CONSTITUTIONAL ISSUES IN THE SUPREME COURT,
1936 TERM
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The term just ended will probably rank in the history of the Supreme Court as one of its most important sessions. This is so not only because of the actual decisions rendered, but also by reason of the influence upon these decisions of outside forces. As early as the summer of 1936 these forces began to operate, following the now overruled Minimum Wage decision. They gained momentum as the election returns registered the great popular approval of the New Deal policies which the conservative group in the Court had done so much to thwart. Justice Stone’s illness left in doubt how the Court was reacting to these forces, although the four-to-four affirmance of New York’s Unemployment Insurance case indicated the imminence of a change from the previous term’s conservative predominance. Confirmation of the trend, however, waited on Justice Stone’s recovery and return. Then, apparently out of a clear sky, came President Roosevelt’s demand for the appointment of additional justices, a demand obviously motivated by a desire for change in the character of the Court’s decisions. And, whether influenced by the demand or not, the change came. In the crucial cases it was a change in the attitude of Justice Roberts. For at this term, in the fourteen cases in which one vote determined the outcome, a greater number of such decisions than at any other term in the Court’s history, Justice Roberts sided with the liberals in every instance but one;


3. For the text of the proposal together with supporting data from the Attorney General, see N. Y. Times, Feb. 6, 1937, p. 1, col. 6. For discussion thereof see Mason, Politics and the Supreme Court: President Roosevelt’s Proposal (1937) 85 U. OF PA. L. REV. 652; White, Disturbing the Balance (1937) id. at 678.
4. There were twelve five-to-four decisions (counting the three N. L. R. B. cases as one), one four-to-three, and two four-to-four. In one of these last, Railroad Comm. v. Pacific Gas & Electric Co., 57 Sup. Ct. 935 (1937), it is not possible to determine how Justice Roberts voted; in the other, Chamberlin, Inc. v. Andrews, 299 U. S. 515 (1936), it is a reasonable inference that he voted with the liberals since in the later case dealing with a similar law he did so: Carmichael v. Southern Coal & Coke Co., 57 Sup. Ct. 868 (1937).
5. At the 1930 term there were six; 1931, three; 1932, three; 1933, eight; 1934, six; 1935, eleven. See Fraenkel, Constitutional Issues in the Supreme Court, 1935 Term (1936) 85 U. OF PA. L. REV. 27, n. 2; Five-to-Four Decisions of the Supreme Court (1935) 2 U. S. L. WEEK 1010.
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at the previous term he had sided with the conservatives in six out of ten such cases. In at least two cases of the present term, the change represented a reversal of position.

The decisions which resulted in this new position of the Court were all, in one respect or another, labor cases. And they came before it against a background of extensive and far-reaching labor disputes accompanied by the growth of the militant C. I. O. and the development of the novel "sit-down" technique. It is hardly strange that under such circumstances as these the Court should have abandoned some of the unrealistic positions it had taken in the past. That it should so quickly have reversed itself on the important questions of interstate commerce was, however, a great surprise.

THE TWILIGHT OF "STATES RIGHTS"

Ever since the decision in the Schechter case the literature of the law, popular as well as learned, has been replete with suggestions to the effect that all would be well if the judges would but see the light and realize that the framers of the Constitution intended to create a national government strong enough to function where the states could not. At the 1935 term the Court heeded none of these admonitions. In the Guffey case the majority made it clear that the doctrine of states rights existed not only to protect the states but also to protect private rights in hostility to the expressed desire of the states concerned. And in the Municipal Bankruptcy case this doctrine was carried so far as to thwart national action directly approved by a state legislature. The hampering effects of undue emphasis on federalism could hardly have gone further.

1. As a consequence of these decisions it was very generally assumed that the Court would apply a narrow interpretation to the Wagner Act.

7. The cases are listed in Fraenkel, supra note 5, 85 U. of Pa. L. Rev. 27, n. 2.
11. The more expert critiques, to be sure, had not then been published. See, for example, Corwin, op. cit. supra note 10.
While that statute by its terms applied only to commerce between the states and with foreign nations, the Labor Board had sought to invoke it against manufacturing plants whose activities crossed state borders. The Circuit Courts of Appeals of several circuits, including the second, which had decided for the government in the Schechter case, ruled against the Board on the general proposition that manufacturing, like mining and agriculture, was local. For this conclusion certain words of Justice Sutherland in the Guffey case seemed complete authority. And not only Justice Roberts but also the Chief Justice had expressed no disagreement with that language.

But a year brought changes. In the National Labor Relations Act cases the Chief Justice, writing for the majority, brushed aside the Guffey decision by the statement that the law there involved was invalid on several grounds, such as improper delegation and deprivation of due process. The Schechter case was distinguished because the evils there involved had but a remote effect on interstate commerce. The Court considered the facts in each of the cases before it and found that a strike due to the refusal of the employer to bargain collectively with his employees would have a “most serious effect upon interstate commerce”. The Chief Justice stated that the judges refused to shut their eyes “to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.” He said further:

“When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.


18. See 298 U. S. 238, 304 (1936), where he described all the elements of the labor relation, including collective bargaining, as incidents of production, not of trade.


21. Ibid.
"Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." 22

In the *Jones & Laughlin*23 case the problem was relatively simple. Here was an industry which owned mines in states other than Pennsylvania where its plant was located. It owned railroads and steamships engaged in interstate commerce; it shipped its products to its own warehouses in several states and owned agencies for the distribution and sale of its products throughout the country and in Canada. If ever a manufacturing plant might be said to be engaged in interstate commerce, clearly this was such a one. The company had argued that its transactions did not constitute a "flow of commerce",24 inasmuch as the changes in the raw material which took place at the plant were very extensive. The Court found it unnecessary to consider this contention since Congressional power did not depend upon the existence of such a flow.

In the *Fruehauf Trailer*25 case the facts were similar to those in the *Jones & Laughlin* case, except that in this instance the raw materials did not come from company-owned mines. The *Friedman-Harry Marks Clothing Co.*26 case presented a different problem. This was not a nationally organized concern, one predominant in its field. Yet the bulk of the raw materials it used as well as that of the product it made crossed state lines, and the concern maintained a sales office in New York. The majority of the Court did not discuss any arguments founded upon the particular facts of that case. But the minority used these facts as the text of its dissent. Justice McReynolds pointed out that the clothing firm employed only eight hundred persons and conducted less than one-half of one per cent of the transactions in the industry. Were it to close, he said, the effect on interstate commerce "obviously would be negligible".27 Yet in the *Guffey* case Justice Sutherland had held that the fact that the effect might be tremendous was immaterial.28 The minority emphasized also the smallness of the number of employees who wanted to join the union and doubted whether per-

22. Ibid.
23. 301 U. S. 1 (1937). 85 U. OF PA. L. REV. 733. For discussion of the due process and civil liberties aspects of this case, see infra notes 101, 211.
25. 301 U. S. 49 (1937).
27. 301 U. S. at 87.
sistence by the employer in his discriminatory practices would have any effect whatever on interstate commerce.

The increase in federal power which the Court has thus established has been widely hailed. Even conservative circles see authority in the decisions for Congressional restriction on union activities such as the sit-down strike. Just how far-reaching the decisions actually are will, of course, have to await a more precise definition of the line beyond which Congress may not go in regulating manufacturing plants. Exactly what percentage of raw material and finished product must cross state lines in order that the plant be brought within the scope of the commerce clause is not yet clear. Further litigation will also result from the creation of labor boards in various states. We are likely to see industry claiming to be interstate when local boards seek to regulate its labor relations and taking the opposite stand as to its status when the federal board takes action. It would be desirable for Congress expressly to authorize the local board to act in those instances in which it comes upon the scene first.

2. Two other labor cases presented interstate commerce questions during this term. In the Associated Press case the employer insisted that it was not engaged in commerce at all so far as its editorial staff in New York was concerned, on the theory that the news was there "manufactured". The Court rejected this fanciful argument, pointing out that the operations of the Press involved the constant use of channels of interstate communication. The minority discussed only the issue of freedom of the press, which will be considered hereafter.

In the Virginia Railway case the employer argued that employees of a repair shop were not engaged in interstate commerce. The Court unanimously held otherwise, on the ground that 97% of the road's business was interstate and that a strike in the repair shops would cripple its business. It was no answer, said Justice Stone, that the company might close its shops and have the work done elsewhere. So long as it maintained the shops the road was subject to the provisions of the law.

3. In three cases the Court approved the use of federal power in cooperation with state legislation. The most far-reaching of these are the two cases dealing with the Social Security Act. In Steward Machine Co. v. Davis the unemployment insurance features were approved, and in

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Helvering v. Davis, the old age pensions. Justices McReynolds, Sutherland and Butler wrote separate dissenting opinions in the first case, Justice Van Devanter agreeing with that of Justice Sutherland. In the second, Justices McReynolds and Butler contented themselves with the brief statement that the law violated the Tenth Amendment. This was, of course, the crucial question. Did these laws invade the reserved powers of the states? Justice Cardozo, writing for the majority in both cases, laid down the broad principles that Congress might levy an excise tax on any occupation or relationship to the same extent as might the states, and that these taxes were for the general welfare and were free from entanglements such as had invalidated the AAA.

