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It is a well-established fact that the most important and substantial business of the Supreme Court of the United States today is to pass upon the constitutional validity of acts of government.¹ Technical legal questions involving the application of common law doctrines, which formerly occupied no inconsiderable portion of the Court’s time, have now been largely supplanted by problems arising out of attempted governmental control over industrial organization, business enterprise and individual freedom. Under the guise of legal form the Court exercises far-reaching economic and political control.

Consider, for example, the nature of the Court’s work as the censor of state legislation in the fields of police power and taxation. The power of the states to regulate the hours of labor and provide by law a living wage for women workers,² to limit the rents that landlords may exact,³ to maintain and operate flour mills, warehouses and elevators,⁴ to establish standard weights for bread,⁵ to prohibit the use of shoddy,⁶ to prescribe building

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¹ See Frankfurter and Landis, The Business of the Supreme Court (1927).
² Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908); Adkins v. Children’s Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923) (involving a District of Columbia minimum wage statute passed by Congress).
zones,\textsuperscript{7} to curb by graduated license taxation the growth of chain stores,\textsuperscript{8} to require the sterilization of mental defectives,\textsuperscript{9} to tax the gross receipts of corporations engaged in the general taxicab business,\textsuperscript{10}—to take only a few recent important examples from a rapidly expanding fabric of "constitutional law"—can be exercised only with the consent of, and in the manner sanctioned by, the nine (or to speak more realistically, the five) justices of the Supreme Court of the United States. The Court's power to deal with fundamental economic and social issues of this sort arising in the states is of course derived wholly from its interpretation of the "due process of law" and the "equal protection of the laws" guaranties contained in the Fourteenth Amendment to the Federal Constitution. The esoteric function of applying these constitutional guaranties to taxation and police power legislation has enormously increased the prestige and authority of the Supreme Court and has thrown into striking relief the American doctrine of judicial review of legislation.\textsuperscript{11}

Mr. Justice Holmes' frequently quoted observation that "general propositions do not decide concrete cases" and that "the decision will depend

\begin{itemize}
  \item Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926) ;
  \item Gorieb v. Fox, 274 U. S. 603, 47 Sup. Ct. 675 (1927).
  \item State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1931).
  \item Buck v. Bell, 274 U. S. 200, 47 Sup. Ct. 584 (1927).
  \item Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 Sup. Ct. 553 (1928).
\end{itemize}
on a judgment or intuition more subtle than any articulate major premise" 12 is peculiarly appropriate as applied to the study of the "constitutional law" of the United States. The cabalistic words of the Fifth and Fourteenth Amendments 13—in the one case operating as a limitation on the power of the federal government and in the other constituting a restraint upon the states—set forth no rules of thumb by which the validity of challenged legislation or administrative action may be determined. What circumstances will justify the Court in concluding, say, that a given classification for purposes of taxation is either "reasonable" or "arbitrary"? The Constitution does not say. There are no magic formulas to guide the justices along the thorny path of constitutional interpretation to the haven of impeccable conclusions. In the great majority of cases, moreover, there is involved, to borrow again the words of Mr. Justice Holmes, merely "the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain." 14 The results reached in individual cases depend primarily upon the exercise of judicial discretion with respect to practical matters. Because these matters so often involve social and economic problems, there is ample justification for the view that the Court is influenced in drawing lines where it draws them in its decisions far more by considerations of social and economic policy than by recondite canons of constitutional interpretation.15

23 "... nor [shall he] be deprived of life, liberty, or property, without due process of law...." (Fifth Amendment.) "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment.) For the evolution of the doctrine of due process see 3 Willoughby, The Constitutional Law of the United States (2d ed. 1929) c. xci; Corwin, The Doctrine of Due Process of Law Before the Civil War (1911) 24 Harv. L. Rev. 366, 460; The Supreme Court and the Fourteenth Amendment (1909) 7 Mich. L. Rev. 643. For an early statement of the doctrine see Davidson v. New Orleans, 96 U. S. 97 (1877).
25 Mr. Jerome Frank has suggested that the thesis that political, economic and social predilections of judges influence court decisions has been pushed too far. He writes: "But are not those categories—political, economic and moral biases—too gross, too crude, too wide? Since judges are not a distinct race and since their judging processes must be substantially of like kind with those of other men, an analysis of the way in which judges reach their conclusions will be aided by answering the question, What are the hidden factors in the inferences and opinions of ordinary men? The answer surely is that those factors are multitudinous and complicated, depending often on peculiarly individual traits of the persons whose inferences and opinions are to be explained. These uniquely individual factors often are more important causes of judgments than anything which could be described as political, economic, or moral biases." And again: "It is to the economic determinists and to the members of the school of 'sociological jurisprudence' that we owe much of the recognition of the influence of the economic and political background of judges upon decisions. For this much thanks. But their work has perhaps been done too well. Interested as were these writers in problems of labor law and 'public policy' questions, they over-stressed a few of the multitude of unconscious factors and oversimplified the problem." Law and the Modern Mind (1930) 195-6. There are no doubt, as Mr. Frank contends, many "hidden" and "unconscious" factors which influence the "inferences" and "opinions" of judges. In dealing with a tribunal like the Supreme Court of the United States, however, whose time is so
Not everyone, of course, will agree with the foregoing thesis. But no matter how violent the dissent may be, the fact remains that only by a detailed consideration of the cases decided from year to year can we ascertain what the Supreme Court is doing and why it is doing it. Gilded references to "general principles" are inevitably futile. Only through the study of the cases themselves can we properly evaluate the operation of the judicial process. Professor Thomas Reed Powell puts the matter succinctly when he says: "The cases deal with situations so varied that their results can seldom be profitably expressed in generalizations. Discard the particulars, and the proposition for which a case may be thought to stand is one that affords little guide for judgment. We must go back to the particulars to find its meaning in the case." 16

The purpose of the present paper is to review the decisions rendered by the Supreme Court during the October term, 1931, in cases where the constitutionality of state action, of either a legislative or administrative character, was challenged on the ground that it violated the due process of law or the equal protection of the laws guaranties of the Fourteenth Amendment. 17 The cases are divided into two groups: (1) those passing upon the constitutionality of state taxation laws, and (2) those determining the validity of state action of either a legislative or administrative character in aid of the exercise of its police power and designed to promote some phase of the public welfare, or to remedy some particular evil. 18 In considering the first group of cases it must of course be borne in mind that taxation laws are frequently attacked in the Supreme Court on grounds other than the deprivation of property without due process of law or the denial of the equal protection of the laws. Such legislation is often challenged on the ground that it is contrary to some federal law, or that its effect is to impose burdens upon the federal government or its instrumentalities, or that it operates as a burden upon interstate commerce. Only those cases in which it has been contended that state action was invalid under the due process or the equal protection clauses of the Fourteenth Amendment are considered here. With respect to the last group of cases it is recognized that the classification is broad and indefinite, covering many more or less unrelated spheres of state action. In view of the small number of cases dealt with, however, a more detailed classification at this time seems to be unnecessary.

Largely absorbed with cases involving large questions of economic, social and political policy, and where the same, or very nearly the same, alignment of judges is found in case after case, the analysts and commentators may perhaps be pardoned for stressing the patent and obvious factors and neglecting the hidden and unconscious stimuli, especially since the hidden and unconscious motivation is so difficult to determine.

16 The Supreme Court and the State Police Power, 1922-1930, supra note 11, at 529.
17 For a similar review of the cases decided during the 1930-1931 term, see my article, The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931 (1932) 80 U. of Pa. L. Rev. 483.
18 Only those cases in which the Court delivered opinions are here considered.
State Taxation Laws

The constitutionality of a provision of the Wisconsin income tax act to the effect that the wife's income should be added to that of her husband in computing the latter's tax liability was passed upon in *Hoeper v. Tax Commission of Wisconsin.* The appellant, subsequent to his marriage in 1927, was in receipt of income taxable to him under the income tax statute of the state. His wife, during the same period, received taxable income composed of a salary, interest and dividends, and a share of the profits of a partnership with which her husband had no connection. In accordance with the statutory authority, a tax was assessed against the appellant computed on the combined total of his and his wife's incomes as shown by separate returns, the aggregate being treated as his income. The amount so ascertained and assessed exceeded the sum of the taxes which would have been due had the incomes of appellant and his wife been separately assessed, since under the Wisconsin law the rates are graduated according to the size of the income. Appellant, paying the tax under protest, instituted proceedings to recover so much thereof as was in excess of the tax computed on his own separate income. He contended that the statute as applied to him was arbitrary and discriminatory and hence violative of the due process of law and equal protection of the laws guaranties of the Fourteenth Amendment. The supreme court of Wisconsin overruled this contention and sustained the levy. The Supreme Court of the United States, by a six to three division of its members, held the tax invalid on the ground that any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another was a violation of due process of law. In announcing the Court's view, Mr. Justice Roberts said:

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19 Wis. Stat. (1929) § 71.05 (2) (d).
20 283 U. S. 206, 52 Sup. Ct. 120 (1932), noted in (1932) 12 B. U. L. Rev. 327; (1932) 32 Col. L. Rev. 374; (1932) 45 Harv. L. Rev. 749; (1932) 30 Mich. L. Rev. 810. The case is also discussed in Bruton, *The Taxation of Family Income* (1932) 41 Yale L. J. 1172, 1192-3. See also Powell, *Due Process Tests of State Taxation*, 1922-25 (1926) 74 U. of Pa. L. Rev. 423, 573; Note (1926) 26 Col. L. Rev. 737. It should be noted here that in 1930 several cases arising in the various community property states were decided by the Supreme Court of the United States, all to the effect that the spouses were at liberty to make separate income tax returns. See Bender v. Pfaff, 282 U. S. 127, 51 Sup. Ct. 64 (1930); Goodell v. Koch, 282 U. S. 118, 51 Sup. Ct. 62 (1930); Poe v. Seaborn, 282 U. S. 101, 51 Sup. Ct. 58 (1930); Hopkins v. Bacon, 282 U. S. 122, 51 Sup. Ct. 62 (1930). After a change in the California law giving the wife an equal interest in the community property, the case of United States v. Malcolm, 282 U. S. 792, 51 Sup. Ct. 184 (1931), brought California within the rule that the wife has such an interest in the community property that she should separately report and pay a federal income tax on half the income. Mr. Justice Roberts made it clear, in his opinions in these cases, that the test of a present vested interest is not the power of management while the marital relation continues, but the substantive interest of the wife in case of dissolution of the relation by death or divorce. See on this subject: Maggs, *Community Property and the Federal Income Tax* (1926) 14 Calif. L. Rev. 351; Donworth, *Federal Taxation of Community Incomes* (1929) 4 Wash. L. Rev. 145; Jacob, *The Law of Community Property in Idaho* (1931) 1 Idaho L. J. 118; Note (1931) 1 Idaho L. J. 180.
21 Hoeper v. Wisconsin Tax Comm., 202 Wis. 493, 233 N. W. 100 (1930), noted in (1931) 44 Harv. L. Rev. 988.

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At common law the wife's property, owned at the date of marriage or in any manner acquired thereafter, is the property of her husband. Her earnings and income are his, he may dispose of them at will, and he is liable for her debts. Were the status of a married woman in Wisconsin that which she had at common law, the statutory attribution of her income to her husband for income tax would, no doubt, be justifiable. But her spouse's ownership and control of her property have been abolished by the laws of the state. Women are declared to have the same rights as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. Under the title 'Property Rights of Married Women' it is enacted that a wife's real estate and its rents, issues and profits shall be her sole and separate property as if she were unmarried, and shall not be subject to the disposal of her husband; and this is true of her personal property as well, whether owned at the date of marriage or subsequently acquired. She may convey, devise or bequeath her property, real and personal, as if she were unmarried, and her husband has no right of disposal thereof, nor is it liable for his debts. She may sue in her own name and have all the remedies of an unmarried woman in regard to her separate property or business and to recover her earnings, and is liable to suit and to the rendition of a judgment, which may be enforced against her separate property as if she were unmarried.

Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income, but, in part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, is apposite:

'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

'It is incorrect to say that the provision of the Wisconsin income tax statute retains or reestablishes what was formerly an incident of the marriage relation. Wisconsin has not made the property of the wife that of her husband, nor has it made the income from her property the income of her husband. Nor has it established joint ownership. The effort to tax B for A's property or income does not make B the owner of that property or income, and whether the state has power to effect such a change of ownership in a particular case is wholly irrelevant when no such effort has been made. Under the law of Wisconsin, the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it, or controls any part of it. That income remains hers until the
tax is paid, and what is left continues to be hers after that payment. The state merely levies a tax upon it. What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.”

The tax provisions had been upheld by the state supreme court on two grounds: (1) as a proper measure to prevent frauds and evasions by married persons; and (2) as a regulation of marriage. Both of these grounds were considered inadequate by the Supreme Court. In regard to the first Mr. Justice Roberts said in substance that the supposed necessity of the measure to prevent evasions was insufficient to justify the imposition of an unconstitutional tax on one person to enable the state readily to collect a tax lawfully imposed on some other person. He pointed out that in Schlesinger v. Wisconsin the Supreme Court had held invalid a statute which, for purposes of inheritance taxation, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death. To the argument of the necessity for such classification in order to prevent frauds and evasions, the Court had answered:

“'That is to say, A may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.'”

