the ground that an act of 1868, 15 Stat. 142, requiring a license, had been repealed by the National Prohibition Act, 41 Stat. 305 (1919). In sustaining the conviction the Court said that although many of the federal liquor taxes were superseded by the National Prohibition Act, Section 5 of the Willis-Campbell Act, 42 Stat. 223 (1921), re-enacted all such taxes except those in direct conflict with the National Prohibition Act or the Willis-Campbell Act, and there is no conflict between a law prohibiting doing a wholesale liquor business and a law taxing it. The United States was not licensing the illegal business, but was simply imposing an excise on the doing of the business, whether lawfully or unlawfully conducted.

Wayne County Bd. of Rev. v. Great Lakes Steel Corp., 300 U. S. 29 (1937), involved the constitutionality of a Michigan statute under the Michigan constitution. The lower court found that the statute, which established a board of review for counties having a population of more than 500,000, could only apply to one county in the state and therefore violated a provision of the state constitution that "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question." Mich. Const. art. V, § 30. In affirming its judgment the Supreme Court said that the lower court should know more about the local law than the Supreme Court did and it could not say that the lower court's decision was erroneous.
Court that they tend to confuse what the Court has done with what it could not possibly do.

It may be well to emphasize some of the things which will be attributed to the action of the Court at the 1936 term which it could not possibly have done. The Social Security cases\(^\text{186}\) by an adroit about-face saved the Court from immediate annihilation at the hands of an angry chief executive. They do not destroy the independence of the states, except to the extent that that is necessarily limited by the Social Security Act\(^\text{187}\) itself. *Sonzinsky v. United States*\(^\text{188}\) sustained the constitutionality of the National Firearms Act.\(^\text{189}\) It does not, however, confer on Congress unlimited opportunity to regulate through the medium of the taxing power, as long as the fact that it is trying to reach ends wholly ulterior to the fisc does not appear on the face of the statute. The test of the "face" of a statute is a shopworn verbalism which works only when the Court wishes it to work. The *Brush* case\(^\text{190}\) reflects the Court's preoccupation with the New York City water system. It does not mean that all the odd things that government is doing are going to be exempt from taxation, if this seriously threatens to frustrate the fiscal necessities of government. *Anniston Manufacturing Co. v. Davis*\(^\text{191}\) does not destroy the constitutional right of the taxpayer to recover an unconstitutional tax, if there is such a right. It does push ultimate federal bankruptcy a little farther into the future by postponing consideration of the processors' rights to recover processing taxes. The *Cohn* case\(^\text{192}\) does not guarantee the states immunity from judicial intermeddling in multiple taxation of income. Restrictions might be invented at the next term of court. The *First Bank Stock Corporation* case\(^\text{193}\) expresses a restrained judicial distaste for the Delaware corporation. It does not upset the principles of jurisdiction to tax. There never have been any. *Binney v. Long*\(^\text{194}\) upheld the application of the Massachusetts succession tax to three specific trusts and invented a new verbal device by which to sustain a retroactive tax. How the Court will treat a different factual situation, or for that matter the same factual situation, if it arises again, is something which was not and could not be predetermined by the decision of that case.

What the Supreme Court says is just as real and frequently much more interesting than what it does. It is not, however, as irrevocable. It is well to bear in mind the admonition of Mr. Justice Stone in the *First Bank Stock*
Corporation case. Legal doctrines are verbal devices which symbolize, without fully revealing (and indeed in some cases without revealing at all), the persuasive considerations which move a court. These symbols, whose interpretations depend upon ulterior considerations, are obviously of less moment than the considerations themselves. Considerations persuasive to one judge, or at one stage of our national development, may appear trivial to another judge or in a different social or political milieu. The weakness from which our legal system draws its greatest strength is its lack of stability and certainty. Happily judicial decisions still spring from the fallible hearts and minds of men, rather than from the mechanical wisdom of an arid legalism.