In the Steward Machine Co. case the attack was based primarily upon the 90% credit for payments to an approved state fund, on the ground that this involved coercion upon the states. In considering that question Justice Cardozo recited the facts regarding unemployment, emphasizing the national character of the problem and the necessity for the expenditure of federal funds for relief. The Federal Government, he said, has the right to plan to lessen evils such as these in the future. The enactment of this law was a spur to the states, not because of any compulsion, but because it relieved each state of the fear that, if it acted and other states did not act, it might find itself at a disadvantage. He commented on the fact that the state there concerned (Alabama) was not complaining of the law, indeed "would be sorely disappointed if it were now to be annulled". The petitioner, he held, confused motive with coercion. Nothing amounting to undue influence was apparent in the case.

In upholding the law the majority expressly left many questions open, especially whether Congress might permit a state to escape a tax by adoption of a law having no relation to national policy, such as was the Child Labor tax.

The dissenting justices believed that the administrative provisions, especially those which compelled deposit of funds with the United States Treasury and limited their withdrawal, were so great an encroachment on state sovereignty as to destroy the entire law. In their opinion the law did not permit withdrawal of the moneys deposited, except for the purposes of unemployment insurance. And Justice Sutherland found this to be destructive of the federal system, saying that the purpose of the Constitution in erecting that system could be "thwarted no more by voluntary surrender

36. 57 Sup. Ct. 904.
39. 57 Sup. Ct. at 892.
from within than by invasion from without." 41 In answer to this argument Justice Cardozo intimated that the moneys could be freely withdrawn, but said that the decision would be the same if the law created a contract not to do so, since states could validly contract for benefits received.

The dissent of Justice McReynolds consisted principally of a long quotation 42 from a message of President Pierce, written in 1854 upon his veto of a bill granting public lands to the states for the benefit of indigent insane persons. The message took the broad position that an appropriation of money for relief purposes was unconstitutional. Justice McReynolds believed the legislation under consideration to be the first step in a process which would imperil the independence of the states and destroy the federal plan of government. 43

In Kentucky Whip & Collar Co. v. Illinois Central Ry. 44 the Court unanimously extended the principle it had announced at the preceding term in Whitfield v. Ohio. 45 In the latter case the Court had approved a state law 46 which forbade the sale of goods manufactured by convict labor even though such goods were manufactured in another state, thus recognizing the doctrine of "economic harm". Now the Court approved complementary federal legislation forbidding transportation into any state of such merchandise, provided the state law forbade its sale there. The argument that regulation was forbidden if the articles transported were inherently harmless was rejected. The Chief Justice pointed out that the laws with regard to liquor rested not on the illegitimacy of the subject but on the harm which might flow from its use, a consideration which enabled the states, even before the Eighteenth Amendment, to prohibit its sale. The Child Labor case 47 was distinguished on the ground that Congress was there attempting to regulate commerce not in aid of state policy but rather with a view to imposing upon the states its own policy.

The possibility that legislation of the kind now approved by these two decisions might be used to stop child labor by the closing of profitable markets to its products has been much discussed. 48 Such legislation failed of

41. 57 Sup. Ct. at 903.
42. Id. at 896. Justice Butler agreed with the dissenting opinions of both Justice Sutherland and Justice McReynolds.
43. In the Helvering case there were no additional problems. The only question was whether an expenditure for old age pensions was for the general welfare. Recognizing the wide discretion which must be given to Congress, the majority could see no ground on which to hold the power lacking. For a full treatment see Lowndes, The Supreme Court on Taxation, 1936 Term (1937) 86 U. of Pa. L. Rev. 299 U. S. 334 (1936), 85 U. of Pa. L. Rev. 529 (1937), 37 Col. L. Rev. 648.
45. 297 U. S. 431 (1936).
passage in the last Congress, although that body did pass a law applying the principle to goods shipped in violation of state Fair Trade laws.

4. Finally, there are two tax cases. In Sonzinsky v. United States the Court upheld the National Firearms Act which imposed a tax on all dealers and importers of firearms and on each sale made by them. The law was attacked as an attempt to regulate an industry essentially local in character. Justice Stone asserted that in the case before the Court nothing in the law indicated an intention by Congress to regulate the industry, and the fact that the tax would have such result did not make it void, since “Every tax is in some measure regulatory”.

In Cincinnati Soap Co. v. United States a processing tax on coconut oil, the proceeds of which, insofar as levied on Philippine oil, were paid into the Philippine treasury, was unanimously upheld. The AAA case was distinguished because the law was in no way regulatory of the industry, and the grant to the Philippines was declared to be a purpose within the general welfare clause.

5. While thus extending the power of the central government, the Court has, with one exception, maintained a due regard for state activity when challenged by private interests. That exception, Great Northern Ry. v. Washington, was a five-to-four decision. The case involved a statute imposing fees on all public utilities, based on a percentage of their gross income. The law required the fees to be used for administering the public service commission law. The railroad company objected to the fee it was required to pay on the ground that it was used to meet all the expenses of the commission, not merely the costs of supervising railroads. It contended that the fees were excessive and thus constituted a burden on its interstate commerce.

The Court concluded that the law was not bad upon its face, but that on the authority of Foote & Co. v. Stanley the burden lay on the state to
justify the amount charged. Although the Supreme Court of Washington had considered that burden sufficiently carried, the majority now disagreed with this ruling, chiefly because the witness for the state had relied on insufficient data. They pointed out that when a constitutional question was at issue the Supreme Court would examine the facts to determine whether the conclusions of the state court were justified, citing as a recent instance of that practice the second *Scottsboro* decision. The minority, while not questioning the right of the Court to examine the facts, stated that it was not enough to show that some of the amounts charged against the railroads were improperly so charged, without proof as to how these charges affected the excess of charges over receipts. The essential difference between the judges was, therefore, that the majority believed the burden was on the state to show that the improper items did not cast the balance in the railroad’s favor, while the minority felt that if the railroad thought such would be the result, it should have explored the matter at the trial. The latter view appears to be more in accord with common sense.

In only one of the remaining cases did the Court rule against the state. That case, *Ingels v. Morf*, involved California’s so-called “Caravan Act”, which imposed a tax upon every automobile brought into the state for purposes of resale. The Court unanimously upheld findings of a three judge court to the effect that the fees charged were a burden on interstate commerce because greatly in excess of the cost of policing the traffic for which they were ostensibly imposed. The decision in *Morf v. Bingham*, handed down at the previous term, was distinguished because the New Mexico law there under consideration provided that the fees should go toward highway maintenance and the car owner had not shown them to have been excessive. It is difficult to see much substance in the distinction insofar as it rests on the form of the statute: to the car owner it makes no difference into which pocket the legislature puts the fees. However, Justice Stone left the door open by indicating that the legislature might appropriate the fees for highway purposes. Presumably the hint will be taken and we shall have more litigation on the subject, since in both of these cases the Supreme Court refused to pass upon the owner’s contention that a state could not impose a fee upon a single car merely because it was to be sold.

58. See 184 Wash. 648, 52 P. (2d) 1274 (1935).
60. 300 U. S. 290 (1937).
63. 298 U. S. 407 (1936).
64. N. M. Laws 1935, c. 56.
65. See 300 U. S. 290, 295 (1937).
The Court approved a tax imposed by California on the privilege of importing beer, but only on the ground that this interference with interstate commerce was sanctioned by the Twenty-first Amendment, which prohibits transportation of liquor into a state in violation of its laws. Justice Brandeis made the interesting comment that a state might create a monopoly in the liquor trade.

Virginia's Milk Law was held by Justice Cardozo not to interfere with interstate commerce, since there was no attempt to regulate the price paid outside the state, but only the price at which the milk might be sold after it had been brought into the state. In this respect the Virginia law differed from the New York law condemned at the 1934 term.

A somewhat similar problem was presented in Henneford v. Silas Mason Co. Washington imposed a tax on all retail sales and one equal in amount on all articles used, excepting from it those articles for which either the retail sales tax or an equivalent tax elsewhere had been paid, and also all articles not bought at retail. This had the effect of taxing all goods bought in other states which imposed no sales tax and was therefore challenged as a burden on interstate commerce. The Court upheld the tax on the ground that it sought not discrimination against outside purchases but equality with domestic ones. Justice Cardozo intimated that it might not be essential to the validity of such a tax that the state exempt transactions also taxed elsewhere:

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions with-

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68. The court also approved a Maine law, Me. Laws 1935, c. 104, which required the registration of all the cosmetics sold in the state, on the ground that the fees were not shown to be excessive and that there was no discrimination against outside products. Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937). Again it upheld the right of Georgia to regulate the charges made by tobacco warehousemen, Ga. Laws 1935, no. 343, p. 476, because Congress had not entered the field and it was one which did not require uniformity of regulation throughout the country. Townsend v. Yecomans, 57 Sup. Ct. 842 (1937). And it further upheld a franchise tax, Ala. Gen. Acts (1927) § 54, upon the capital of a foreign corporation actually employed in Alabama. Southern Nat. Gas Corp. v. Alabama, 301 U. S. 148 (1937).
69. 299 U. S. at 63.
71. Highland Farms Dairy v. Agnew, 300 U. S. 608 (1937). In this case Justices Van Devanter, McReynolds, Sutherland, and Butler dissented only from the holding, approving the fixing of maximum and minimum prices and relying on their dissent in Nebbia v. New York. See 291 U. S. 502, 539-559 (1934).
74. 300 U. S. 577 (1937), 36 Col. L. Rev. 1179 (1936).
out heeding systems elsewhere. If there are limits to that power, there
is no need to mark them now.”