With respect to the second ground, the Court pointed out that under the law of Wisconsin married women and single women have the same status except in the matter of social relations, and that the latter was insufficient to alter their taxable status. It can hardly be claimed, said Mr. Justice Roberts, that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax. It was pointed out, moreover, that the Act was not a regulatory tax but a revenue measure.

Mr. Justice Holmes delivered a dissenting opinion concurred in by Justices Brandeis and Stone. He said:

“This case cannot be disposed of as an attempt to take one person’s property to pay another person’s debts. The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one the husband; and that as the husband took the wife’s chattels

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22 Supra note 20, at 214-16, 52 Sup. Ct. at 121-22.
24 Supra note 20, at 217, 52 Sup. Ct. at 122.
he was liable for her debts. They form a system with echoes of different moments, none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption, in the sections quoted of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned, the Legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property, and shall or shall not be liable for his wife's debts, it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over, but actual enjoyment of, the property taxed. . . . In some states, if not in all, the husband became the owner of the wife's chattels, on marriage, without any trouble from the Constitution; and it would require ingenious argument to show that there might not be a return to the law as it was in 1800. It is all a matter of statute. But for statute the income taxed would belong to the husband and there would be no question about it.”

Mr. Justice Holmes also thought the statute justified because of its tendency to prevent tax evasion. The fact that it might reach "innocent people" should not condemn it. "It has been decided too often to be open to question," he said, "that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class." 26

The holding in the Hoeper case invalidated an income tax provision that had stood without challenge for more than twenty years. 27 Shortly after its enactment the classification had been sustained by the Wisconsin Supreme Court as being necessary to prevent fraudulent evasions of surtaxes by colorable transfer of property among members of a family. 28 However, upon the decision of the Supreme Court of the United States in 1926 in the case of Schlesinger v. Wisconsin, it became doubtful whether that Court would accept the reasoning of the Wisconsin court, if called upon to decide the same issue. In announcing the Court's view in the Schlesinger case Mr. Justice McReynolds declared that an otherwise forbidden tax could not be enforced in order to facilitate the collection of one properly laid. 29 In his dissenting opinion in the same case Mr. Justice Holmes (speaking also for Justices Brandeis and Stone) conceded that "of course many gifts

25 Supra note 20, at 219-20, 52 Sup. Ct. at 123.
26 Supra note 20, at 220-21, 52 Sup. Ct. at 124.
27 England has enacted similar statutes, both with respect to the rights of married women and the assessment of the wife's income to the husband. 45 & 46 Vict. c. 75, § 1 (1882); 17 & 18 Geo. V, c. 10, § 42 (9b) (1927). It has been suggested that this supports the reasonableness of the classification. See (1932) 32 Col. L. Rev. 375; (1932) 45 Harv. L. Rev. 740, 741.
28 Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164 (1912).
29 Supra note 23, at 240, 46 Sup. Ct. at 262.
will be hit by the tax that were made with no contemplation of death” but that “the law allows a penumbra to be embraced that goes beyond the outline of its [the statute’s] object in order that the object may be secured.” 30

As indicated above, the same doctrine of the “penumbra” or “administrative necessity” was invoked by Mr. Justice Holmes in his dissent in the instant Hoeper case in order to “justify the inclusion of innocent objects or transactions within a prohibited class.” 31 In fact, this so-called “penumbra doctrine” had been previously utilized in numerous cases in behalf of the exercise of state police power. 32 Since the power to tax is as distinctive and vital an attribute of sovereignty as the police power, it was deemed by many commentators passing strange that the “penumbra doctrine” should be invoked in order to sustain the latter and thrown overboard in the case of the former. 33 The decision in the Hoeper case, together with that in Heiner v. Donnan 34 (where a provision in the Federal Revenue Act of 1926 to the effect that a transfer except for value “made in contemplation of death” should be added to the gross estate for inheritance tax purposes, and if made within two years of death should be conclusively presumed to be made in contemplation thereof, was held repugnant to the Fifth Amendment) 35 indicates unmistakably an attitude of distinct judicial unfriendliness toward the “penumbra doctrine”. 36

There can be but little question that the holding in the Hoeper case will facilitate evasions of the higher rates imposed on those whose incomes are in the upper divisions of the graduated scale, such evasions being effected through transfers between husband and wife. It may be argued with considerable force, moreover, that despite modern legislation which has almost completely divorced the wife’s property and income from the legal control

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30 Supra note 23, at 241, 46 Sup. Ct. at 262.
31 Supra note 20, at 220-21, 52 Sup. Ct. at 124.
33 See, however, Weaver v. Palmer Brothers Co., 270 U. S. 402, 46 Sup. Ct. 320 (1926), where a Pennsylvania statute which forbade the use of shoddy in the manufacture and sale of bedding was held offensive to the requirements of due process. Here the Supreme Court refused to invoke the penumbra doctrine in behalf of the exercise of the police power. In his dissenting opinion Mr. Justice Holmes argued that since it was impossible to distinguish the innocent from the infected product in any practicable way, the legislature might, in order to prevent the spread of disease, forbid the use of all shoddy in bedding. See Note (1926) 26 Col. L. Rev. 737 for further discussion of the subject.
35 Mr. Justice Stone wrote a dissenting opinion concurred in by Mr. Justice Brandeis. Mr. Justice Cardozo, who took Mr. Justice Holmes’ place on the bench, was not sworn in until March 14, 1932, and took no part in the consideration or decision of the case.
36 Of course it may be argued that the recent decisions of the Court alluded to above do not indicate an abandonment of the “penumbra doctrine” but merely a disinclination to accept the legislative judgment as to the reasonableness of its application in those cases. Even so, the decisions seem to forecast more rigidity of attitude in the future.
and proprietorship of her husband, it is probably true that in the great majority of cases he still enjoys very substantial benefits from such income. The family frequently operates as an economic unit and the property and income of all its members are pooled for the common benefit, regardless of where the legal title may lie. Should the consideration that there may be (and doubtless are) individual instances where no such community of interest between husband and wife obtains, be allowed to defeat a classification otherwise based on solid economic fact? Mr. Justice Holmes, with the approval of Justices Brandeis and Stone, replies that "the power is not to be denied simply because some innocent articles or transactions may be found within the proscribed class." But the Supreme Court has answered the question in the affirmative.

The Court's solution of the problem arising in the Hoeper case—together with those reached in several other cases to be considered presently—casts considerable doubt upon the attractive thesis presented recently by Professor Walton Hamilton that the decision in O'Gorman and Young v. Hartford Fire Insurance Co. was portentous of a more tolerant attitude toward state legislative action challenged under the Fourteenth Amendment. "Upon that day the views of Brandeis became 'the opinion of the Court,'" he wrote, "and a new chapter in judicial history began to be written." In the O'Gorman case the Court refused to declare unconstitutional as a denial of due process of law a statute of New Jersey which provided that "in order that rates . . . shall be reasonable", it should be unlawful for any fire insurance company licensed in the state to pay any local agent commissions in excess of those paid to any other local agent in

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37 See Bruton, The Taxation of Family Income (1932) 41 YALE L. J. 1172, 1192, where it is said: "The family is an economic unit, at least in the vast majority of cases, and the husband whose wife has a separate income is subjected to a lighter financial burden than one whose wife is entirely dependent upon his income. The income of either spouse is usually available to meet family expenses, and as far as the actual enjoyment of it is concerned it makes little difference which spouse earns it. Ordinarily the only exception to this would arise in the case of husband and wife who were separated, but such persons need not come within the terms of the act, since it might apply only to spouses living together as members of a family."

38 Dissent in Schlesinger v. Wisconsin, supra note 23.


40 Hamilton, The Jurist's Art (1931) 31 COL. L. REV. 1073. I hasten to add that I expressed much the same optimistic view in writing a year ago: "The analyst of these opinions who is bold enough to venture into the domain of prophecy certainly has no inconsiderable basis for the prediction that the presence on the bench of Mr. Chief Justice Hughes and of Mr. Justice Roberts will exert in the immediate future a profound influence upon the course of legal statesmanship." See my article, The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931 (1932) 80 U. OF PA. L. REV. 483, at 485.

the state on similar risks. After observing that "the business of insurance is so far affected with a public interest that the State may regulate the rates", Mr. Justice Brandeis said:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

Justices Van Devanter, McReynolds, Sutherland and Butler dissented on the ground that the law impaired the "liberty of contract" guaranteed by the Fourteenth Amendment. Had the Court approached the issues in the *Hooper* case with the same judicial tolerance for legislative action exhibited in the *O'Gorman* case, a different result might have been reached. At all events, Justices Brandeis, Holmes and Stone, who, together with Chief Justice Hughes and Justice Roberts, constituted the majority of the Court in the *O'Gorman* case, are found in the ranks of the dissenters in the *Hooper* case. It is not without interest, moreover, that in *State Board of Tax Commissioners of Indiana v. Jackson*, where the Court in a five to four decision rendered during the same term had upheld the constitutionality of Indiana legislation imposing graduated license fees upon the operators of chain stores, Mr. Justice Roberts emphasized that it was not the Court's function to consider the propriety or justness of the tax, or to seek for the motives, or to criticize the public policy that prompted its enactment, but to sustain the classification adopted if there were substantial differences between the occupations separately classified. Here again Chief Justice

42 The New Jersey Court of Errors and Appeals had affirmed the judgment of the trial court sustaining the constitutionality of the statute upon the ground that since commissions paid to local agents naturally enter into the cost of such insurance to the public, it was within the police power of the state to require that the commissions must be reasonable. 105 N. J. L. 642, 146 Atl. 370 (1929). Since 20 per cent. was the amount of commissions paid to some local agents, the effect of this legislation was to determine that a commission in excess of that amount was unreasonable.

43 Supra note 39, at 257-58, 51 Sup. Ct. at 132.

44 283 U. S. 527, 51 Sup. Ct. 540 (1931), noted in (1931) 31 Col. L. Rev. 1040; Note (1931) 20 Geo. L. J. 87; (1931) 44 Harv. L. Rev. 1295; Note (1931) 17 Iowa L. Rev. 72; (1931) 15 Minn. L. Rev. 341; (1931) 18 Va. L. Rev. 72. See also Legis. (1931) 31 Col. L. Rev. 145.

Hughes and Justice Roberts joined Justices Brandeis, Holmes and Stone to form the majority of the Court.

It would seem that there has been a "swing to the right" in the Court's attitude in cases involving the constitutionality of state action challenged under the Fourteenth Amendment, and that this swing has been brought about by the failure of Chief Justice Hughes and Justice Roberts to accept the full implications of what may be termed the "Holmes theory" of constitutional interpretation in due process cases. Until further changes occur in the personnel of the tribunal, we may expect to hear less judicial conversation (except in dissenting opinions) about "presumptions of constitutionality", "penumbras of permitted legislative unreasonableness", the necessity for the existence of "factual foundations of record" in order for statutes to be overthrown, and the refusal to consider the "propriety or justness" of legislation or to engage in adverse criticism of the "public policy" that motivated it.

Prior to the decision in Farmers' Loan and Trust Co. v. Minnesota, decided during the 1929-30 term of the Court, the Supreme Court had taken the position that incidental hardship resulting from the operation of state taxation laws did not in itself render such legislation invalid, and that there was nothing in the Federal Constitution to afford protection against double taxation by a state. In that case, however, the Court denied the power of Minnesota to levy an inheritance tax upon the transfer of bonds and certificates of indebtedness of itself and its municipalities held outside the state by a non-resident. In other words, the Court flatly repudiated its previous position that choses in action were subject to taxation both at

\[\textit{See the dissenting opinions of Mr. Justice Holmes (1930); Frank, Law and the Modern Mind (1930) 253 et seq.; Dobyns, supra note 11; Frankfurter, The Constitutional Opinions of Justice Holmes, supra note 11; Twenty Years of Mr. Justice Holmes' Constitutional Opinions, supra note 11; Mr. Justice Holmes and the Constitution, supra note 11.}\]

\[\textit{For a discussion of the practical problems involved in the legislative endeavor to prevent tax evasion see the dissenting opinion of Mr. Justice Stone in Heiner v. Donnan, supra note 34, at 347-48, 52 Sup. Ct. at 369, where it is said: "Congress cannot be held rigidly to a choice between taxing all gifts or taxing none, regardless of the practical necessities of preventing tax avoidance, and regardless of experience and practical convenience and expense in administering the tax. Even the equal protection clause of the Fourteenth Amendment has not been deemed to impose any such inflexible rule of taxation."}\]

\[\textit{280 U. S. 204, 50 Sup. Ct. 98 (1930), noted in Note (1930) 29 Mich. L. Rev. 93; (1930) 40 Yale L. J. 99. For a discussion of the problem involved see also (1930) 30 Col. L. Rev. 404, 1071.}\]

\[\textit{See, for example, Baker v. Druesedow, 263 U. S. 137, 140, 44 Sup. Ct. 49, 41 (1923), where Mr. Justice Brandeis, in holding that the due process clause did not preclude a state from taxing the intangible property of a railroad, or from ascertaining its value by deducting the value of the tangible property from that of the entire property of the road, after giving the railroad company an opportunity to be heard and submit evidence as to the value, said: "The contention that the statute violates the Fourteenth Amendment is wholly without merit. It has long been settled that the due process clause does not preclude a State from taxing the intangible property of a railroad, or from ascertaining its value substantially in the manner prescribed by the statute herein assailed; that the equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business; and that the federal Constitution does not afford protection against double taxation by a State, which is here alleged."}\]
the debtor's domicile and at the domicile of the creditor, and that two states might tax on different principles the same testamentary transfer of property.\textsuperscript{50} Justices Holmes and Brandeis dissented, adhering to the earlier view that the bonds should be held taxable by Minnesota in spite of the fact that they were also taxable at the domicile of the owner, because the debt or obligation represented by the bonds existed by virtue of, and under the protection of, the laws of Minnesota.\textsuperscript{51} In \textit{Baldwin v. Missouri},\textsuperscript{52} decided at the same time of court, the decision in the \textit{Farmers' Loan and Trust Co.} case was relied upon to sustain the proposition that Missouri was not entitled to levy an inheritance tax upon the transfer of bonds and promissory notes physically present in Missouri at the time of the non-resident owner's death, or upon credits for deposit in Missouri banks owned by her at the time of her death. Mr. Justice Holmes (joined now by both Justices Stone and Brandeis) again dissented, contending that since the property was within the power and received the protection of Missouri, it had a taxable situs in that state. Finally, in \textit{Beidler v. South Carolina Tax Commission},\textsuperscript{53} decided during the 1930-31 term, it was held that South Carolina was not entitled to levy an inheritance tax upon the transfer of an indebtedness on an open, unsecured account due a non-resident decedent from a South Carolina corporation. In this case Mr. Justice Holmes merely observed that the decisions cited by the majority seemed to sustain the conclusions reached by them. "Therefore", he continued, "Mr. Justice Brandeis and I acquiesce, without repeating reasoning that did not prevail with the Court."\textsuperscript{54}

The most recent case involving the troublesome question of multiple taxation of intangibles through inheritance levies is \textit{First National Bank of Boston v. Maine},\textsuperscript{55} decided during the 1931-32 term. Here the decedent, a resident of Massachusetts, died owning shares of stock in a Maine cor-

\textsuperscript{50} See Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277 (1903).