A HUMANIZED DUE PROCESS CLAUSE

I. At the 1935 term the Court had declared 77 New York’s Minimum
Wage law 78 void, since it was like the law previously declared unconstitu-
tional in the Adkins case 79 and since the state had not sought reconsidera-
tion of the doctrine of that case. The Court at this term refused 80 the
state’s plea for a reargument at which the broader issue might be presented.
But when the identical question came up later on appeal from Washington,
decision was postponed 81 until such time as the return of Justice Stone
permitted consideration by the full Court. Then Justice Roberts changed
to the liberal side. From the decision then reached in West Coast Hotel Co.
v. Parrish 82 a new conception of the due process clause should result.

The opinion of the Chief Justice attacked the problem directly and
completely. The Adkins case was expressly overruled. 83 Justice Hughes
defined the liberty guaranteed by the Constitution, carefully noting that
freedom of contract is not there written:

“It [the Constitution] speaks of liberty and prohibits the depriva-
tion of liberty without due process of law. In prohibiting that depriva-
tion the Constitution does not recognize an absolute and uncontrollable
liberty. Liberty in each of its phases has its history and connotation.
But the liberty safeguarded is liberty in a social organization which
requires the protection of law against the evils which menace the health,
safety, morals and welfare of the people.” 84

The Chief Justice pointed to many instances of restrictions on freedom of
contract, drawing freely from the dissents in the Adkins and Morehead cases.
He emphasized the right of the state to legislate in favor of women whose
bargaining power was relatively weak, saying that such action cannot be
regarded as arbitrary or capricious and is therefore a matter as to the wis-
dom of which the legislature is entitled to judge. He went on to state that

76. 300 U. S. 577, 587 (1937). Justice Cardozo met the argument that this tax created a “tariff” in violation of the doctrine of Baldwin v. Seelig, 294 U. S. 511 (1935), by pointing out the ineptitude of labels. It is submitted that there is here no real analogy to a tariff, since the tax in question was imposed solely to equalize a tax locally imposed. A tariff is always discriminatory against foreign articles.


81. The argument took place on December 16 and 17, 1936; decision was rendered March 29, 1937.


83. 300 U. S. at 400.

84. Id. at 391.
the law might be upheld because it prevented underpaid workers from becoming charges on the community: "The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest." 85

In dissent Justice Sutherland repeated what had been said in the earlier cases. He nevertheless felt constrained to write a brief essay on the processes followed by judges when declaring laws unconstitutional, in the course of which he answered Justice Stone's remarks 86 in his dissent in the AAA case on the subject of judicial self-restraint. He insisted that each judge must determine for himself whether a challenged law is void beyond reasonable doubt and should not relinquish his doubts out of deference to the views of his colleagues. 87 He contended further that no question of the "self-restraint" of judges was here involved: "Self-restraint belongs in the domain of will and not of judgment." 88 While recognizing the value of dissenting opinions, he remarked that the language of these should not "impugn the good faith of those who think otherwise". 89 On the merits, he pleaded that the meaning of the Constitution "not change with the ebb and flow of economic events". 90 The Constitution, he maintained, must be interpreted now as it would have been interpreted when written. If, in consequence, something desired is forbidden, the remedy is for the people to amend the document, not for the judges to rewrite it. The minority quoted with approval and with emphasis the declaration of Judge Cooley that the courts must interpret the Constitution "as written". 91 They then argued that, since liberty includes liberty to contract, inclusive of contracts of employment, and since liberty of contract is the rule and restraint the exception, therefore minimum wage legislation constituted an improper exception. Justice Sutherland was at some pains to note the distinction between the regulation of hours, which left the employer free to fix a compensating wage, and legislation of the type then before the Court, which left the employer without freedom. But as Justice Holmes pointed out 92 long ago, the employer is free not to employ anyone under the prohibited wage. 93

85. Id. at 399.  
87. "And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence." 300 U. S. at 401.  
88. 300 U. S. at 402.  
89. Ibid.  
90. Ibid.  
91. Id. at 404, quoting from COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 124.  
93. Discussion of this case under the equal protection clause will be found infra at note 164.
The decision of the majority was widely hailed.\textsuperscript{94} It is hoped that it will be followed without further relapses such as those which occurred after \textit{Muller v. Oregon}\textsuperscript{95} was thought to have disposed of \textit{Lochner v. New York}.\textsuperscript{96}

2. On the day when it handed down the \textit{Minimum Wage} decision the Court also settled another question of great importance to labor. In \textit{Virginia Ry. v. System Federation No. 40}\textsuperscript{97} the problem was whether the Railway Labor Act\textsuperscript{98} violated due process in compelling a carrier to negotiate with representatives of the majority of its employees. The Court unanimously upheld the law. Justice Stone recapitulated the history of Congressional efforts to minimize labor disputes in the transportation industry. He held that, in the light of this history, the law demanded that the employer make reasonable efforts to negotiate with the representatives chosen by the majority. But he concluded that, although the employer might not negotiate with representatives of any minority group, he was not forbidden to make contracts with individual employees.

So construed, the Court held that the law violated no requirements of due process. The means were appropriate to the ends; no rights of the railroad company were infringed. The argument that rights of workers might be affected was answered by the statement that the company could not complain of the infringement of any immunities of its employees. Justice Stone was nevertheless careful to point out that the decision was not in conflict with the two \textit{Yellow Dog Contract} cases,\textsuperscript{99} since the law did not interfere with the normal right of the employer to hire or fire.

This decision, of course, foreshadowed the approval of similar provisions of the National Labor Relations Act.\textsuperscript{100} And in the \textit{Jones & Laughlin} case\textsuperscript{101} the Chief Justice briefly stated that the right of the employer to conduct his business was subject to the correlative right of employees to organize and bargain collectively: "Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious."\textsuperscript{102} He noted further:

"The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and repre-

\textsuperscript{94} See N. Y. Times, March 30, 1937, p. 22, col. 1.
\textsuperscript{95} 208 U. S. 412 (1908).
\textsuperscript{96} 198 U. S. 45 (1905).
\textsuperscript{97} 300 U. S. 515 (1937). Treatment of the interstate commerce aspect of this case will be found supra note 32.
\textsuperscript{100} For citation of the act and discussion of the cases involved thereunder, see supra note 15 and pp. 39-42.
\textsuperscript{101} 301 U. S. 1 (1937). See infra note 211 for the civil liberties features of this case.
\textsuperscript{102} Id. at 41.
sentation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.”

The contention that the law was one-sided since it did not deal with abuses on the part of employees went, said Justice Hughes, to the wisdom of Congress in passing the law, not to its power to do so. The majority also upheld the various procedural provisions of the law since they afforded adequate opportunity to question arbitrary action. It found nothing wrong with the provision that the findings of the Board on the facts were to be conclusive: this did not differ from the laws affecting many other administrative agencies. Therefore, the Court upheld an order requiring the company to reinstate employees whom the Board found to have been discharged because of union activities.

Justices Van Devanter, McReynolds, Sutherland and Butler dissented on this point as well as on the interstate commerce point already reviewed. Justice McReynolds asserted that Congress had more power to deal with railroads than with industry. This explains his concurrence in the Virginia Railway case decided the previous week and in the Washington Coach case decided that day.

3. The next group of cases involved various forms of social security legislation. As has already been noted, the Court upheld the New York unemployment insurance law without opinion, by an evenly divided vote. Later a similar Alabama statute was held valid in Carmichael v. Southern Coal & Coke Co. by a five-to-four decision. Justice Stone wrote for the majority and Justice Sutherland for the minority. The latter conceded to the states the right to deal with the relief of unemployment, but contended that the law under review violated the due process clause because it permitted pooling of the contributions made by different employers. In reply to such contention Justice Stone said:

103. Id. at 45.
104. See supra note 23.
106. See supra note 2.
110. Justice Sutherland approved the Wisconsin plan, under which benefits are paid from each employer's account and only to his own former employees, thus permitting particular employees to build up reserves and obtain rate reductions.
"The Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. . . . Many believe that the responsibility for the business cycle, the chief cause of unemployment, cannot be apportioned to individual employers in accordance with their employment experience; that a business may be least responsible for the depression from which it suffers most." 111

4. One other important labor decision was handed down. In Senn v. Tile Layers Protective Union,112 by another five-to-four vote, the Court upheld Wisconsin's anti-injunction statute.113 The case was peculiar. Plaintiff was the owner of a small contracting concern in which he employed three or four persons. He was willing to make a contract with the tile layers' union provided they would allow him to work as a tile layer in spite of a union rule which forbade contractors to do such work themselves. The union refused to waive its rule and plaintiff thereupon refused to sign up. A strike ensued, accompanied by peaceful picketing. The pickets carried signs stating that plaintiff was "unfair" to the union. The state courts 114 refused an injunction and ruled that the situation was controlled by a state law which expressly permitted peaceful picketing. The employer claimed a constitutional right to work with his own hands, with which right no union could interfere by picketing, and that any statute which permitted such interference deprived him of liberty without due process of law.