\textsuperscript{51} In his dissenting opinion Mr. Justice Holmes said: "It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good. . . . A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds." \textit{Supra} note 48, at 216-18, 50 Sup. Ct. at 102-3.


\textsuperscript{53} 282 U. S. 1, 51 Sup. Ct. 54 (1930), noted in (1931) 31 \textit{Col. L. Rev.} 174; (1931) 29 \textit{Mich. L. Rev.} 389.

\textsuperscript{54} \textit{Supra} note 53, at 10, 51 Sup. Ct. at 55.

poration having most of its property in that state. His will was probated in Massachusetts, which state levied and collected a transfer tax on legacies and distributive shares made up in large part of the proceeds of this stock. Maine levied a similar tax under its statutes on the property passing by the will. Upon this amount the Massachusetts tax was allowed as a credit, and an action of debt was brought to recover the balance. The state supreme court held that the shares of stock were within the jurisdiction for taxing purposes, even though the owner was a non-resident decedent, and regardless of whether they were at the time of death in the state of the domicile or in the taxing state. The executor thereupon appealed to the Supreme Court of the United States.

The Court, in a six to three decision, held the tax invalid. Reiterating its view as to the unreasonable and discriminatory nature of multiple taxation of intangibles, the majority concluded that the situs of intangibles is at the domicile of the owner and that taxation by any other state is repugnant to the due process clause of the Fourteenth Amendment. It was said, moreover, that for inheritance taxation purposes there was no substantial difference between bonds and shares of stock. After reviewing the decisions in Farmers' Loan and Trust Co. v. Minnesota, Baldwin v. Missouri, and Beidler v. South Carolina Tax Commission, supra, Mr. Justice Sutherland, speaking for the Court, said:

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes, and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and at the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit

57 Maine v. First Nat. Bk. of Boston, 130 Me. 123, 154 Atl. 103 (1931).
denial that there is a local situs in another state for the purpose of transferring the same thing there.

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment to hold that jurisdiction to tax that event may be distributed among a number of states.

"It is true, there are such differences between bonds and stocks as might justify their being placed in separate categories for some purposes. But, plainly, they may not be so placed for the purpose of subjecting a transfer by death of the former to a tax by one state only, and a similar transfer of the latter to a tax by two or more states. Both are intangibles and both generally have been recognized as resting in contract, or, technically, as 'chooses in action'."

The majority opinion recognized the possibility that shares of stock, as well as other intangibles, might be so used in a state other than that of the owner's domicile as to give them a business situs analogous to the actual situs of tangible personal property. That question, it was said, would be held open for future decision when, if ever, it should be presented for consideration.

Mr. Justice Stone wrote a dissenting opinion, concurred in by Justices Holmes and Brandeis, declaring that he was "not persuaded that either logic, expediency, or generalizations about the undesirability of double taxation justify our adding to the cases recently overruled, the long list of those which, without a dissenting voice, have supported taxation like the present." He continued:

"Such want of logic as there may be in taxing the transfer of stock of a nonresident at the home of the corporation results from ascribing a situs to the shareholder's intangible interests which, because of their very want of physical characteristics, can have no situs, and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have situs in one and not in the other. Situs of an intangible, for taxing purposes, as the decisions of this court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.

"The withdrawal from appellee of authority to impose the present tax, in terms which would sweep away all power to impose any form of tax with respect to the shares of a domestic corporation if owned by nonresidents, would seem to be a far greater departure from sound and accepted principles, and one having far more serious consequences,

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63 Supra note 55, at 326-27, 52 Sup. Ct. at 176-77.
64 Supra note 55, at 331, 52 Sup. Ct. at 178.
65 Ibid.
than would the disregard of wholly artificial notions of the situs of intangibles.

"The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words, saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere, is it possible to stigmatize the tax as arbitrary." 61

As already indicated, the decision in the instant case reinforces and amplifies the stand against multiple taxation of intangibles theretofore taken by the Court in the Farmers' Loan and Trust Co., Baldwin and Beidler cases. As matters now stand, bonds, bank deposits, promissory notes, open book accounts, shares of corporate stock, and by implication all other intangibles may be legally subjected to a death duty tax only in the domiciliary state of the owner, similar taxation elsewhere being a violation of due process of law. This conclusion is predicated upon the concept that transmission of a particular thing from the dead to the living is an event which can take place in only one state at one and the same time. As in the previous cases, the Court fixes the occurrence of the taxable event at the state of the decedent's domicile by reliance upon the legal fiction, mobilia sequuntur personam. The reasoning resorted to in the cases involving other intangibles is utilized in granting a preference to the state of the decedent's domicile, stress being laid upon the desirability of a uniform rule. The dissent is based upon the view that taxation does not violate the due process clause if it has a reasonable connection with the control or benefit of the property with respect to which the tax is levied. In the opinion of the dissentients, the fundamental objection to the majority view is that the due process clause is made the basis for withholding from a state the power to tax interests subject to its control and benefited by its laws. Such control and benefit, said Mr. Justice Stone, are "the ultimate and indubitable justification of all taxation". 62

Prior to the decision in the instant case, it had been decided in many cases that the state in which a corporation was created and domiciled could impose a transfer tax on the devolution of shares of stock in its domestic

61 Supra note 55, at 332-33, 52 Sup. Ct. at 179.
62 Supra note 55, at 334, 52 Sup. Ct. at 180.
corporations, regardless of the fact that the shares were owned by non-residents and actually located outside the taxing state. In *Frick v. Pennsylvania*, for example, it was held that the power to levy an inheritance tax on tangible personally belonged exclusively to the state where the property had an actual situs; but as to intangibles (shares of stock were here under consideration) it was held that the state of the domicile of the corporation had the primary power to tax the stock and that the power of the state of the owner's domicile to levy an inheritance tax was secondary to that of the state of incorporation. That part of the *Frick* case permitting multiple death transfer taxes on intangibles was based on *Blackstone v. Miller*, which case was expressly overruled in *Farmers' Loan and Trust Co. v. Minnesota*, where, as we have seen, it was held that the state which created the corporation had no jurisdiction to impose an inheritance tax on corporate bonds when the instruments and their holders were outside the taxing state. The *Frick* case, however, was not overruled and there was still judicial warrant for the thesis that shares of stock could be taxed a death duty by the state of incorporation as well as by the state of the shareholder's domicile. The decision in the instant case, however, by placing corporate shares in the same category as bonds for purposes of inheritance taxation, repudiates that portion of the *Frick* decision dealing with shares of stock. As Mr. Justice Sutherland observed, the *Frick* case was "one of the latest" to approve *Blackstone v. Miller* and "give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest."

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64 268 U. S. 473, 45 Sup. Ct. 603 (1925).

65 Mr. Justice Van Devanter said: "The decedent owned many stocks in corporations of states, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of liens in possession. As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that state it was essential that the tax be paid." *Supra* note 64, at 497, 45 Sup. Ct. at 607.

66 *Supra* note 70.

67 Before the decision in the instant case the supreme court of Minnesota had held that corporate stocks of non-resident decedents were still taxable in the state of incorporation, Benson v. State, 183 Minn. 358, 236 N. W. 626 (1931). Here a Minnesota statute imposed a transfer tax on stock of corporations of that state whether owned by residents or non-residents. Decedent died a resident of Wisconsin owning stock in Minnesota corporations. His administrators petitioned to have this stock exempted from the tax. The court, relying on *Frick v. Pennsylvania*, held that the petition should be denied since the situs of the property interest represented by the stock was still within the jurisdiction of Minnesota. See also *In re Sack's Estate*, 232 App. Div. 433, 250 N. Y. Supp. 113 (1931).
It might be supposed that the effect of the decision in the principal case will be to deprive the states of a fruitful source of revenue. It has been estimated upon good authority, however, that prior to 1925 the annual income of all the states from the taxation of intangibles, of which stocks are only a part, was not in excess of $10,000,000, a considerable portion of which was collected by New York, New Jersey, Connecticut, Massachusetts and Pennsylvania, states subsequently enacting reciprocity statutes or legislation exempting intangibles of nonresident decedents. It seems that prior to the decision in the First National Bank case some thirty-seven states had adopted some type of reciprocity statute. The effect of the decision is of course to make the reciprocal exemption system unnecessary. It may be urged that since the decision is in harmony with the reciprocity principle it should be welcomed. It is scarcely necessary to point out, however, that there is a vast difference between the voluntary grant of reciprocity and the loss of taxable jurisdiction. And the eleven states in which there was no reciprocal exemption plan will of course be adversely affected by the decision. There will also be the question of refunds and waivers in every state where taxes have been collected on nonresident intangibles.

Irrespective of how much or how little revenue the states may be deprived of as a result of the judicial disapproval of multiple taxation, the most disquieting aspect of the decisions is the material expansion of the scope of the due process clause effected in order to achieve the desired results. Why should the Fourteenth Amendment be stretched to support a denial of the right of a state to impose a tax on the devolution of property so peculiarly within its control? Are not control and benefit the ultimate justification of taxation? The Court's answer to such queries is founded primarily on grounds of social and economic policy. Double taxation, it says, sins against the canons of economic justice. Double taxation, it says, sins against the canons of economic justice.

83 "By a sort of treaty or mutual understanding in interstate comity several states have agreed to a reciprocity provision of law, to the effect that they will impose only a small tax on shares of stock in their own corporations held by decedents in such other states as have a like provision and what is perhaps more important will give speedy release of tax liability." Plehn, Introduction to Public Finance (5th ed. 1929) 215. The estimate noted above was made by F. S. Edmonds, Chairman, Pennsylvania Tax Commission. See Proceedings of the Nineteenth Annual Conference on Taxation of the National Tax Association (1927) 326.


85 The possibility of tax avoidance as a result of the decision is obvious. Take, for example, the case of a resident of Connecticut who dies leaving an estate consisting entirely of intangibles kept in New York City. If his will, his executor and his beneficiaries are all located in New York, his entire estate can be probated there without resort to the courts of Connecticut. New York will be powerless to impose a tax and Connecticut will have no assets upon which to satisfy its claim. Under this set of facts the estate may avoid inheritance taxation altogether.
the Fourteenth Amendment". The dangers implicit in the Court's solution of the problem were summed up by Mr. Justice Holmes in his dissent in Baldwin v. Missouri in words of moving vigor:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions . . . . Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

In Lawrence v. State Tax Commission of Mississippi a Mississippi income tax statute relieving domestic corporations, but not individuals, from taxation on income derived from activities carried on outside the state, was held not to be a violation of due process of law or a denial of the equal protection of the laws. The defendant tax commission, acting under an amended statute taxing resident individuals, but not domestic corporations, on income earned both within and beyond state borders, taxed the appellant on income earned in adjacent states. The statute was challenged on the ground that in so far as it imposed a tax on income derived wholly from activities engaged in outside the state, it deprived appellant of property without due process of law, and that in exempting corporations, which were his competitors, from a tax on income derived from like activities carried on outside the state, it denied him the equal protection of the laws. From a decision of the state supreme court upholding the statute, an appeal was taken to the Supreme Court of the United States.