With this contention the minority agreed. Justice Butler rested his argument on the following premise: "Our decisions have made it everywhere known that these provisions forbid state action which would take from the individual the right to engage in common occupations of life, and that they assure equality of opportunity to all under like circumstances." 115 He admitted that the employer's right to conduct his business was subject to the employees' right to strike and picket peacefully, but only if the object of the strike was lawful. In the instant case he contended that the object was unlawful because the union sought only to compel plaintiff to quit work. He rejected the contention that the union had an interest in plaintiff's work because he was in effect a competitor, describing that interest as too remote. He maintained also that the picketing was unlawful because the signs misrepresented the facts, there being no basis in truth for the charge of unfairness. In conclusion he said that the decision of the state court violated the

111. 57 Sup. Ct. at 879.
112. 57 Sup. Ct. 857 (1937).
114. For discussion of the opinion of the Wisconsin Supreme Court, 222 Wis. 383, 268 N. W. 270 (1936), see (1937) 46 Yale L. J. 1064.
115. 57 Sup. Ct. at 865.
fundamental principle "that no man may be compelled to hold his life or the means of living at the mere will of others." 116

For the majority, Justice Brandeis disputed the contention that the sign misrepresented the facts and insisted that the end sought by the union was lawful. The evidence justified the finding of the state court that the union's rule was reasonable in the light of conditions in the industry. All that the picketing accomplished was to lessen plaintiff's opportunity to obtain jobs; it did not prevent his working. And, said Justice Brandeis, "A hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right." 117 He distinguished Truax v. Corrigan,118 relied on by the plaintiff, on the ground that the acts complained of in that case were libelous and abusive and thus clearly wrongful.119

5. In Old Dearborn Distributing Co. v. Seagram Distillers Corp.120 the Court upheld fair trade practice laws, and, somewhat unexpectedly, did so unanimously. These laws permit a manufacturer to fix the retail price of branded articles and to prevent any one from selling them at a lower price while having knowledge of the price fixed, even if such person was not a party to any agreement fixing the price.121 Justice Sutherland declared that the rule against price fixing had to do only with legislative price fixing. The objection to price fixing by private agreement was merely that it promoted monopoly, and if in certain circumstances the legislature authorized private price fixing, there was no constitutional barrier. Nor was the law unconstitutional because it presented a remedy for knowingly violating the manufacturer's right in his good will. This decision rests upon the fact that the law is confined to articles bearing brands or trade-marks, articles in which the manufacturer in effect retains some property interest. The Court held that any one who bought such merchandise, knowing of the restriction, assented to it and could be sued if he violated it. It assumed that the law would be enforced only against persons who had bought the property with knowledge of the fixed price, although the law itself is not so limited. It further asserted that the goods could be sold free of restriction if the mark or brand were removed and not utilized to bring about the sale. Finally, Justice Sutherland adverted to the body of opinion tending to show

116. Id. at 868.
117. Id. at 864.
118. 257 U. S. 312 (1921).
119. For separate treatment of the equal protection features of the Senn case, see infra p. 60.
121. See, for example, Ill. Laws 1935, p. 1436, the statute involved in the instant case. See also Legis. (1937) 22 CORN. L. Q. 445; Note (1937) 50 HARV. L. REV. 667.
the injurious effect of price cutting not only on the trade but also on the general public; that this was controverted, he maintained, was immaterial, since the existence of controversy permitted choice by the legislature.

6. Two important bankruptcy questions were decided, the first having to do with Section 77B,122 the second with the revised Frazier-Lemke Act.123 In both the decisions were unanimous.

*Kuehner v. Irving Trust Co.*124 involved the statute limiting a landlord’s claim for indemnity to an amount not to exceed three years’ rent.125 In the particular case the loss sustained by the landlord was about twice the amount allowable under the law, a difference of over $40,000. Justice Roberts, in upholding the law, pointed out that Congress was not denied the power to impair contracts; that, indeed every bankruptcy resulted in such impairment. While Congress could not destroy the contract altogether, it could affect the creditor’s remedy pursuant to a fair and reasonable plan for the distribution of the debtor’s assets. He recalled that landlords’ claims for future rent had not always been provable, that it was necessary to make them provable in order to make reorganization of corporate enterprises possible, and that Congress had discretion in determining the extent to which they should be provable on account of the inherent difficulties in establishing the amount of the loss and the at best contingent character of such claims. He pointed out also that landlords get their property back, whereas merchandise creditors do not. The possibility that different landlords might in this way receive varying proportions of their theoretical losses was dismissed as of no consequence.

In the other case, *Wright v. Mountain Trust Bank*,126 the law in question127 was also upheld. Justice Brandeis found that the new law had removed the objections which he himself had voiced against the original one128 by expressly preserving the lien of the mortgage until the debt is paid, permitting the owner, however, to remain in possession under control of the court, and by expressly preserving the mortgagee’s right to a judicial sale upon the termination of the stay authorized. The contention that this stay, fixed at three years, was unreasonable, was met with the answer that the law did not require so long a stay and gave the court discretion to order a sale sooner. Finding the language of the law lacking in clarity, Justice Brandeis turned to Congressional records and found that they confirmed his

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126. 300 U. S. 440 (1937), 37 Col. L. Rev. 1005, 32 Ill. L. Rev. 239.
construction. The Court held also that it was not a requisite of due process that the mortgagee have the right to put a receiver in possession. Justice Brandeis pointed to the similar practice in the reorganization of corporations which permitted them to remain in possession.\textsuperscript{129} The law, he emphasized, dealt with farmers interested in conserving the value of their land.\textsuperscript{130}

7. Other federal cases covered a variety of subjects,\textsuperscript{131} one of the most important being an extension of the holding of the Gold Clause case\textsuperscript{132} to a lease calling for a rental payment of a quantity of gold equal to a certain sum in gold dollars.\textsuperscript{133} In view of the business of the parties it was evident that money, not a commodity, was to be paid as rent. Justice Cardozo declared that the argument that such leases were so rare that their enforcement according to their terms would not interfere with the country's monetary policy created no limitation on the power of Congress. The four conservative justices dissented without opinion.

In view of Professor Lowndes' discussion elsewhere in this issue,\textsuperscript{134} it is not necessary to discuss the three federal tax cases which the Court decided at this term.\textsuperscript{135}

8. State tax questions involving due process were considered in several cases. Comment will be confined to a brief discussion of a few of them.\textsuperscript{136}


\textsuperscript{130} Various minor objections were found untenable. One of the points urged was that rent was not payable until the end of the first year of occupancy. The Court construed the statute as permissive and refused to consider its validity if mandatory since the lower court had required semi-annual payments. See 300 U. S. 440, 467.

\textsuperscript{131} Two interesting unanimous decisions should be mentioned: in Cummings v. Deutsche Bank und Disconto-Gesellschaft, 300 U. S. 115 (1937), the Court unanimously upheld a Congressional Resolution which postponed the return to Germans of property seized by the Alien Property Custodian until Germany paid awards on war claims; and in Hill v. United States \textit{ex rel.} Weiner, 300 U. S. 105 (1937), the Court approved greater punishment for contempt in a suit to which the United States was a party than might have been inflicted in an ordinary case.


\textsuperscript{133} Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324 (1937).

\textsuperscript{134} Lowndes, \textit{The Supreme Court on Taxation, 1936 Term} (1937) 86 U. of Pa. L. Rev. 1, 11-13.


\textsuperscript{136} A Texas tax on the production of oil was held to be an excise tax, though labeled an occupation tax, and therefore validly assessed against a lessor who was not engaged in the occupation of oil production. Barwise v. Sheppard, 299 U. S. 33 (1936). New York was allowed to tax a non-resident on profits realized from his seat on the New York Stock Exchange, the seat having a business situs in that state even though the owner transacted all of his business outside New York. New York \textit{ex rel.} Whitney v. Graves, 299 U. S. 366 (1937), 37 Col. L. Rev. 661, 50 Harv. L. Rev. 704. And the same state was also permitted to tax its residents on income derived from real estate situated outside the state, an income tax being proportioned to the taxpayer's ability to pay and based on the protection given him by the state of his residence. New York \textit{ex rel.} Cohn v. Graves, 300 U. S. 308 (1937) [thus
The question of the right of a state to tax property not situated within its borders was raised in the Louisiana chain store case, Great Atlantic & Pacific Tea Co. v. Grosjean. Because the tax was graduated on the basis of all the stores operated by the company, it was argued that the state was taxing stores located outside its boundaries. Justice Roberts held otherwise, because the subject of the tax was the conduct of business within the state, a business which the state could wholly forbid and which, therefore, it could permit on conditions.

In First Bank Stock Corp. v. Minnesota, the Court unanimously upheld the taxation of bank stock held by a corporation by the state of its commercial, as distinguished from its legal, domicil. It found it unnecessary to consider whether this ruling affected the right of other states to tax the same stock, such taxes resting on the fact that the banks were incorporated and did business there. The vexed question of whether double taxation is prohibited by the due process clause still remains open.

In two recent cases the Court has treated as identical questions of due process and of undue burden on interstate commerce, a confusion surely wholly unnecessary. A tax may be a burden on interstate commerce, as has been shown, provided it is so large that the receipts exceed the proper expenses for the bearing of which it was imposed; a tax may also, although not too large in this sense, be imposed in so arbitrary a manner as to run afoul of the due process clause. It is difficult to see, however, in what respects arguments addressed to one of these contentions have any applica-


The Court was unanimous in Binney v. Long, 299 U. S. 206 (1936), 85 U. of Pa. L. Rev. 428 (1937), 37 Col. L. Rev. 874, which permitted the taxation by Massachusetts of remainders which had not vested until after the passage of the applicable law.

137. 57 Sup. Ct. 772 (1937). Further treatment of this case will be found infra at note 179.

138. Justice Sutherland disagreed. He considered the law an attempt to punish the taxpayer for acts performed elsewhere than in the taxing state. Justices McReynolds and Butler agreed with him. (Neither Justice Van Devanter nor Justice Stone sat on this case).

139. 301 U. S. 234 (1937).

140. Prior to the line of cases culminating with First Nat'l Bank v. Maine, 284 U. S. 312 (1932), 80 U. of Pa. L. Rev. 605, the Court had frequently declared that the Constitution did not prohibit double taxation. See Kid v. Alabama, 188 U. S. 730, 732 (1903); Citizens Bank v. Durr, 257 U. S. 99, 109 (1921). The subject is discussed at length by Tuller, op. cit. supra note 136, at 270-305. The income tax cases, Lawrence v. Mississippi, 286 U. S. 276 (1932), and People ex rel. Cohn v. Graves, 300 U. S. 308 (1937), have cast doubt upon the view that these earlier dicta have been completely repudiated.

141. Great Northern Ry. v. Washington, 300 U. S. 154 (1937), 85 U. of Pa. L. Rev. 639; Southern Natural Gas Co. v. Alabama, 301 U. S. 148 (1937). In the former, Justice Roberts said, at page 400: "If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment." In the latter case, the Court did not expressly discuss the due process contention of the appellant but apparently assumed that it had disposed of it when it had disposed of the commerce question.

142. See supra note 62.
bility to the other. It is regrettable that the Court should let itself be drawn by the zeal of counsel into such confusion of thought as this.

9. Various state regulatory laws and orders were, in all but two cases, unanimously upheld. Chicago was allowed 143 to compel coal brought into the city to be weighed by a city weighmaster even though it had previously been weighed by a state official. A Texas law forbidding the use of sweet natural gas for the manufacture of carbon black was approved 144 as a proper regulation of natural resources. South Carolina was upheld 145 in its efforts to compel the manufacturers of fertilizers to give certain information concerning the ingredients of their products, even though this might involve disclosure of secret formulae, there being no proof that the expense of compliance would be prohibitive. And the contention that the Georgia legislature, in decreeing the regulation of charges by tobacco warehousemen, had denied due process because it had conducted no special inquiry, was overruled; 146 the legislature was presumed to know the facts.

The Court held 147 that the due process clause was not violated when a public utility was permitted to charge rates higher than those previously fixed by a contract after the state utilities board had found the higher rates necessary. Nor was there any deprivation of due process because a board was given the right to refuse to register cosmetics without holding a hearing, when the party aggrieved was given the right to appeal from such refusal. 148

In two cases the Court unanimously decided against the state. In Thompson v. Consolidated Gas Utilities Corp. 149 orders limiting the production of gas from certain wells were set aside because they were made not to stop waste of natural resources but to compel one set of owners to buy from another. Justice Brandeis found this to be a "glares instance" 150 of taking property from one in order to give it to another, saying: "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 151 The argument that this regulation was part of a total plan which plaintiff had partially sponsored was answered by pointing out that plaintiff had not consented to the restrictions it objected to.

144. Henderson Co. v. Thompson, 300 U. S. 258 (1937). See infra note 232 for treatment of this case under the contract clause.
146. Townsend v. Yeomans, 57 Sup. Ct. 842 (1937) (the Court determined also that no proof of confiscation had been made).
149. 300 U. S. 55 (1937).
150. Id. at 79.
151. Id. at 80.
In *Ohio Bell Telephone Co. v. Public Utilities Comm.* the Court condemned the procedure of the Ohio Utilities Commission. In a rate proceeding that body had taken proof of the value of plaintiff's property as of 1925. In its report, filed nine years later, it fixed rates for the intervening years on the basis of valuations for those years which it had established by the application of price trend figures. No evidence on this subject had been presented to the commission. It refused to permit a rehearing to enable the company to give evidence concerning the value of its property in the later years. This, said Justice Cardozo, was a denial of all proper aspects of a hearing. Since there was nothing in the record to show what facts had been considered by the commission, it was impossible for the company to know what it had to meet. No question of judicial notice existed, because, while that might establish that there had been a decline in values, it could not determine the amount of such decline. Justice Cardozo characterized the proceedings as "condemnation without trial".

10. Both interesting and far-reaching in its implications is Justice Stone's re-affirmation of a former dictum to the effect that due process does not include the right to appeal. And, although the due process clause was not mentioned in its opinion, the Court no doubt had it in mind when it determined that no state was required by the Constitution to entertain a habeas corpus proceeding in order to test a constitutional question after conviction, the proper way to do this being by appeal from the conviction.

11. Another case which belongs under this head, although again no specific reference to due process is made in the opinion, is *American Tel. & Tel. Co. v. United States.* The company objected to certain accounting rules set up by the Federal Communications Commission, primarily to the requirement that all items for plant acquisition be entered at original cost to the first user and that amounts representing the difference between such cost and the actual cost to the telephone company be separately stated. The company expressed the fear that the difference would be arbitrarily charged off. The Court unanimously rejected this contention, largely because the government had disclaimed any intention of requiring such writing off. Justice Cardozo justified the requirement for separate statement of original cost because so many purchases of plant and equipment had been carried out between members of the same system so that the resultant price paid was not, perhaps, representative of the real value. Even when purchases were from independent companies, the price may often have represented nuisance value rather than actual value. It was for the Commission to deter-

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152. 301 U. S. 292 (1937).
153. Id. at 300.
mine what portion of the actual price paid should properly remain as investment.

The company objected also to the requirement that all charges be just and reasonable. This rule was upheld as necessary to prevent padding of accounts, especially since punishment for violation could take place only if the violation was knowing and wilful. Classification of "plant" into that now in use and that held for future service was found neither vague nor arbitrary. Finally, the Court held that the expense of revising the accounts in order to comply with the rules would not be unreasonably great.

A number of other cases involving the due process clause will be considered in connection with the subject of civil liberties.168

**Equal Protection**

1. Almost always, when a law is attacked as violative of due process, it is also attacked as being a denial of equal protection. If it is a federal law, any attack based on discrimination must be formulated in terms of due process, since the equal protection clause is a restraint upon the states only.159 The line has not yet been drawn between discriminatory provisions which pass muster under the due process clause and those which are defective as denying equal protection.160 The current cases throw no new light on the distinction the Court will ultimately draw. In one,161 an order was challenged because it compelled plaintiff and not its competitors to furnish shipping data. Without discussing what would be prohibited discrimination, the Court here unanimously concluded there had been no discrimination at all. In the federal *Social Security* cases162 Justice Cardozo said merely that the exemptions claimed to be discriminatory were permissible even to a state. And in the *State Unemployment Insurance* case163 similar exemptions were considered and found within permissible legislative discretion. Distinctions such as the taxation only of persons employing eight or more people could be justified on administrative grounds; it was for the legislature, not the courts, to draw the precise line. The dissenting judges did not disagree with these conclusions of the majority. Similar reasoning led to the approval164 of the classification adopted by Washington in its minimum

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159. See infra pp. 66-67.
wage legislation and to the differentiation\textsuperscript{165} between branded and unbranded merchandise which underlies the various fair trade laws.

2. A more troublesome question than these was presented by Wisconsin's anti-injunction law,\textsuperscript{166} which applied only to labor disputes. Many years ago by a five-to-four vote in \textit{Truax v. Corrigan}\textsuperscript{167} the Supreme Court had denied the validity of such a classification in a very similar case. Speaking by Justice Brandeis, the majority of the present Court\textsuperscript{168} now distinguished the earlier decision on the ground that the acts involved in the Wisconsin case were lawful. For this reason, said Justice Brandeis, the issue of equal protection did not arise: "one has no constitutional right to a remedy against the lawful conduct of another."\textsuperscript{169} The minority relied upon the \textit{Truax} case without any discussion. It is unfortunate that the equal protection question was left in so very ambiguous a form. Perhaps it was impossible to secure the concurrence of the fifth justice to a complete overruling of this portion of the \textit{Truax} case. However, the equal protection issue actually arises only in a case where the Court finds the acts complained of by the employer to be unlawful and concludes that the legislature did not intend to declare them lawful. In other words, the effect of the statute would be to leave intact all legal remedies for wrongs committed, but, in labor cases only, to abolish or restrict injunctive remedies. No case has yet arisen in which the Supreme Court has accepted this distinction.

3. Many of the state cases have been discussed in other connections. In the \textit{Chicago Coal} case\textsuperscript{170} the Court could find no discrimination between local and outside dealers. In \textit{Henderson Co. v. Thompson}\textsuperscript{171} Justice Brandeis said that the difference between sour gas and sweet gas justified the difference in treatment which the law afforded. In the \textit{California Beer Import} case\textsuperscript{172} Justice Brandeis declared that what was permitted by the Twenty-first Amendment could not be forbidden by the Fourteenth. He also found the distinction between domestic and imported beers justified by the inability of the state to levy a manufacturer's tax upon the latter. All these decisions were unanimous.