With respect to the first contention, Mr. Justice Stone, who delivered the opinion of the Court, pointed out that the Federal Constitution imposes on the states no particular modes of taxation, and apart from the grant to

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71 Supra note 55, at 327, 52 Sup. Ct. at 177.
72 Supra note 52, at 595, 50 Sup. Ct. at 439.
73 286 U. S. 276, 52 Sup. Ct. 556 (1932), noted in (1932) 32 Col. L. Rev. 1078. For a careful discussion of the various aspects of the problem presented, but written before the decision in the instant case, see Rottschaefer, State Jurisdiction of Income for Tax Purposes (1931) 44 Harv. L. Rev. 1075.
74 Miss. Code Ann. (1930) § 5025 et seq.
75 162 Miss. 338, 137 So. 503 (1931), noted in (1932) 32 Col. L. Rev. 534.
the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states free to tax those domiciled within them, so long as the tax is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. He continued:

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of income upon payment of that same obligation. We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state."

Answering the contention that the statute, in exempting corporations from a tax on income received from activities carried on outside the state, operated as a denial of the equal protection of the laws, Mr. Justice Stone said:

"What the local conditions are in Mississippi and its neighboring states with respect to businesses like the present, carried on across state lines by individuals and corporations, does not appear. How the statutory provisions now in question are related to others by which a permissible divergence in state policy with respect to the taxation of corporations and of individuals may be effected, is not shown. We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment, demonstrates that there may be.

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in

76 Supra note 73, at 280-81, 52 Sup. Ct. at 557.
tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. 77

The decision in the instant case is predicated on the view that domicile establishes a basis for taxation, and that enjoyment of the privileges of residence within a state, and the resulting right to invoke the protection of its laws, are inseparable from the responsibility for sharing the cost of government. Some years prior to the Lawrence case the Supreme Court passed on the domiciliary state's jurisdiction to tax income in Maguire v. Trefry. 78 That case involved the power of Massachusetts to tax a resident beneficiary on income received from a trust established by a Pennsylvania testator. The trustee was a Pennsylvania trust company; the trust was being administered in that state; and the trust property, the income from which was in question, consisted of bonds of non-Massachusetts debtors which were held in Pennsylvania. The tax was upheld, the Court adopting the view of the Massachusetts court 79 that the tax was based on the protection received from the state by the recipient of the income in his person, in his right to receive the income, and in its enjoyment. The Court made it clear that the sole issue involved was the right of the state to tax the beneficiary of a trust at his residence, although the trust had been created and was being administered under the laws of another state. The decision in the instant Lawrence case is therefore much broader in scope, since it sustains generally the power of a state to tax income received by its residents derived from sources wholly without the state.

In previous cases the Court has held that a state in which the income producing activities occur may tax the income; or in other words that a state may tax the privilege of earning income, no matter whether the recipient is a resident of the state or not. In Shaffer v. Carter, 80 for example, an Oklahoma statute 81 was upheld which levied an annual tax upon the entire net income of every resident of the state, from whatever source derived, and a like tax upon the net income of nonresidents derived from all property owned and from every occupation carried on in the state. The Court rejected the view that a state could not tax the income received by nonresidents from sources within it because an income tax was a tax on the person, and said that the issues in that case did not depend on mere questions of form and definition but on the practical effect and operation

77 Supra note 73, at 283-84, 52 Sup. Ct. at 558-59.
78 253 U. S. 12, 40 Sup. Ct. 417 (1920). See the illuminating discussion of this case in Rottschaefer, supra note 73, at 1085 et seq.
81 Laws 1915, c. 164.
of the tax. "The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition", said Mr. Justice Pitney, "and that his management was exerted from his place of business in another state, did not deprive Oklahoma of jurisdiction to tax the income which arose within its own borders." 82

It is apparent that when a state taxes both the resident recipient of non-local income and the nonresident recipient of income derived from sources within the taxing state, the former is being taxed on the privilege of enjoyment, arising from domicile, and the latter on the privilege of earning, irrespective of domicile. The resident recipient of domestic income, however, has a distinct advantage in that he may exercise both the privileges of enjoyment and earning. Since the Supreme Court in the Lawrence case has held squarely that the domiciliary state may tax income derived from out-of-state sources, it would seem that multiple taxation of the same income can be legally outlawed in the future only by depriving non-domiciliary states of their power to tax. We have seen, however, that the Court has previously sustained the income taxing power of non-domiciliary states.

In the case of Farmers' Loan and Trust Co. v. Minnesota Mr. Justice McReynolds inveighed against the evils of double taxation. He declared that taxation is an intensely practical matter and that laws in respect to it should be construed and applied with a view to avoiding unjust and oppressive consequences. He asserted that a very large part of the country's wealth is invested in negotiable securities whose protection against discrimination and unjust and oppressive taxation is a matter of the greatest moment. And we have noted that Mr. Justice Sutherland was scarcely less emphatic in his vigorous denunciation of the practice in First National Bank of Boston v. Maine.83 Will the Supreme Court take the position that the consequences of multiple income taxation are no less oppressive and unjust than those resulting from multiple inheritance taxation? If so, by what judicial technique and upon the basis of what canons of constitutional interpretation will it seek to curb them? 84

Passing from the consideration of decisions involving the constitutionality of state income and inheritance taxation to other cases in the tax field where state action was challenged under the Fourteenth Amendment, we find less controversial issues raised and the Court in substantial agreement as to the solution of the problems presented. An important case sustaining the validity of the Idaho kilowatt tax law was Utah Power and Light Co. 85

82 Supra note 80, at 55, 40 Sup. Ct. at 226.
83 Supra note 58.
84 Of course the discrimination in favor of the resident recipient of domestic income and other evils of multiple taxation may be avoided by reciprocal legislation like that found in New York and other states permitting a nonresident to deduct from his income tax the tax exacted in the domiciliary state on income earned in the foreign jurisdiction, a solution of a sort now unnecessary in the case of inheritance taxation, in view of the cases above discussed. The suggestion is made and the matter discussed in (1932) 32 Col. L. Rev. 1078.
v. *Pfost.* 85 Here the legislation in question 86 provided for a license tax of one-half mill per kilowatt hour, measured at the place of production, on all electricity and electrical energy generated, manufactured or produced, by any individual or corporation engaged in the generation, manufacture or production of electricity and electrical energy in Idaho for barter, sale or exchange. The plaintiff company, engaged in generating electricity in Idaho and distributing electrical power and energy in Idaho, Utah and Wyoming, sought to enjoin the enforcement of the law on the ground primarily that it operated as a burden on interstate commerce, and secondarily that it constituted a deprivation of property without due process of law and a denial of the equal protection of the laws. From a decree of the United States district court dissolving the interlocutory injunction, 87 plaintiff appealed to the Supreme Court.

In holding the Act constitutional, the Court accepted the position of the appellees that the tax was laid upon the generation of electrical energy as a distinct act of production, without regard to its subsequent transmission in interstate commerce; that the process of generation was one of converting mechanical energy into electrical form; that the tax was measured by the amount of electrical energy generated, without regard to its transmission; that such transmission was subsequent to, and separable from, generation, and corresponded to the transportation of goods after their manufacture; that the generation of electrical energy was local, and only its transmission was in interstate commerce; that since the tax was laid upon generation as a distinct act of production, it was not invalidated by reason of any intent on the part of the producer subsequently to transport the energy across state lines; in short that the tax did not operate as a burden on interstate commerce. "We are satisfied, upon a consideration of the whole case", said Mr. Justice Sutherland, "that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture." 88

Referring to the contention that the tax constituted a deprivation of property without due process of law and a denial of the equal protection

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85 286 U. S. 165, 52 Sup. Ct. 548 (1932), noted in (1932) 2 Idaho L. J. 212. For a discussion of state taxation of electric power see Comment (1932) 42 Yale L. J. 94. See also the related case of South Carolina Water Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (E. D. S. C. 1931), aff'd 286 U. S. 525, 52 Sup. Ct. 494 (1932), noted in (1932) 32 Col. L. Rev. 375; (1932) 80 U. of Pa. L. Rev. 450.
86 Idaho Laws 1931 (Ex. Sess.) c. 3.
87 54 F. (2d) 803 (D. Idaho 1931).
88 Supra note 85, at 181, 52 Sup. Ct. at 552. Since the argument that the law operated as a burden on interstate commerce was the principal contention raised, the Court's position on this point has been summarized, although the subject does not fall within the scope of this paper.
of the laws, since it was so uncertain and ambiguous as to require arbitrary
administrative action without a legislative standard, the Court said:

"Since the tax applies not to all electrical energy generated, and
therefore not to all measured at the point of production, but only to
such as is produced for barter, sale, or exchange, it necessarily follows
that other factors than the basic measurement at the generator must
be taken into consideration. That is, to put the matter concretely, the
amount of the initial production must first be ascertained by measure-
ment at the place of production, and from that must be taken amounts
used by the producer or consumed in effecting transmission (including
so-called line or system losses), or disposed of otherwise than by barter,
sale or exchange; the remainder only being subject to the tax. The
record shows that the ascertainment of these necessary factors is prac-
ticable; testimony being to the effect that the flow of energy passing
any point in the transmission system, as well as the amount delivered
at any point on the system, can be measured with fair accuracy if
proper instruments be attached. Neither the validity of the tax nor
its certainty is affected because it may be necessary to ascertain, as an
element in the computation, the amounts delivered in another juris-
diction."

In Iowa-Des Moines National Bank v. Bennett plaintiffs brought an
action of mandamus to compel the refund of taxes alleged to have been
exacted illegally. The state code provided for the taxation of national and
state bank shares and competitive capital at one rate and for the taxation
of non-competing investments at a rate which was only from one-fifth to
one-seventh as great. The assessor and the local board of review had
properly applied the bank rate in taxing the shares of a number of com-
peting domestic corporations, but the county auditor, in making up the tax
list, wrongfully changed these assessments. Although conceding that there
was systematic discrimination in favor of shares in the competing domestic
corporations, the state supreme court denied relief on the ground that the
auditor was without authority to make the alteration and that his act and
the ensuing collection were void and not attributable to the state. It said
that since the wrongful exaction was made without authority from the

89 Supra note 85, at 190, 52 Sup. Ct. at 555. The technical features of the problems aris-
ing in state taxation of electric power are discussed in the Comment in (1932) 42 YALE L. J.
94, where the decision in the instant case is adversely criticised. The commentator views the
decision as one "distorting physical facts" and contrary to "the general consensus of scientific
opinion", presumably because such distinguished gentlemen as Dr. Robert A. Millikan and
Dr. Irving Langmuir upheld the position of the power company, overlooking the fact that
there was equally reliable testimony introduced supporting the contentions of the state, though
emanating from a less exalted source.

90 284 U. S. 239, 52 Sup. Ct. 133 (1931), with which was tried Central State Bank v.
Bennett, ibid. The case is noted in (1932) 32 COL. L. REV. 539. See also the discussion of
the case in Comment (1932) 41 YALE L. J. 669, 675. The issues involved are consid-
ered in Isselk, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorised Action
of State Officials (1927) 40 HARV. L. REV. 969, and, James, Federal Equity Jurisdiction to

91 IOWA CODE SUPP. (1913) §§ 1310, 1311, 1321, 1332, 132-1a.
state, it did not constitute discrimination by the state. It held that the petitioners had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection. In reversing this judgment, the Supreme Court, through Mr. Justice Brandeis, held that the state was responsible for the consequences of the illegal acts of its taxing officers and that the state court, in giving judgment against the bank, had in effect ratified the act of the state in retaining the taxes known to have been wrongfully collected. The Court took the position, moreover, that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Said Mr. Justice Brandeis:

“Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the Fourteenth Amendment. . . . The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the state, as distinguished from action by private individuals. . . . But acts done ‘by virtue of public position under a State government, . . . and . . . in the name and for the State,’ . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the Federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law.”

In the instant case respondents relied upon *Barney v. City of New York*. In the *Barney* case the plaintiff sought in the circuit court for the southern district of New York to enjoin the City of New York and its Board of Rapid Transit Commissioners from proceeding with the construction of the Rapid Transit Railroad. It was alleged that the road was being constructed in violation of the statutes of New York in that a change in the plans for the construction of the road had been made without the approval required by statute. The plaintiff's contention was that the continued construction of the road would deprive it, an abutting owner, of its property without due process of law, in contravention of the Fourteenth Amendment. The circuit court, on the strength of an opinion in a prior case based on similar facts, dismissed the suit for want of jurisdiction. On appeal the Supreme Court affirmed the decree. After pointing out that

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93 Supra note 90, at 245-46, 52 Sup. Ct. at 135-36.
the road construction was not authorized by state law and had been so recognized by the lower New York courts, Chief Justice Fuller said:

"Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the 14th Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without authority of or contrary to state law. . . ." 97

It will be seen that, however broad the language of its opinion, the Barney case is authority only for the proposition that the federal courts, in the absence of diversity of citizenship, have no jurisdiction to enjoin state administrative action alleged to contravene the Fourteenth Amendment when such action is prohibited by state law. It has been suggested, moreover, that the reasoning in the Barney decision was dealt a death blow in Home Telephone and Telegraph Co. v. Los Angeles.98 Here plaintiff sought, in the district court for the northern district of California, to enjoin Los Angeles officials from enforcing a city ordinance fixing telephone rates, on the ground that the rates were confiscatory and hence in violation of the Fourteenth Amendment. The defendant filed a plea to the jurisdiction of the court on the ground that there was no diversity of citizenship. From an order dismissing the bill for want of jurisdiction, an appeal was taken to the Supreme Court. In an opinion written by Chief Justice White, reversing the decree below, it was said:

". . . the settled construction of the [Fourteenth] Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids, even though the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the


97 Supra note 94, at 437-38, 24 Sup. Ct. at 503.

98 227 U. S. 278, 33 Sup. Ct. 312 (1913). See Isseks, supra note 90, at 969.
power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.”