In the \textit{Great Northern} case\textsuperscript{173} the opinion of the majority contains a suggestion that the imposition of fees upon utilities for the cost of regula-

\textsuperscript{165} Old Dearborn Distrib. Co. v. Seagrams Corp., 299 U. S. 183 (1936). And see \textit{supra} note 120.

\textsuperscript{166} Cited \textit{supra} note 113.

\textsuperscript{167} 257 U. S. 312 (1921).

\textsuperscript{168} Senn v. Tile Layers Union, 57 Sup. Ct. 857 (1937). For discussion of this case under due process, see \textit{supra} pp. 52-53.

\textsuperscript{169} 57 Sup. Ct. at 864.

\textsuperscript{170} Hauge v. Chicago, 299 U. S. 387 (1937).

\textsuperscript{171} 300 U. S. 285 (1937).


\textsuperscript{173} 300 U. S. 154 (1937). For full discussion of this case in connection with states' rights, see \textit{supra} pp. 45-46.
tion in some way involves the equal protection clause, a suggestion carried forward by Justice Brandeis in the Maine Cosmetic case. It is difficult to understand these references. There seems to be here the same confusion between interstate commerce questions and equal protection which seems to have been made between interstate commerce and due process. It is hardly conceivable that the Court would declare unconstitutional a statute which imposed fees on certain intrastate industries merely because of the classification adopted by the legislature.

4. Two chain store cases came before the Court. In one it held the law bad as a tax on gross sales, following its earlier ruling in the Stewart case. In the other, by a four-to-three decision, the Court upheld a Louisiana law which graduated the tax by the number of stores operated by the chain, regardless of where such stores might be located. The minority reiterated the views expressed in the original Chain Store case, finding this one more aggravated because the stores used in determining the tax were not confined to those in the taxing state. They found discrimination in the Louisiana law between members of what they described as the same class, namely owners of a like number of stores operating in the state. The majority, however, disputed the contention that there was any such class; the class considered by the legislature, they maintained, was a class of stores and it made no difference where they were located. Justice Roberts was unable to see how, if competitive advantages increase with an increase in the number of stores, this condition should be affected by state lines. The state court had found that such advantages existed, primarily in purchasing power, and the evidence sustained the findings. The Liggett case was distinguished, since there the graduation was based not on total number of stores but on the number located in any one county.

5. Another case in which the Court divided sharply was Hartford Steam Boiler Inspection & Ins. Co. v. Harrison. The majority held void a Georgia statute which forbade the salaried employees of insurance companies to act as agents of fire or casualty companies but

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174. Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937) (where no equity was found to exist).
175. See supra p. 56.
176. See supra note 137.
183. 301 U. S. 459 (1937).
permitted salaried employees of mutual companies to do so. Justice McReynolds, for the majority, could see no basis which related to the subject of the law in the distinction between insurance companies organized for profit and mutual companies. He said that none of the state courts had been able to find such a difference, nor had counsel. Nevertheless, Justices Brandeis, Stone, Roberts and Cardozo dissented. Their spokesman, Justice Roberts, took the position that since it was conceivable that local conditions justified the difference in treatment of the employees of the two kinds of companies, the attack on the law must fall. He adverted also to the small amount of business done by the mutual companies as justification for the distinction. Another basis for the difference, he said, was the fact that a salaried agent of a mutual company works for the policy holders while a like agent of a stock company works for the stockholders. It remains somewhat difficult to understand what all this has to do with the objects of the statute; the views of the minority go to extreme lengths to uphold an irrational classification.

6. An unusual case was that of Phelps v. Board of Education. A New Jersey school teacher complained of a salary reduction plan on the ground that different rates of reduction were applied to different salary levels. Justice Roberts, writing for a unanimous Court, was unable to see anything improper in a division of employees into classes based on their compensation.

CIVIL LIBERTIES

In this field the decisions of the Court have assumed special importance since the public lays such great stress upon the role which the Court plays as protector of civil liberties. During the arguments over the President's Court proposal there came about a re-appraisal of this role, leading to the conclusion that the Court has not always been so great a defender of civil liberties as the opponents of the President's plan like to make it appear. In recent years, especially in cases coming from the states, the one way in which the Court has appreciably extended its influence in the field has been by showing an increased conception of the requirements of due process.

185. 300 U. S. 319 (1937). See infra note 231 for treatment of this case under the contract clause.
187. After the Court had expanded the conception of the due process clause beyond its original procedural meaning in cases involving property rights, it became increasingly difficult not to do so in civil liberties cases. The reluctance with which it reached its present position is manifest in cases involving free speech. In Patterson v. Colorado, 205 U. S. 454 (1907), and Fox v. Washington, 236 U. S. 273 (1915), the Court cast doubt upon the applicability of the Fourteenth Amendment; in Prudential Insurance Co. v. Cheek, 259 U. S. 539 (1922), is found the statement that the Constitution imposed no restrictions on the States in his respect.
Two of the decisions of the 1936 term carry this important development further.

1. In *DeJonge v. Oregon* the Court unanimously set aside a conviction under a criminal syndicalism law. The defendant had been charged with participation in a meeting sponsored by the Communist party. It was not claimed that he had himself said or done anything unlawful; nor was it charged that the meeting had violated the law. To punish a person because of the auspices under which he speaks, said the Chief Justice, constitutes such an interference with freedom of speech and of assemblage as to amount to a denial of due process. He said:

"... the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. ... It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects, ..."

Thus, for the first time, freedom of assemblage has been added to those rights looked on as so fundamental that they are protected against state action by the Fourteenth Amendment. The question whether a state may punish mere membership in an organization which advocates unlawful doctrine was left undecided as not involved. But the Chief Justice commented on the fact that De Jonge had not been indicted for joining the Communist party, of which he was a member.

A different problem in relation to the Communist party came up in the *Herndon case*. Under an ancient law of Georgia drawn originally in order to quell uprisings of slaves, Herndon, a Negro organizer for the Communist party, was found guilty of inciting to insurrection. He had induced various persons to become members of the party, and had in his

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189. 299 U. S. at 364.
191. No case has ever squarely presented the problem to the Supreme Court.
192. Herndon v. Lowry, 301 U. S. 242 (1937), 50 HARV. L. REV. 1313, 46 YALE L. J. 862. This was an appeal from habeas corpus proceedings permitted by Georgia practice after the Supreme Court had dismissed an appeal from the judgment of conviction on the ground that no federal question had been properly presented. *Herndon v. Georgia*, 295 U. S. 441 (1935). That the second appeal to the Supreme Court would have been impossible had the state courts disputed the practice is evident from Woolsey v. Best, 299 U. S. 1 (1936).
possession when arrested single copies of booklets which the state claimed proved that the Communist party sought to overthrow the state by force. The prosecution depended principally on a booklet which advocated the establishing of a black belt where Negroes were to have the right of self-determination. Such advocacy, said the state court, necessarily involved the use of force, since the communists must have known they could not hope to accomplish an aim such as this in any other way. The majority of the Supreme Court voided the conviction on two grounds. They held that Herndon's freedom of speech had been infringed upon in the absence of proof either that he had advocated any of the doctrines in the literature or that the persons he had solicited as members even knew about them. Further, they decided that, as construed by the state courts, the statute was too vague and indefinite to allow of conviction. The standard laid down by the state court permitted the jury to convict provided force might result at any time within which defendant might reasonably expect his influence to bring it about. That, said Justice Roberts, sanctioned the punishment of words having a "dangerous tendency". It created "a dragnet which may enmesh anyone who agitates for a change of government".

This opinion is noteworthy in that it quotes with approval the "clear and present danger" rule of the Espionage case, until then generally ignored in state criminal syndicalism cases. It also makes it clear that the power of the state to punish speech is exceptional:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

Justices Van Devanter, McReynolds, Sutherland and Butler dissented from the decision. They were of the opinion that the standard laid down by the state court was sufficiently definite because it meant in effect that a defendant could not be convicted unless forcible resistance should "proximately result from his act of inducement". Justice Van Devanter analyzed the evidence and concluded that it could be inferred that Herndon had distributed

195. 301 U. S. at 263.
198. 301 U. S. at 258.
199. Id. at 277.
the literature complained of by the state and that the distribution of inflammatory matter by a Negro to other Negroes was equivalent to advice to resort to force, "for all know that such measures could not be effected otherwise".200

2. Another free speech case (really a free press case) left the justices with their positions reversed. The four who had voted against Herndon again dissented, this time, however, because they were of the opinion that the constitutional privilege had been impaired. The question arose in the case of Associated Press v. National Labor Relations Bd.201 over the discharge of Watson, an editorial writer, due to his activities on behalf of the Newspaper Guild. The Press contended that to compel it to reinstate Watson would violate the freedom of the press. Again Justice Roberts wrote for the majority; this time it was Justice Sutherland who wrote the dissenting opinion.

The argument of the minority was based upon the importance of an unbiased press and the fear that reporters who belong to unions might not be impartial in their rendering of the struggles between capital and labor, or, at least, that each employer should be free to determine for himself whether employees were so or not. They insisted that their decision did not impair the right of employees to bargain collectively and eloquently called on the people to resist at the beginning any encroachment upon their fundamental liberties. For, said Justice Sutherland, "... the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." 202

These arguments enlisted no support from the majority. Justice Roberts stressed the fact that bias had not been charged against Watson and that if it should appear that he failed to perform his duties as an impartial editorial writer he could be dismissed for that reason.

3. Three cases arose involving jury questions. In two of these the Court was again divided, with judges reputed as conservative contending that the Constitution had been violated.

In United States v. Wood 203 the issue was whether, in a criminal case in the District of Columbia, Congress could authorize government employees to sit as jurors. The argument to the contrary rested on the guarantee of a trial by an "impartial" jury,204 and was to the effect that a government employee in a case in which the government was a party could not be impartial. Some intimations to that effect had been given by the Supreme Court many years ago in the Crawford case.205 The majority of the present Court, by

200. Id. at 276.
201. 301 U. S. 103 (1937). For discussion of the interstate commerce feature of this case, see supra note 31.
202. Id. at 141.
204. U. S. CONST. Amend. VI.
the Chief Justice, pointed out that in the *Crawford* case the Court had dealt with a question of statutory construction, not with the issue of Congressional power. He insisted that there was no basis for the contention that bias must be presumed as a matter of law, recognizing that in each case the relationship of the employe with the facts involved could be explored to make sure that no bias existed in fact. He reviewed the English precedents to ascertain whether, at the time the Constitution was adopted, any rule existed from which it might be argued that it was intended to exclude government employes from jury service, and was unable to deduce a rule sufficiently definite. He argued that, in any event, Congress could have changed such a rule, since the qualifications of jurors were not included in what the Court had previously declared to be essential to trial by jury: that there be twelve men, supervised by a judge, who reach a unanimous decision.206 Justices McReynolds, Sutherland and Butler dissented briefly, relying entirely on the *Crawford* case.

In *District of Columbia v. Clawans* 207 the question related to the right to a jury trial. Congress had created police courts for the District of Columbia for the trial of petty offenses without a jury. Of its constitutional right to do this there could be no question.208 Miss Clawans was charged with selling railroad tickets without a license, the punishment for this offense being a fine of not more than $300 or imprisonment for not more than ninety days. There was no question but that the nature of the crime was such that a jury trial could be dispensed with. But it was argued on behalf of the defendant that the severity of the possible punishment changed this. The majority rejected the argument. Ninety days, said Justice Stone,209 had not been an unusual punishment for petty offenses in the colonies.

Justices McReynolds and Butler disagreed. Since the majority reversed the conviction for errors committed at the trial, the dissent they expressed through Justice McReynolds was only partial. Their argument rested chiefly on the fact that the Constitution guaranteed trial by jury in civil cases involving more than $20.00.210

In the third case 211 the question related to the right of Congress in the National Labor Relations Act to permit the Board to award money damages for lost wages after a hearing without a jury. The Chief Justice noted that the Seventh Amendment referred only to suits at common law. The proceedings authorized by the Wagner Act were not of that

207. 300 U. S. 617 (1937).
209. 300 U. S. at 625.
210. U. S. Const. Amend. VII.
211. See National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937). For further discussion of this case, see *supra* notes 23, 101.
character. The justices who dissented from the application of the law to the industry did not discuss this point.

4. In *Lindsey v. Washington* 212 the Court unanimously declared void a law changing the manner in which sentence must be imposed. At the time of the commission of the crime for which the defendant was convicted the law provided for an indeterminate form of sentence. Under the new law 213 the judge was required to sentence him to the maximum term originally provided for this offense. The parole board was given power to release defendant earlier. Justice Stone held there was considerable difference between giving discretion to the judge at the time of sentence and permitting a board later to let a prisoner out on parole: in the latter event he remained subject to surveillance during the entire period. Since the new law thus worked to the substantial disadvantage of the defendant, it violated the constitutional provision against ex post facto laws, whether or not it might be said to inflict a greater punishment.

5. In *Valentine v. United States* 214, executive power to extradite citizens was unanimously restricted. The brothers Neidecker, American citizens, charged in France with various extraditable offenses, fled to New York. President Roosevelt ordered their return to France. The Supreme Court sustained writs of habeas corpus which challenged the President’s authority. The Chief Justice ruled that the President had no constitutional power to order extradition and that such power could arise only from Act of Congress or treaty. Since existing treaties did not specifically include American citizens, it could not be presumed that it was intended to include them. The Chief Justice said of the President’s power: “the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.” 215

**Delegation of Powers**

1. The Court made clear that this doctrine had no relation to state legislation, at least insofar as the Federal Constitution was concerned. In the *Virginia Milk* case, 216 since the highest court of the state had held 217 there was no improper delegation under the state constitution, there was nothing for a federal court to consider. Yet where the delegation is to private instead of public agencies, the question may well be a different one.

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212. 57 Sup. Ct. 797 (1937).
214. 299 U. S. 5 (1936); see Note (1937) 46 Yale L. J. 525.
For in such a case considerations of due process may supervene. The Court, nevertheless, found no instance of this in the *Fair Trade* cases.

2. Two federal laws presented the problem in its broader aspects. By the Neutrality Resolution of 1934 Congress had authorized the President to forbid the sale of arms to any of the countries then at war in the Chaco. In *United States v. Curtiss-Wright Export Corp.* the Court upheld the discretion vested in the President. Justice Sutherland said that in the realm of foreign affairs the power of the President under the Constitution was so broad that it was permissible to grant him discretionary powers which might be an unlawful delegation if concerned with internal affairs. He reviewed a long and unbroken practice of Congress in that regard, which the Court would "not feel at liberty at this late day to disturb". Justice McReynolds dissented, without saying more than that the lower court had rightly held the delegation excessive.

In the *Cocoanut Oil Processing Tax* case it was argued that Congress had unlawfully delegated the manner of expending certain of the proceeds by directing that they be paid into the Philippine treasury without also prescribing how the money was to be spent. The Court unanimously disposed of this argument on the grounds that Congress had frequently authorized public agencies to spend money as they thought best and was here dealing with a dependency in connection with which it had full sovereign powers.

**TAXATION OF SOVEREIGN INSTRUMENTALITIES**

It is a familiar doctrine that the states may not tax federal agencies nor the Federal Government tax state instrumentalities. Yet it has not always been easy for the courts to determine instances for the application of the general rule. Some difficulty was found in fixing the status of the general counsel to the Panama Railroad, a wholly owned instrumentality of the United States. New York sought to levy an income tax upon his salary on the ground that the railroad was a commercial enterprise. The Supreme Court unanimously declared this could not be done. The canal, said Just-

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220. 48 STAT. 811 (1934).


222. *Id.* at 329.


Two other unanimous decisions involved Indian oil lands. A Montana tax on the production of oil was sustained because of express Congressional consent. British-American Oil Producing Co. *v. Board of Equalization of Mont.*, 299 U. S. 139 (1936). And an Okla-
Justice Sutherland, was clearly immune from taxation. The railroad, although used in part to carry private freight and passengers, was primarily used for governmental purposes. Its officers, therefore, were immune from taxation by the states.

A federal case presented an analogous situation to the one just discussed. The United States attempted to levy an income tax on the salary of New York City's Chief Water Supply Engineer. Again it was urged that the activity was commercial, not governmental, and again the Court ruled otherwise, this time without unanimity. The majority, by Justice Sutherland, reviewed the history of the supplying of water and concluded that this was an essential governmental function of a city like New York. They confined the decision to the particular case and took care to formulate no rule generally applicable to municipal activities. The fact that the city charged a fee, or even made a profit, was held immaterial. Justices Stone and Cardozo concurred in the result on the sole ground that the treasury regulations had recognized the engineer's exempt character, it therefore being unnecessary to review the fundamental question of immunities. Justices Brandeis and Roberts dissented in an opinion written by the latter, taking the position that not every tax imposed upon a sovereign instrumentality was void. They sought to establish the rule that the tax was bad only if it discriminated against the instrumentality or was clearly direct. They could see no reason why a person performing services similar to those performed for private agencies should escape taxation on his compensation merely because in a certain instance he was employed by a public agency. It is curious that these views were not similarly expressed in the Panama Railroad case, for they apply to it in the same measure as to the case just mentioned.

The fact seems to be that in these two cases the Court has laid down a rule unduly favorable to the Federal Government: all federal agencies constitutionally created are exempt from state taxation; but state agencies are exempt from federal taxation only if they are necessary to the carrying on of governmental functions. It is high time that this whole subject be given fresh consideration.

homa tax on property used by a corporation in connection with its exploitation of a lease on Indian lands was upheld on the ground that the influence of the tax upon the operations was at best remote. Taber v. Indian Terr. Illuminating Co., 300 U. S. 1 (1937). Both decisions followed settled authority.


In Liggett & Myers Tobacco Co. v. United States, 299 U. S. 383 (1937), 50 Harv. L. Rev. 690, the United States sought to recover an excise tax on the manufacture of tobacco which was sold to a state institution for free distribution to patients. The court unanimously permitted recovery on the ground that the tax, although not payable until the removal or sale of the tobacco, was not measured by the sales price and hence was not a sales tax; the effect on the institution was, therefore, indirect.

227. The Attorney General asked the Supreme Court to reconsider certain phases of the doctrine of sovereign instrumentalities, particularly to overrule Panhandle Oil Co. v. Mis-
RESTRICTIONS ON THE STATES

1. Among the remaining cases which deal with state laws or proceedings, none presented problems of particular importance. In answer to an attack \(^{228}\) upon Virginia’s Milk Control law as a denial of a republican form of government, Justice Cardozo (after disposing of the contention in a brief sentence) recalled that the enforcement of that particular constitutional guarantee was for Congress, not for the courts. In the Maine Cosmetics case, \(^{229}\) Justice Brandeis avoided the necessity for passing upon a search and seizure question raised under the state constitution by pointing out that none of plaintiff’s property was threatened with seizure.