Although the opinion in the *Home Telephone Co.* case did not expressly overrule the *Barney* case, the theory on which that case was decided—that action unauthorized by state law is not state action within the meaning of the Fourteenth Amendment—was plainly disavowed. In its opinion in the *Iowa-Des Moines National Bank* case the Court refused to discuss the applicability of the *Barney* case except to observe that “some expressions in the opinion in the *Barney* case, said to be inconsistent with the conclusions stated above, have been disapproved by this Court”, citing the *Home Telephone Co.* case. It would seem, therefore, that while the *Barney* case has never been directly overruled, it is now regarded by the Court with but scant favor.

Another instance of administrative discrimination was passed upon in *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pennsylvania,* where it was held that the equal protection clause prevented local taxing authorities in Pennsylvania from assessing at a uniform rate all coal in continuous vein underlying a township, disregarding differences in actual or market value due to distances from transportation facilities and other factors. Petitioners, on appeal to the court of common pleas of Greene county, assailed the plan of assessment adopted by local taxing officials, alleging that the valuation placed upon their coal was unjust and discriminatory in that all coal in the same township (except what was termed “active coal”) was assessed at the same valuation, regardless of its remoteness or accessibility to market, cost of operation, or means of transportation, and without adequate consideration of the valuation and assessment of other coal and other classes of real estate in the county. The lower court dismissed the appeals and its decrees were affirmed by the supreme court of the state. After pointing out that “it is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property”, Mr. Chief Justice Hughes, in announcing the Court’s view, went on to say:

“... the fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which

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530 Supra note 98, at 287, 33 Sup. Ct. at 315.
531 Supra note 90, at 247, 52 Sup. Ct. at 136.
532 284 U. S. 23, 52 Sup. Ct. 48 (1931).
533 Greene County Coal Tax Appeals, 302 Pa. 179, 152 Atl. 755 (1930).
ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. . . . "The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district." 103

In Gregg Dyeing Co. v. Query 104 a South Carolina statute 105 imposing a tax on gasoline imported into the state, and there placed in storage for future use, was held not to contravene the equal protection clause of the Fourteenth Amendment, since other statutes imposed a tax at the same rate on the purchasers or producers of domestic gasoline. 106 The Court emphasized the point that discrimination, like interstate commerce, is a practical conception, and that only "substantial distinctions" and "real injuries" ought to be considered. Continuing, Mr. Chief Justice Hughes said:

". . . the state court found no distinction of substance with respect to the practical operation of the taxing statutes in pari materia, as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gasoline they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the state. This burden they have not sustained. They have failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact." 107

The technical question of the valuation of public utilities for taxation purposes was considered in Southern Railway Co. v. Kentucky. 108 It was held here that the enforcement of franchise taxes imposed by Kentucky in respect of railroad lines in that state which constituted a part of the system of the appellant company, a foreign corporation, based on certain additional values which, though erroneously computed, were less than if the computation had been correctly made, was not a denial of due process of law. The additional values in question were based on average net earnings per mile

103 Supra note 101, at 29-30, 52 Sup. Ct. at 50-51.
106 The challenged legislation had been upheld by the supreme court of the state. 166 S. C. 117, 164 S. E. 588 (1931).
107 Supra note 104, at 481-82, 52 Sup. Ct. at 635.
of the railway's system in the year preceding that for which franchise taxes were imposed. Domestic mileage used in calculations included certain railroad lines which the highest state court had held were not a part of the system. After pointing out that the commonwealth had shown that, taking both years together, the additional values arrived at were much less than if the computation had been correct, Mr. Justice Butler said:

"The error operates to the advantage of the appellants. They have not shown, and but faintly claim, that when attributed to the entire system mileage in Kentucky, the additional values are so excessive or arbitrary as to amount to the inclusion of property outside the state. On this record, it cannot be said that the enforcement of franchise taxes on the basis of values established by the judgment would deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment." 110

State Action in Aid of the Police Power

"Whatever the theory," observes Professor Thomas Reed Powell, "the fact is that the Supreme Court of the United States can pass on the reasonableness of the police measures of every state and city in the land." 111 The Fourteenth Amendment, as construed by judges profoundly affected by changing social and economic forces, subjects the domestic affairs of the states to the ultimate control of five men in the national capital. Among the types of challenged state action often found in this broad grouping are measures designed to curtail civil liberties, regulate trade, commerce and banking, establish forms and modes of judicial procedure, conserve natural resources, and promote the public safety, health, morals and general welfare. In none of the cases here discussed, however, can the challenged state action be classified as pertaining to "morals" or "health." 112

The only important case involving civil liberties, and one in which the Supreme Court found itself in sharp disagreement, was Nixon v. Condon. 113 The political background of this case is interesting. In Nixon v. Herndon 114 the Supreme Court had declared invalid a Texas statute 115 prohibiting negroes from voting in Democratic primaries. The Governor of the state thereupon recommended that the legislature repeal the objec-

110 Supra note 108, at 341-42, 52 Sup. Ct. at 161. The same decision had been reached by the Kentucky court of appeals. See 238 Ky. 638, 38 S. W. (2d) 696 (1931).
111 The Supreme Court and State Police Power, 1922-1930 (1931) 17 Va. L. Rev. 529.
112 Two important cases involving freedom of speech and of the press came before the Court during the 1930-31 term: Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931); Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 532 (1931). Both cases are discussed in my article, The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931 (1932) 80 U. of Pa. L. Rev. 483, 502 et seq.
113 286 U. S. 73, 52 Sup. Ct. 484 (1932), noted in (1932) 21 Calif. L. Rev. 62; (1932) 32 Col. L. Rev. 1069; (1932) 1 Wash. L. Rev. 131; (1932) 17 Minn. L. Rev. 85. See also: Note (1932) 41 Yale L. J. 1212; Note (1932) 32 Col. L. Rev. 80.
tionable article and substitute therefor a statute which would "vest power in the executive committee of the several political parties to determine the qualifications requisite to membership in such parties." Following the enactment of such a law, the Democratic state executive committee passed a resolution that "all white Democrats . . . and none other" be permitted to participate in the forthcoming primary elections. The same negro who had successfully attacked the statute in *Nixon v. Herndon* presented himself at the polls and, upon being denied a ballot on the strength of the resolution of the executive committee, brought an action for damages against the primary officials. The district court dismissed the suit on the ground that no violation of the Fourteenth or Fifteenth Amendments was established, since the plaintiff's exclusion from participation in the primary was not the result of state action. The circuit court of appeals for the fifth circuit affirmed this judgment and the case was thereupon taken to the Supreme Court of the United States on writ of *certiorari*. The Court, in a five to four division, reversed the judgment below on the ground that the resolution of the party committee, adopted pursuant to statutory authorization, was the act of a state agency. It fell, therefore, within the authority of *Nixon v. Herndon* and was unconstitutional as a denial by the state of the equal protection of the laws guaranteed by the Fourteenth Amendment. Delegates of the state's power had discharged their official functions in such a manner as to discriminate invidiously between white and black citizens. In delivering the opinion of the Court, Mr. Justice Cardozo said:

"We do not impugn the competence of the Legislature to designate the agencies whereby the party faith shall be declared and the party discipline enforced. The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this Court will determine for itself.

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119 49 F. (2d) 1012 (C. C. A. 5th, 1931), noted in (1932) 32 COL. L. REV. 135; (1931) 5 So. CALIF. L. REV. 162.
It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.”

The minority judges contended that political parties are not governmental agencies and perform no governmental functions. The state legislature here did not authorize the party but merely recognized its existence. Parties are the fruits of voluntary action. The sole purpose of the party primary is to determine the party nominees to be offered as candidates for offices in the general election. Where there is no unlawful purpose, citizens may create parties at will and limit their membership. Blacks are at liberty to organize as well as whites. Freedom of action in this respect is essential to free government. Said Mr. Justice McReynolds (in a dissenting opinion concurred in by Justices Van Devanter, Sutherland and Butler):

“...The act now challenged withhold nothing from any negro; it makes no discrimination. It recognizes power in every political party, acting through its executive committee, to prescribe qualifications for membership, provided only that none shall be excluded on account of former political views or associations, or membership or nonmembership in any nonpolitical organization. . . .

“If statutory recognition of the authority of a political party through its executive committee to determine who shall participate therein gives to the resolves of such party or committee the character and effect of action by the state, of course the same rule must apply when party conventions are so treated; and it would be difficult logically to deny like effect to the rules and by-laws of social or business clubs, corporations, and religious associations, etc., organized under charters or general enactments. The state acts through duly qualified officers, and not through the representatives of mere voluntary associations.”

It will be recalled that in Newberry v. United States the Supreme Court dealt with the status of primary elections. The defendant had been indicted and convicted for violation of the Federal Corrupt Practices Act, in securing his nomination for United States Senator at a primary election. The Court agreed in deciding that the judgment should be reversed but not in the reasoning by which the result was reached. According to four justices, Congress had no power to regulate senatorial primaries before the Seventeenth Amendment and acquired none by its adoption; according to one justice, Congress had no such power before the Amendment but might

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120 Supra note 113, at 88-89, 52 Sup. Ct. at 487.
121 Supra note 113, at 94, 103-4, 52 Sup. Ct. at 489, 493.
122 256 U. S. 232, 41 Sup. Ct. 469 (1921).
have acquired it through its adoption, on which latter point decision was reserved; and according to four justices Congress always had such power. In delivering the Court's opinion in the Newberry case, Mr. Justice McReynolds observed that primaries are "in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors".123 In his dissent in Nixon v. Condon,124 Mr. Justice McReynolds did not consider the question of the constitutional status of primary elections except in relation to the situation presented in that case, and the authorities cited by him were confined to Texas statutes and cases,125 no mention being made of the Newberry case. The majority opinion ignored altogether this aspect of the case, resting the decision on the state agency of primary officials acting in pursuance of the resolution of the state committee and the state statute.

It is probable that still another attempt will be made by Texas Democrats to bar negroes from party primaries. The obvious course would be to repeal all primary laws and thus permit the party authorities to adopt their own rules of eligibility without reliance upon statutory authorization. In the event such action is taken, could it be effectively argued that the party committees and primary officials are nevertheless acting as agents of the state? Would the Supreme Court undertake to safeguard negro suffrage under this set of facts on the ground (to borrow the words of Mr. Justice Cardozo) that "parties and their representatives have become the custodians of official power" and that "if heed is to be given to the realities of political life, they are now agencies of the state, the instruments by which government becomes a living thing"?126

The illusory concept of "affectation with a public interest"127 furnished the chief topic of judicial conversation in the much discussed case of New State Ice Co. v. Liebmann.128 Here the Supreme Court held unconstitutional as a deprivation of property without due process of law an

123 Supra note 122, at 250, 47 Sup. Ct. at 472.
126 Supra note 113, at 84, 52 Sup. Ct. at 485.
127 For discussions of this subject see Finkelstein, From Munn v. Illinois to Tyson v. Banton (1927) 27 Col. L. Rev. 769; McAllister, Lord Hale and Business Affected With a Public Interest (1930) 43 Harv. L. Rev. 759; Robinson, The Public Utility Concept in American Law (1928) 41 Harv. L. Rev. 277; Powell, State Utilities and the Supreme Court 1922-1930 (1931) 29 Mich. L. Rev. 811, 1001; McClain, The Convenience of the Public Interest Concept (1931) 15 Minn. L. Rev. 546; Hamilton, Affectation With Public Interest (1930) 39 Yale L. J. 1089.
Oklahoma statute declaring the business of manufacturing, selling and distributing ice to be a public utility; forbidding persons from engaging therein without first obtaining a certificate of public convenience and necessity from the Corporation Commissioner of the state, granted after a hearing; and further providing that application for such license might be denied if it appeared that facilities existing in the community were sufficient to meet the public needs therein. Persons already engaged in the business were entitled to a license upon payment of the required fee, without meeting the other requirements of the Act. The plaintiff company, engaged in the business of manufacturing, selling and distributing ice under a license, sought to enjoin the defendant from engaging in the same business without first having obtained the required license. The district court dismissed the bill of complaint and the circuit court of appeals affirmed this decree.

Speaking for the majority of the Court, Mr. Justice Sutherland declared the statute to be an arbitrary and unreasonable interference with the right to engage in a private business and hence invalid under the Fourteenth Amendment. The challenged legislation, he said, dealt with an ordinary business, essentially private in nature, and not with a paramount industry, upon which the prosperity of the entire state depended. The ice business in Oklahoma, in other words, was not sufficiently "affected with a public interest" to warrant the regulation imposed by the statute. The aim of the statute, it was said, was not to encourage competition, but to prevent it; not to regulate business, but to preclude persons from engaging in it; the control asserted did not protect against monopoly, but tended to foster it. Mr. Justice Sutherland continued:

"There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges.

"And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in

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129 OKLA. COMP. STAT. ANN. (Harlow, 1931) §§ 3684-3691.
130 42 F. (2d) 913 (W. D. Okla. 1930).
131 52 F. (2d) 349 (C. C. A. 10th, 1931).
our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”

Mr. Justice Brandeis and Mr. Justice Stone were unable to agree with this disposition of the case, and Mr. Justice Cardozo, who had succeeded former Justice Holmes, took no part in its consideration or decision. The dissenting opinion, written by Justice Brandeis, pointed out that the introduction in the United States of the “certificate of public convenience and necessity” marked the growing conviction that under certain circumstances free competition might be harmful to the community, in which event absolute freedom to enter private business should be denied. The state legislature, being familiar with local conditions, ought to be the most competent judge of the necessity for enactments of this type. The mere fact that a court may differ with the legislature in its views as to public policy, or that judges may hold views inconsistent with the propriety of the legislation, affords no ground for judicial interference. Since the basis of the attack here was upon the statute itself, rather than upon any claim of its arbitrary application, it was argued that unless the Court could say that the Federal Constitution conferred an absolute right to engage anywhere in the business of manufacturing ice for sale, it could not properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to such business. Local conditions and the history of the legislation were discussed in detail in an effort to demonstrate that the legislative solution of the problem was not unreasonable. In conclusion the view was advanced that present economic conditions make it imperative that the Fourteenth Amendment be so construed as not to prevent experimentation by the states in the field of social and economic science.

The influence of Justice Stone’s forceful dissent in *Tyson v. Banton* may be traced in Justice Brandeis’ discussion of the “affectation with a public interest” formula. He said:

“... so far as concerns the power to regulate, there is no difference, in essence, between a business called private and one called a public utility or said to be ‘affected with a public interest.’ Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business ‘affected with a

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132 Supra note 128, at 279-80, 52 Sup. Ct. at 375.
public interest,' employing property 'devoted to a public use,' rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago, and by the decision of this Court in *Munn v. Illinois*, . . . which first introduced them into the law of the Constitution. In my opinion, the true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible." 134

Answering the contention that manufacturing ice for sale and distribution is a common calling, and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause, he said:

"To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in *Slaughter House Cases* . . . was created by the Legislature. Prior to the Eighteenth Amendment selling liquor was a common calling, but this Court held it to be consistent with the due process clause for a state to abolish the calling, . . ." 135

As in most other cases where some form of state action is attacked under the Fourteenth Amendment, the question of the "reasonableness" of the legislative regulation which the Court had to pass upon in the Oklahoma case was one requiring for its solution the exercise of judicial discretion with respect to a practical problem of social and economic policy. Two significant and widely divergent points of view are presented by the majority and minority opinions. The majority would test the constitutionality of the challenged law by determining whether the business sought to be regulated is one "affected with a public interest". The foremost expounder of the utility of this concept as a yardstick for determining the validity of legislative price-fixing and other forms of industrial regulation—Mr. Justice Sutherland—has conceded that it "furnishes at best an indefinite standard," and that "attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation". In *Wolff Packing Co. v. Court of Industrial Relations*,136 nevertheless, Mr. Chief Justice Taft, in denying the power of the state to prescribe compulsory arbitration of labor disputes, ventured the following classification of the types

134 Supra note 128, at 302-3, 52 Sup. Ct. at 383-84.
135 Supra note 128, at 303, 52 Sup. Ct. at 384.
of businesses included under the term: (1) Those carried on under the authority of a public grant or franchise from the state (such as railroads, other common carriers and public utilities) which either expressly or impliedly imposes the duty of rendering a public service demanded by any member of the public; (2) Certain occupations (such as innkeeping and operating cabs and grist mills) which have from earliest times been considered public in their essential nature; (3) Businesses which, though not public in their inception, have assumed during their existence such a peculiar relationship to the public that they are said to be clothed with a public interest and consequently subject to governmental regulation. With respect to the last category the Chief Justice said: "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." ¹³⁷ In determining whether or not the business in question falls within the third grouping, the factors usually stressed are its similarity to businesses whose regulation has been judicially permitted on the basis of this concept in the past, and the extent to which the enterprise is deemed by the Court to have been "dedicated to a public use", by which is seemingly meant its "indispensable nature" and its capacity and willingness to serve the public as a whole. In the instant case, for example, Mr. Justice Sutherland used the following language:

"Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use." ¹³⁸

The view of the dissentients, expounded in the instant case by Mr. Justice Brandeis and ably argued in past decisions by both Justices Holmes and Stone, accords the formula of "affectation with a public interest" scant respect. In his dissent in *Tyson v. Banton*, ¹³⁹ which declared invalid the

¹³⁷ *Supra* note 136, at 538, 43 Sup. Ct. at 634. In *Tyson v. Banton*, *supra* note 133, at 430, 47 Sup. Ct. at 428, the following qualification was added: "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease, or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right', that synonym more nearly than any other expresses the sense in which it is to be understood."

¹³⁸ *Supra* note 128, at 277, 52 Sup. Ct. at 374.

¹³⁹ *Supra* note 133.
restriction on the resale price of theatre tickets in New York, Mr. Justice Stone levelled against it the most telling verbal onslaught:

“...The phrase ‘business affected with a public interest’ seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.”

If, then, the phrase “business affected with a public interest” is merely a question-begging concept ill-suited for the solution of problems raised by legislative price-fixing and other forms of industrial regulation, how would the dissentients test the validity of a challenged statute? The problem, in their judgment, is simply one of a limitation on state police power arising out of the Fourteenth Amendment, and involves nothing more than a careful and realistic balancing of the public interests served by the regulation on the one hand, and the desirability of freedom from restraint of which the regulation deprived the owner of the business, on the other. In order to determine whether or not a given regulation is “arbitrary” or “unreasonable” and hence a violation of due process of law, attention must be centered, not on the notions which the judges themselves may entertain concerning the economic wisdom of the legislation, but on local conditions and the history of the regulation, due weight being attached to the solution arrived at by the lawmakers and courts of the state involved. The vital issues are: What is the nature of the evil to be remedied? In what manner has the state dealt with this evil? Far from being sacrosanct, the “public interest” test, says former Justice Holmes, is “little more than a fiction intended to beautify what is disagreeable to the sufferers.”

It would be better to recognize that the legislature “can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.”

140 Id. at 451, 47 Sup. Ct. at 435.
141 Id. at 446, 47 Sup. Ct. at 434.
142 Id. at 446, 47 Sup. Ct. at 433-434.
Problems of constitutional law arising out of another type of business regulation were passed upon in Coombes v. Getz.\textsuperscript{143} In this case the assignee of a creditor of a California corporation brought suit against one of its directors to enforce a liability, based upon a provision of the California constitution,\textsuperscript{144} for moneys embezzled or misappropriated by officers of the corporation during the defendant's term of office. Pending an appeal to the supreme court of the state from a ruling of the superior court sustaining a demurrer to the complaint, a constitutional amendment repealed the clause upon which the plaintiff relied. The state constitution provides that all laws concerning corporations may be altered or repealed, and the state political code declares that statutes may be repealed at any time and that persons acting under any statute are deemed to have acted in contemplation of this power of repeal.\textsuperscript{145} The state supreme court granted respondent's motion to dismiss the appeal on the theory that the cause of action had abated with the repeal of the clause on which it was based.\textsuperscript{146} On appeal the Supreme Court of the United States reversed this decision on the ground that the plaintiff's right was a vested contractual obligation within the protection of the contract impairment and due process clauses of the Federal Constitution, and that its repeal did not fall within the state's reserved power to amend or repeal corporate charters.\textsuperscript{147} Through Mr. Justice Sutherland the Court spoke as follows:

"The authority of a state under the so-called reserved power is wide; but is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation, and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. . . . The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor . . . to enforce his cause of action upon the contract. . . ."\textsuperscript{148}

\textsuperscript{143} Supra note 143, at 441-42, 52 Sup. Ct. at 436.
\textsuperscript{144} Art. 12, § 3.
\textsuperscript{145} Supra note 143, at 441-42, 52 Sup. Ct. at 436.
\textsuperscript{146} Art. 12, § 1; Cal. Pol. Code (Deering, 1923) § 327.
\textsuperscript{147} Coombes v. Franklin, 213 Cal. 164, 1 P. (2d) 992, 4 P. (2d) 157 (1931).
\textsuperscript{148} Dodd, Amendments to Corporate Charters (1927) 75 U. of Pa. L. Rev. 723.
In his first judicial opinion as a member of the Court, Mr. Justice Cardozo dissented, with the concurrence of Justices Brandeis and Stone. He argued that the liability imposed was not contractual (except in a qualified and fictional sense) but statutory, since it would not have not been destroyed even had the directors upon assuming office repudiated the obligation altogether. This being so, the obligation of the petitioner's contract was whatever the law of the state attached to the contract at the time it was made. The obligation, therefore, being subject to repeal or alteration under the constitution and laws of the state, was wholly contingent.

"The difficulty with the petitioner's case is this, [declared Mr. Justice Cardozo] that his security in its origin was not vested, but contingent. The meaning of the California Constitution is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that state had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment. . . . Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the state of its creation, or he did not take anything." 150

Had the reasoning of the minority prevailed in the present case, aid and comfort would have been extended to corporation directors rather than to creditors. The decision, indeed, might be viewed as an illustration of the tendency to protect creditors of corporations at the expense of directors and stockholders were it not for the fact that the group on the Court which might ordinarily be expected to favor such a policy are found on the other side. The position of the dissentients, however, is unquestionably consistent with the general tendency of this group to impose as few judicial limitations as possible on the scope of state action. The majority found the action here challenged to be a denial of due process of law as well as an impairment of the obligation of a contract, despite the fact that the protection of the former clause had not been invoked and that apparently no consideration whatsoever was given to the possibility that the repealing statute might have been a legitimate exercise of the police power.151

150 Supra note 145.
151 Supra note 143, at 450-51, 52 Sup. Ct. at 439.
152 See the discussion of the present status of the contract clause in the Note (1932) 32 Col. L. Rev. 476, where it is pointed out that so far as contracts between individuals are concerned, the notion of an absolute prohibition has disappeared and the test of state interference has become (at 478) "exclusively a matter of the technique the Supreme Court has built up around the substantive law side of due process." The note continues: "Of influence in aiding the Court to arrive at this result have been its frequent statements in cases involving contracts made by states that the contract clause did not override the power of the state to regulate the public health, the public morals, the public safety, and (more recently) the public welfare." Many cases are cited, including Marcus Brown Holding Co. v. Feldman, 256 U. S.
In *Shriver v. Woodbine Savings Bank* 152 it was held that an Iowa statute 153 making a stockholder of a state bank personally liable for the deficiency of the proceeds of the sale of his stock to satisfy an assessment levied by reason of impairment of the capital stock was not in violation of either the contract clause or the due process clause of the Federal Constitution, even as to a stockholder who had acquired his shares prior to the enactment of the statute, and despite the fact that the only statutory proceeding for the enforcement of such an assessment at the time he acquired his stock was the sale of the stock. Mr. Justice Stone, speaking for a unanimous Court, pointed out that, strictly speaking, the appellant presented no question of impairment of the obligation of contract, for it was not insisted that either party had been deprived by legislative action of any right or remedy secured by the statute in force when appellant acquired his stock. The contention was rather that the personal liability provision imposed on him an obligation where none existed before, and that its imposition, after he had bought his stock, operated to deprive him of property without due process of law. The Court rejected this contention on the ground that the earlier statute defined a liability quasi-contractual in nature which, even though no specific remedy for enforcement was then provided, would have been enforceable in full against the stockholder in the common law action of debt or its modern equivalent. Said Mr. Justice Stone:

"Here the remedy provided is a summary and only partially effective supplement or alternative to that which the common law affords for enforcing the obligation to pay a sum certain, which, when fixed by the prescribed assessment, is declared to be due and owing. The very fact that the remedy is on its face inadequate to compel full performance of the obligation declared is persuasive that it was not intended to be exclusive of applicable common law remedies, by which complete performance might be secured." 154

It is unquestioned that the liability of stockholders to statutory assessments to provide for the restoration of an impairment of capital stock, or for the benefit of creditors of an insolvent corporation, is within the protection afforded by the contract and due process clauses. 155 In concluding

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152 *Shriver v. Woodbine Savings Bank*, 152
154 *Supra* note 152, at 478-79, 52 Sup. Ct. at 443.
that the statute in question here did not offend the guaranties of the Federal Constitution, the Court merely relied on the familiar doctrine that in general there are no vested rights in particular remedies or modes of procedure and that legislative changes or modifications of existing remedies are permissible, providing an efficacious remedy still remains or is substituted for the enforcement of legal rights. Ever since becoming a stockholder of the bank, the appellant had been obligated to pay any legal assessment levied for the purpose of repairing the capital stock. The purpose of the challenged enactment was simply to afford a remedy considered more appropriate for the enforcement against the appellant of an obligation already in existence.

Our review now shifts from the consideration of problems raised by state regulation of trade, commerce and banking to two decisions dealing with the regulation of forms and modes of judicial procedure. Porter v. Investors' Syndicate involved an appeal from a decree of the federal district court for the district of Montana enjoining the enforcement by the investment commissioner of that state of a certain administrative order pertaining to the conduct of appellee's business of selling investment certificates. The commissioner had threatened to revoke appellee's permit if it failed to comply with the order. The lower court's action was based on the view that the challenged "blue sky" statute was violative of due process in that it lacked any provision for notice and hearing before the revocation of a license. The Supreme Court, however, speaking through Mr. Justice Roberts, held the lower court to be without jurisdiction, since the appellee had failed to exhaust the administrative remedy afforded by the statute of bringing an action within thirty days against the commissioner in a state district court to vacate his order as unjust and unreasonable. A right of appeal from the judgment of the district court to the state supreme court was also provided. The Court said that where, as ancillary to the review and correction of administrative action, the state statute allows the complaining party to have a stay until final decision, there is no deprivation of due process, even though the words of the statute attribute final and binding character to the initial decision of the board or commissioner. Here the challenged statute was construed to permit such a stay. It was added, however, that where either the statute itself or the decision of the state court interpreting it, precludes such stay until the legislative process is completed by the final action of the reviewing court, due process is denied. "The present case", said Mr. Justice Roberts, "is not one in which the review of

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156 286 U. S. 461, 52 Sup. Ct. 617 (1932).
157 52 F. (2d) 189 (D. Mont. 1931).
158 Mont. Rev. Codes (Choate, 1921) §§ 4026-4055, as amended by Laws, 1931, c. 194.
the commissioner's action is judicial in character. If it were the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply."

The constitutionality of a Minnesota statute which substituted arbitration for court trial in the determination of the amount of loss under fire insurance policies was upheld in *Hardware Dealers' Mutual Fire Insurance Co. v. Glidden Co.* The appellant Wisconsin corporation, licensed to carry on the business of writing fire insurance in Minnesota, issued its policy insuring appellee's assignor against loss of personal property located there. The policy was in standard form, the use of which is enjoined by Minnesota statutes on all fire insurance companies licensed to do business in the state. Failure to comply with the law is ground for revocation of the license. Willful violation thereof is made a criminal offense, punishable by fine or imprisonment. A fire loss having occurred, the insured appointed an arbitrator and demanded that the amount be determined by arbitration, as provided by the policy. Upon the company's refusal to participate in the arbitration, the insured, in accordance with the arbitration clause, procured the appointment of an umpire to act with its own designated arbitrator. The arbitrator and umpire thus selected determined the amount of the loss and made their award accordingly. The company defended the present suit, brought to recover the amount of the award, on the ground that the law requiring the use of the arbitration provisions of the standard policy infringed the due process and equal protection of the laws guaranties of the Fourteenth Amendment. The state supreme court, in holding the statute constitutional and sustaining a recovery of the amount of the award, had ruled that the authority of the arbitrators did not extend to determination of the liability under the policy, which was a judicial question, but that their decision as to the amount of the loss was conclusive, unless grossly excessive or inadequate or procured by fraud.

Mr. Justice Stone, speaking for the Court, pointed out that this type of arbitration clause has long been incorporated in fire insurance policies both in Minnesota and elsewhere, and when voluntarily used, compliance with its provisions has been held to be a condition precedent to an action on the policy. Answering the contention that the statute violated the "liberty to contract" guaranteed by the Fourteenth Amendment, he said:

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160 Supra note 157, at 471, 52 Sup. Ct. at 621.
161 MINN. STAT. (Mason, 1927) §§ 3314, 3366, 3512, 3515, 3711.
162 284 U. S. 151, 52 Sup. Ct. 60 (1931), noted in (1932) 32 Col. L. Rev. 373; (1931) 5 So. CALIF. L. Rev. 171. See also Note (1932) 18 Va. L. Rev. 545.
163 Supra note 161, § 3550.
We cannot assume that the Minnesota Legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

"Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern, . . . that, in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators cannot be deemed to be a denial of either due process or equal protection of the laws." 165

Despite its comparatively slow development, arbitration as a method of settling disputes seems now to be steadily achieving legislative and judicial recognition.166 The present decision, permitting states to legislate in accordance with this unmistakable trend, is solidly grounded on past holdings to the effect that the procedure by which rights may be enforced and wrongs remedied is almost wholly a subject of state regulation and control.167 The Fourteenth Amendment, of course, does not guarantee jury trial or any particular form of judicial procedure.168 The Court in the past has gone far to sustain procedural devices with little more than long established usage to commend them.169 Its general position is well summarized by Mr. Justice Stone in the instant case: "In the exercise of that power [to control procedure] and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the

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165 Supra note 162, at 158-59, 52 Sup. Ct. at 71.
interests concerned, provided its choice is not unreasonable or arbitrary, and
the procedure it adopts satisfies the constitutional requirements of reason-
able notice and opportunity to be heard." 170 It is to be noted that in the
present case the sole issue before the Court was whether a state could re-
quire the parties to an insurance controversy to settle the purely factual
issue of the amount of loss by the arbitration method. In view of previous
decisions sustaining state workmen's compensation laws providing for the
determination of the amount of compensation by a commission, 171 upholding
condemnation statutes making controlling the appraisal by a commis-
sioner of the value of property taken under the exercise of eminent do-
main, 172 and validating statutes making conclusive upon courts findings of
fact by boards or commissions when supported by evidence, 173 it is not
surprising that the Court experienced no difficulty in sustaining the com-
puslory features of the Minnesota statute.

The power of the states to safeguard natural resources was furthered
in two unanimous decisions upholding state regulation of oil and gas pro-
duction attacked under the Fourteenth Amendment. In Bandini Petroleum
Co. v. Superior Court of California 174 the Court validated legislation of
California 175 prohibiting "unreasonable waste" of natural gas and author-
izing suit by the director of natural resources to enforce the prohibition.
The state, acting through the director, brought suit in the superior court
against appellants, producers of oil and gas in the Santa Fe Springs oil field
in Los Angeles County, to enjoin an alleged unreasonable waste of natural
gas. A preliminary injunction was granted on the ground that the evidence
showed "unreasonable" waste and that such relief was necessary in order
"to preserve the subject matter of the action to abide the decree of the court
at the conclusion of the trial". Appellants then sought a writ of prohibition
from the district court of appeal restraining the superior court from en-
forcing the injunction order. The jurisdiction of the lower court was
attacked on the ground that the statute violated the due process clause of
the Fourteenth Amendment in that it afforded no certain or definite standard
as to what constituted "waste" or "unreasonable waste" and unlawfully

170 Supra note 162, at 158, 52 Sup. Ct. at 71.
171 Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1917); New
York Central Railway Co. v. White, supra note 167.
172 Crane v. Hahlo, supra note 167; Dohany v. Rogers, 281 U. S. 362, 50 Sup. Ct. 299
(1930); Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718 (1897).
Ct. 108 (1912); Virginian Railway Co. v. United States, 272 U. S. 658, 47 Sup. Ct. 222
(1926); Tagg Bros. and Moorhead v. United States, 280 U. S. 429, 50 Sup. Ct. 220 (1930);
Silberschein v. United States, 266 U. S. 221, 45 Sup. Ct. 69 (1924).
174 284 U. S. 8, 52 Sup. Ct. 103 (1931), noted in (1932) 10 N. C. L. Rev. 284. The case
is discussed in Ford, Controlling the Production of Oil (1932) 30 Mich. L. Rev. 1170, 1191.
For review of the legislation giving rise to the case see Note (1931) 19 Calif. L. Rev. 416; Note
(1932) 20 Calif. L. Rev. 203. See also: Legisl. (1931) 31 Calif. L. Rev. 1170; Note
(1932) 21 Calif. L. Rev. 38.
175 CAL. GEN. LAWS (Deering, 1931) at 4916.
delegated power to the court to legislate upon that subject. The district
court of appeal denied the writ of prohibition and a hearing was also
denied by the supreme court of the state. Appellants thereupon appealed
to the Supreme Court of the United States. After the decision of the dis-
trict court of appeal and before the denial of a hearing by the supreme court
of the state, the latter court in another case arising out of the same facts
had upheld the constitutionality of the statute and decided that under the
statute the trial court had the power to determine what wastage of gas in
the production of oil was unreasonable.

In announcing the Court's opinion, Mr. Chief Justice Hughes adverted
to the decision of the state supreme court (in the case just referred to)
which discussed the general conditions under which oil and gas were found
in California and the reasonableness of the standard established by the
statute. In explaining why it considered the standard sufficiently definite,
the state court said that "because of the many and varying conditions
peculiar to each reservoir and to each well, which will bear upon a determina-
tion of what is a reasonable proportion of gas to the amount of oil pro-
duced, it may be said that it would be impossible for the legislature to frame
a measure based on ratios or percentages or definite proportions which would
operate without discrimination, and that what is a reasonable proportion
of gas to the amount of oil produced from each well or reservoir is a
matter which may be ascertained to a fair degree of certainty in each indi-
vidual case." The Chief Justice observed that the statute must be read
in the light of the construction placed upon it by the state court; so read he
concluded that there was no basis for holding it invalid upon its face be-
cause of the uncertainty of the standard. Pointing out that excessive pro-
duction of oil and gas by one surface owner necessarily depletes the future
supply of his neighbor, the Chief Justice viewed the statute as one regulating
and adjusting the correlative rights of surface owners to a common source
of supply and hence valid as a legitimate exercise of state police power. He
left open the alternative argument for the statute—the interest of the public
in the conservation of natural resources—on the ground that that feature of
the case had not been raised.

Another judicial milestone in the matter of state regulation and control
of oil production was the decision in Champlin Refining Co. v. Corporation
Commission of Oklahoma, which upheld the validity of the Oklahoma
oil "proration" statute.\textsuperscript{181} This legislation gave the corporation commission authority to prevent waste of oil and natural gas by limiting the production of oil wells. Waste was defined to include production in excess of transportation or marketing facilities or reasonable market demands. It was provided that whenever the full production from a common source of supply could be obtained only under conditions constituting waste, any producer having the right to drill into such common source could take therefrom only such proportion as could be produced, without waste, as the production of the wells of such producer bore to the total production of the common supply. The plaintiff company sought to enjoin the commission and other state officers from enforcing the statute and certain orders of the commission, alleging repugnance to the due process and equal protection clauses of the Fourteenth Amendment and the commerce clause. The federal district court denied the application\textsuperscript{182} and plaintiff thereupon appealed to the Supreme Court of the United States. The Court approved the legislation as a reasonable regulation of the correlative rights of the common owners and as a measure designed to conserve a natural resource. It held that the due process clause was not violated in the absence of a showing of unreasonable restrictions or a design to control prices. In the absence of proof of unreasonable discrimination or other administrative abuses, there was also no denial of the equal protection of the laws. Since only production was restricted there was no interference with interstate commerce. Mr. Justice Butler, speaking for an undivided Court, said:

"In Oklahoma, as generally elsewhere, landowners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction, or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface, and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool."\textsuperscript{183}

The chief purpose of proration to market demand is of course to prevent the waste certain to ensue if the market is unable to absorb the product. The Court pointed out in the \textit{Champlin} case that the constant bringing in

\textsuperscript{182} 51 F. (2d) 823 (W. D. Okla. 1931), discussed in (1932) 45 HARV. L. REV. 557.
\textsuperscript{183} \textit{Supra} note 180, at 233-34, 52 Sup. Ct. at 564. For previous decisions involving oil and gas conservation see: \textit{Ohio Oil Co. v. Indiana}, 177 U. S. 190, 20 Sup. Ct. 576 (1900); \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U. S. 61, 31 Sup. Ct. 337 (1911); \textit{Walls v. Midland Carbon Co.}, 254 U. S. 300, 41 Sup. Ct. 118 (1920).
of new wells in the Oklahoma City field resulted in a continuous and rapid increase in the potential production of that field, whereas market demand for oil there increased very slowly. Legislation of the type enacted in Oklahoma may be a solution for many of the problems arising from overproduction. At all events, it is an experiment in economic control which the states should be allowed to make unhampered by judicial interference. If economically unsound, its unwisdom will in time be demonstrated. There are, of course, dangers of abuses in administration, but these may always be dealt with by courts if, and when, they arise.

Municipal regulation of motor carriers in the interest of the public safety was the topic of judicial discussion in *Hodge Drive-It-Yourself Co. v. City of Cincinnati*.84 Here the Supreme Court refused to declare unconstitutional as a denial of due process and of the equal protection of the laws an ordinance of Cincinnati requiring all persons engaged in the business of renting "Drive-It-Yourself" automobiles to deposit with the city treasurer insurance policies or bonds in specified sums for the protection of persons injured or whose property might be damaged as a result of the negligent operation of such vehicles by the hirers. The appellant company sued to enjoin the enforcement of the ordinance. The trial court found the provisions invalid and granted a permanent injunction. The court of appeals, however, sustained the ordinance and its judgment was affirmed by the highest court of the state.85 Appellants maintained that the ordinance was not a regulation of the use of the streets but an unreasonable interference with private business, that it imposed liability without fault and was discriminatory and oppressive. Answering these contentions Mr. Justice Butler said:

"This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain. It does not attempt to impose any burden or duty that is peculiar to public utilities. . . . Nor does the ordinance attempt to make hirers the agents or employees of the owners or to make the latter liable for the negligence of the former. It merely requires the giving of security that lessees shall 'respond in damage for their own tortious acts.' . . . There is no showing that the conditions imposed are arbitrarily burdensome or that the measure in any way operates to deprive appellants of property without due process of law."86

The Court declared that the challenged ordinance was not distinguishable, so far as its constitutionality was concerned, from state laws previously

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84 284 U. S. 335, 52 Sup. Ct. 144 (1932), noted in (1932) 20 Geo. L. J. 387; (1932) 17 Iowa L. Rev. 541; (1932) 18 Va. L. Rev. 796.
85 123 Ohio St. 284, 175 N. E. 196 (1931).
86 Supra note 184, at 337-38, 52 Sup. Ct. at 145.
sustained requiring reasonable security for the protection of persons in respect of injuries and losses caused by the negligent operation of motor vehicles engaged in carrying for hire. In Packard v. Banton,\textsuperscript{187} for example, the Court had upheld the requirement that operators of motor vehicles for hire on the streets of first class cities give security for the payment of judgments obtained against them for personal injuries caused by the operation of their cars. And in Hess v. Pawloski\textsuperscript{188} control over the highways of the state had been held to justify a requirement that use of the highways by a nonresident motorist should be a sufficient basis for bringing suits for injuries resulting from the operation of the car within the state by service of process on the registrar of motor vehicles, provided notice thereof was sent by registered mail to the nonresident by the plaintiff, and the defendant’s return receipt and plaintiff’s affidavit of compliance with the requirement were attached to the writ and entered with the declaration.

The Motor Vehicle Act of Kansas,\textsuperscript{189} subjecting motor carriers to a comprehensive scheme of regulation by the state public service commission, was sustained in Continental Baking Co. v. Woodring.\textsuperscript{190} The Act divided motor vehicles into three classes: (1) “public motor carriers” of property and passengers; (2) “contract motor carriers” of property and passengers, and (3) “private motor carriers of property.” All classes were forbidden to operate for compensation on public highways except in accordance with the Act. Public motor carriers were declared to be common carriers within the meaning of the state public utility laws and subject to regulation by the state public service commission, including regulation of rates and charges. Such carriers were required to obtain certificates of convenience and necessity to operate in intrastate commerce. Contract motor carriers and private motor carriers operating either in intrastate or interstate commerce were required to obtain licenses. A tax of five-tenths mill per gross ton mile was imposed on all the defined classes of motor carriers in addition to the license fees; the proceeds were to be devoted to the administration of the Act and the maintenance of highways.\textsuperscript{191} All motor carriers were required to keep records on prescribed forms showing ton miles traveled, and other information. The commission was empowered to promulgate rules relating to safety and sanitation, the qualifications and hours of service of operators, and for reporting accidents. Violation of the Act or of any order of the commission was made a misdemeanor. It was provided that the Act should not apply to (1) motor carriers operating wholly within any city or village

\textsuperscript{187} 264 U. S. 140, 44 Sup. Ct. 257 (1924).
\textsuperscript{188} 274 U. S. 352, 47 Sup. Ct. 632 (1927).
\textsuperscript{189} Kan. Laws 1931, c. 256.
\textsuperscript{191} \textit{Supra} note 189, § 13. Because of the taxation feature involved, this case might have been considered in the first section of this paper.
in the state; (2) private motor carriers operating within a radius of twenty-five miles beyond the corporate limits of such city or village; (3) the transportation of livestock and farm products to market "by the owner thereof or supplies for his own use in his own motor vehicle," and (4) the transportation of children to and from school. The appellants, "private motor carriers of property" operating bakeries in Kansas and other states and making their own deliveries to customers, alleged that the statute, by reason of its obligations, classifications and exceptions, violated the due process and equal protection clauses of the Fourteenth Amendment. In repudiating these contentions Mr. Chief Justice Hughes pointed out that requirements of this sort were clearly within the authority of the state, which may demand compensation for the special highway facilities provided and regulate the use of its roads in such manner as to promote the public safety. It was proper to treat motor vehicles as a special class, since their movement over the highways is frequently attended by serious dangers to the public, and is also destructive of the roads themselves. The Court refused to regard the several exemptions as offensive to the guaranties of the Fourteenth Amendment. In respect of the second exemption above noted, for example, the Chief Justice said:

". . . the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the Legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the Legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities. . . ."

In *Sproles v. Binford* the Motor Vehicle Act of Texas, prescribing certain detailed and technical limitations on the size, weight and load of motor vehicles operating over the highways of the state, was sustained as a valid exercise of state police power in order to prevent the wear and hazards due to excessive size of vehicles and weight of load. The Act was challenged as violative of the due process, equal protection, commerce and contract clauses of the Federal Constitution. The federal district court had dismissed the bill of complaint brought to restrain enforcement of the Act. In holding the legislation constitutional Mr. Chief Justice Hughes said:

"In exercising its authority over its highways the state is not limited to the raising of revenue for maintenance and reconstruction,
or to regulations as to the manner in which vehicles shall be operated, but the state may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. . . . When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.\footnote{\textsuperscript{196}}

The decisions in the \textit{Continental Baking Co.} and \textit{Sproles} cases furnish strong intimation, if any were needed, that the Supreme Court is loath to invalidate state motor vehicle regulation where the social justification for the legislative policy is brought clearly into view. No matter how comprehensive the scheme, how detailed and onerous the requirements, how numerous the exemptions or how varied the restrictions imposed upon the several classes of carriers involved, the Court may be expected to accept the legislative judgment on the matter in the absence of a clear showing of favoritism and arbitrary discrimination.\footnote{\textsuperscript{197}} The public need for effective regulation is doubtless as pressing in the case of private as public carriers. There is the same danger of loss of life and limb, the same wear and tear on the highways, and the same uncertainty of service through ruinous competition. Direct legislation, in the form of license laws, bonding and insurance laws and special equipment requirements, has gradually been superseded by control through commissions, which have been vested with extensive power to regulate rates, service, equipment and finance. Existing public utilities or railroad commissions already engaged in the regulation of common carriers and public utilities, have generally been utilized. The cases under discussion here illustrate the variety, complexity and technical character of the problems involved and indicate the desirability of clothing the designated administrative agency with a wide measure of discretionary power.

Regulation of billboard advertising was given an impetus in \textit{Packer Corporation v. Utah},\footnote{\textsuperscript{198}} where a Utah statute prohibiting tobacco advertis-
ing on billboards, placards, street cars, or other objects or places of display,¹⁹⁸ was unanimously held to constitute neither a taking of property without due process of law nor a denial of the equal protection of the laws. The Packer Corporation, engaged in billboard advertising, was convicted of a misdemeanor under the statute in displaying a large poster advertising Chesterfield cigarettes in Salt Lake City. Upon affirmance of the conviction by the highest court of the state,²⁰⁰ an appeal was taken to the Supreme Court of the United States. In denying the contention that the statute violated the equal protection of the laws guaranty of the Fourteenth Amendment in discriminating between the display of tobacco advertisements upon billboards and the display of similar advertisements in newspapers and magazines, Mr. Justice Brandeis quoted with approval the distinction drawn by the state supreme court:

"Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers or magazines."²⁰¹

The Court dismissed as without merit the contention that the law was an arbitrary curtailment of the liberty of contract and hence contravened due process of law. "No facts are brought to our attention", said Mr. Justice Brandeis, "which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate."²⁰²

Conclusion.

Of the eight cases discussed in this paper in which the constitutional validity of state taxation laws was attacked as being repugnant to the Fourteenth Amendment, four attempted exercises of the taxing power were held to be unconstitutional. In two of these cases—*Hoeper v. Tax Commission*

¹⁹⁸ Utah Laws 1921, c. 145, § 2, as amended by Laws 1923, c. 52, § 2, and Laws 1929, c. 92.
²⁰⁰ 2 P. (2d) 114 (Utah 1931).
²⁰¹ Supra note 198, quoted at 110, 52 Sup. Ct. at 274-75. The quotation is from State v. Packer Corporation, 77 Utah 500, 297 Pac. 1013 (1931).
²⁰² Supra note 198, at 111, 52 Sup. Ct. at 275.
of Wisconsin\textsuperscript{203} and First National Bank of Boston \textit{v.} Maine\textsuperscript{204}—there was sharp and significant conflict of opinion. In the \textit{Hoeper} case, where a provision of the Wisconsin income tax law to the effect that the wife's income should be joined to that of the husband in computing the latter's tax liability was held to contravene due process of law, the vote was six to three. Chief Justice Hughes joined Justices Butler, Sutherland, Van Devanter, McReynolds and Roberts in forming a majority against Justices Holmes, Brandeis and Stone. In the \textit{First National Bank} case, where the Court invalidated an inheritance tax on shares of stock in a corporation levied by the state of incorporation, the same six to three alignment resulted. Issues similar to those involved in the \textit{First National Bank} case had previously been settled contrary to the views of the same dissentents in \textit{Farmers’ Loan and Trust Co. v. Minnesota},\textsuperscript{205} Baldwin \textit{v. Missouri},\textsuperscript{206} and \textit{Beidler v. South Carolina Tax Commission},\textsuperscript{207} decided during the two preceding terms of the Court. In these cases it was held that the due process clause afforded protection against various forms of multiple taxation of intangibles. In \textit{Iowa-Des Moines National Bank v. Bennett},\textsuperscript{208} where the Court held that a state was responsible for the consequences of the illegal acts of its own taxing officers and that a taxpayer subjected to discriminatory taxation could not be required to assume the burden of seeking an increase of the taxes levied against others, there was no difference of opinion. The Court was also unanimous in vouchsafing relief to coal dealers in \textit{Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pennsylvania},\textsuperscript{209} where it was held that local taxing officials could not constitutionally assess at a uniform rate all coal underlying a township, disregarding differences in actual or market value due to accessibility to market, cost of operation, means of transportation and other factors. In the four cases which upheld the exercise of state taxing power there was virtually no divergence of view. In \textit{Lawrence v. State Tax Commission of Mississippi},\textsuperscript{210} where the state's power to tax income derived wholly from activities engaged in outside the state was sustained, Mr. Justice Van Devanter dissented from so much of the opinion as concerned the equal protection clause.

Of the remaining twelve cases under consideration, in only three was the state's attempt to exercise its police power declared invalid. In each of these three instances, however, there was a spirited clash of views. In \textit{Nixon v. Condon},\textsuperscript{211} where pursuant to a Texas statute the Democratic state

\textsuperscript{203} Supra note 20.
\textsuperscript{204} Supra note 55.
\textsuperscript{205} Supra note 48.
\textsuperscript{206} Supra note 52.
\textsuperscript{207} Supra note 53.
\textsuperscript{208} Supra note 90.
\textsuperscript{209} Supra note 101.
\textsuperscript{210} Supra note 73.
\textsuperscript{211} Supra note 113.
executive committee had undertaken to bar negroes from voting in primary
elections, the Court divided five to four. The Chief Justice and Mr. Justice
Roberts joined Justices Brandeis, Stone, and Cardozo (who had replaced
Justice Holmes) in holding invalid the action of the party committee on
the ground that it constituted state, rather than individual, action. This
conclusion evoked vigorous opposition from Justices McReynolds, Van
Devanter, Sutherland and Butler. In New State Ice Co. v. Liebmann, in
which the Court held unconstitutional an Oklahoma statute declaring the
manufacture, sale and distribution of ice to be a public business not to be
carried on without a license, and providing that the application for such
license might be denied if existing facilities in a community were deemed
sufficient to meet the public needs therein, Justices Brandeis and Stone
disssented and Justice Cardozo took no part in its consideration or decision. In

Coombes v. Gets a clause of the California constitution making directors
individually liable for all money embezzled from the corporation during
their term of office was held to have given rise to a vested contractual obliga-
tion within the protection of the due process clause. In this case the director
had been sued under the clause but the provision was repealed during the
pendency of the litigation. The majority of the Court—Justices Brandeis,
Stone and Cardozo dissenting—held the director still liable.

It is of course not always easy to predict the fate of challenged legis-
lation in the Supreme Court or the alignment of the justices with respect
to it. Many important cases are decided without any divergence of view
whatsoever. For example, during the last term regulations of motor vehicles
and of oil and gas production of a rigorous and far-reaching nature, which
might have been expected to draw at least some judicial fire, were given
unanimous approval. Nevertheless, in important divided decisions, where
the cases involve controversial economic and social issues, an unmistakable
and persistent cleavage among the justices is apparent in a study even as
limited in scope as the present. Justices Van Devanter, McReynolds, Suther-
land and Butler will usually be found in agreement. The tendency of this
group is to seek to interpose a judicial veto on state action of an experi-
mental or radical character. Justices Brandeis, Stone and Cardozo, on the
other hand, may be expected to favor the imposition of as few judicial
restrictions as possible on the scope of legislative and administrative power.
Chief Justice Hughes and Justice Roberts now hold the balance of power.
Their position in "borderline" cases, where controversial problems are pre-
sented for solution, is more difficult to prophesy. In the sphere of taxation
they may be expected, on the basis of their actions during the past two
terms, to range themselves more frequently with the first group than with

Supra note 128.

Supra note 143.
the second. Where civil liberties are in jeopardy, however, they have tended to make common cause with the second. They may also be expected to join this group in upholding miscellaneous forms of police power legislation where the social and economic policy on which the legislation is based is brought into view and some practical justification of it more or less apparent. Needless to say, the cleavages indicated cannot be defined with any degree of precision. In Stromberg v. California\textsuperscript{214} and Near v. Minnesota,\textsuperscript{215} where freedom of speech and of the press was involved, and in Nixon v. Condon,\textsuperscript{216} where negro suffrage was at stake, the group usually found in the minority did not hesitate to view the challenged state action with cold and disapproving eyes.

\textsuperscript{214} Supra note 112.
\textsuperscript{215} \textit{Ibid.}
\textsuperscript{216} Supra note 113.