2. The contract clause was invoked in a number of other cases already considered. In two of these \(^{230}\) the discussion of the due process contention disposed also of the argument based on impairment of contracts. In the New Jersey Teacher’s case \(^{231}\) the Court held that legislation which ensured against dismissal without cause did not create a contract. And in the Carbon Black case \(^{232}\) it was decided that both under the federal and state constitutions the contract clause did not prevent the passage of measures under the police power. Similar reasoning led to rejection \(^{233}\) of the contention that a Texas tax on oil production impaired the terms of leases, regardless of which of the parties might, under such lease, have to assume the tax.

In Peoples Banking Co. v. Sterling \(^{234}\) stockholders of failed banks unsuccessfully objected to certain changes affecting their liability for debts of the bank. Justice Cardozo ruled that there had been no impairment of contracts since the legislature had reserved the right to amend the charter of the banks and the changes were in the remedy only. He left open the question of whether the result would have been different had the stockholders been held answerable for debts for which they would not have been liable under the old law. The recent case of Coombes v. Getz \(^{235}\) was distinguished in that it involved rights of creditors, not of stockholders.

In like fashion, on the ground that the remedy only was affected, the Court rejected \(^{236}\) the contention of a mortgage holder that its rights had

\[^{228}\text{Highland Farms Dairy v. Agnew, 300 U. S. 608 (1937), discussed supra note 71.}\]
\[^{229}\text{Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937), discussed supra note 68.}\]
\[^{230}\text{Binney v. Long, 290 U. S. 280 (1936); Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109 (1937).}\]
\[^{231}\text{Phelps v. Board of Education, 300 U. S. 319 (1937).}\]
\[^{232}\text{Henderson Co. v. Thompson, 300 U. S. 258 (1937).}\]
\[^{233}\text{Barwise v. Sheppard, 299 U. S. 33 (1936).}\]
\[^{234}\text{300 U. S. 175 (1937).}\]
\[^{235}\text{285 U. S. 434 (1933).}\]
\[^{236}\text{Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U. S. 124 (1937).}\]
been impaired. Justice Roberts held that the change in remedy was not so substantial as to deprive the holder of the mortgage of any essential right. The new law provided that if the mortgagee bought in the property at a trustee's sale and sued for a deficiency, a jury might credit the mortgagor with the true value of the property at the time of the sale. In foreclosure proceedings as distinguished from a trustee's sale the court had the power to accomplish the same result irrespective of the new law. Accordingly, the Court could find no impairment of the contract, since the mortgagee was entitled to be paid only once. This was accomplished by giving him the property and a deficiency judgment which took the value of the property into consideration.

3. The full faith and credit clause received an unusual application in *John Hancock Mutual Life Ins. Co. v. Yates.* Suit was brought in a Georgia state court on a life insurance policy made in New York. When the insurance company contended that the insured had failed to disclose certain facts about his medical history, plaintiff was permitted to prove that insured had disclosed the true facts to the agent who had obtained the policy. The court instructed the jury that if it believed this testimony it might find that the company had waived strict compliance with the policy. The law of New York, however, forbade proof of this kind. The Supreme Court reversed the judgment so rendered in plaintiff's favor, because it disregarded the law of New York. Justice Brandeis held that the defense relied upon by the company was given to it by a statute of New York to which the Georgia court was bound to give effect, and that the law must be applied as it had been construed by the highest court of New York.

4. In *Carlin Construction Co. v. Heaney* the Court ruled that under the New York Workmen's Compensation Act suit could be maintained in the courts of that state to recover for injuries sustained in the explosion of a steamer in the East River by an employee who had been engaged in work on shore. The accident had happened while the employee was being transported to work by his employer. Although ordinarily the rules of maritime law would apply to an accident on the river, Justice McReynolds differentiated this case because the contract of insurance under which the recovery was sought had no relation to maritime business. He emphasized the fact that no claim was being asserted against either the ship or her owner.

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237. N. C. Code (Michie, 1935) § 2593d.
239. N. Y. Cons. Laws (Cahill, 1930) c. 30, § 58.
240. 299 U. S. 41 (1936).
241. N. Y. Cons. Laws (Cahill, 1930) c. 66, § 10.
242. In addition to the above, four decisions not readily classifiable deserve notice. In the most important, *United States v. Norris,* 300 U. S. 564 (1937), the conviction for perjury before a Congressional committee of George W. Norris, the grocer rival of the Senator of the same name, was upheld, the Court ruling that the committee could investigate matters
Practice Questions

Most of these cases followed established precedent; in all the votes were unanimous.

1. The Court refused to consider the constitutionality of a part of Section 77B of the Bankruptcy Act, even though the lower court had done so, since the plan involved in the particular case was properly disapproved. And in other cases the Court refused to consider questions which were merely hypothetical.

2. In *Chisholm v. Gilmer* the Court laid to rest a question concerning which there had been some difference of opinion. It was primarily one of statutory construction, namely whether it was possible to commence a common law proceeding by notice of motion instead of by process issued from a court. In passing on this question Justice Cardozo pointed out that there was no constitutional bar to any method of instituting suit so long as it gave reasonable notice.

In *Mountain States Power Co. v. Public Service Comm.* the Johnson Act notwithstanding, the Court approved the institution of suit in a federal court to enjoin the enforcement of a Montana rate reduction order. Justice McReynolds rejected the contention that a state statute which forbade the granting of any injunction prior to final determination could be disregarded as unconstitutional, since the Montana courts had not so declared. Until they had done so, it was impossible to say that there existed such "plain, speedy and efficient remedy" as the Johnson Act required.

3. In three cases the Court refused to pass on constitutional issues because it believed the cases should be remanded to the lower courts. In one of these this was done so that the facts might be more fully developed;

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Footnotes:


246. 299 U. S. 167 (1936).


249. Villa v. Van Schaik, 299 U. S. 152 (1936). But see American Propeller & Mfg. Co. v. United States, 300 U. S. 475 (1937), where remand was refused because of the length of time already consumed in litigation and the unlikelihood that additional evidence would be discovered (no constitutional issue was involved in that case).
in another 250 so that the record might be amplified to show just how the constitutional issue was raised and disposed of in order to make sure its disposition was essential. The third, Duke Power Co. v. Greenwood County 251 was remanded because events subsequent to the trial had created a confused record. This case requires some brief comment on account of both the importance of the constitutional issue involved and the peculiar circumstances which led to the remand. The power company challenged the validity of the law, which permitted federal loans to local governments for the construction of power plants, 252 and sued to enjoin the erection of the plant by the county. After judgment had been granted in its favor declaring the law unconstitutional, the original contract between the county and the government was cancelled and a new one substituted which eliminated conditions held by the trial court to be beyond the authority of the county to make. The Circuit Court of Appeals then remanded the case with instructions that the trial court reconsider its decision in the light of the new contract. At the new hearing additional evidence was taken, but the judge refused to allow amendment of the pleadings, and limited the new evidence to matters relating to the new contract. He then decided that none of the new material caused him to change his original decision. On the second appeal the complaint was dismissed on the merits. 253 The Supreme Court criticized both lower courts. The appellate court should have reversed the original judgment instead of remanding the case with ambiguous directions, it maintained; the trial court failed properly to understand the order and re-try the case. Then, on the second appeal, the appellate court had failed to realize that the trial court had not taken the proper steps. So the Supreme Court ordered that the judgment be set aside, the pleadings amended and the case tried over again. What additional facts might be added to the record by this observance of the judicial proprieties was not intimated. Consequently at this term the Court did not pass on the pressing question of the validity of these government loans. As a result the construction of power plants has been halted all over the country, with probable loss to consumers and increased costs of construction due to rising prices. On the last day of the term the Court consented to hear argument in other cases involving the same issues. 254

250. Honeyman v. Hanan, 300 U. S. 14 (1937). The New York Court of Appeals then reheard the case and adhered to its original decision that the challenged law was constitutional: 275 N. Y. 382 (1937), 9 N. E. (2d) 970 (1937).


254. On June 1, 1937, certiorari was granted to review Alabama Power Co. v. Ickes, 91 F. (2d) 303 (App. D. C. 1937).
4. The Court gave qualified approval to an interesting method of simplifying the work of the government in meeting constitutional problems. Many suits having been instituted to test the recent utility legislation, the Government moved to stay one of them until the determination of a test case. The Supreme Court upheld the government's contention that such a move was permissible, but remanded the case to the lower court because the stay it had granted was too drastic.

CONCLUSION

Despite the new trend in the Court, the demand continues for farther-reaching and more permanent reform. The President has announced that he still hopes to achieve some form of legislative control. Others insist it is by constitutional amendment only that substantial progress may be effected. Liberals seem agreed that some restriction on the power of the Court is not only essential but inevitable.

And the case against the Court is a strong one. Too often have we seen it the champion and apologist of the powerful. There is no need to list the valuable measures the Court has condemned as lacking in due process. Nor does it matter essentially that in the matter of minimum wages a retreat has now been sounded from the more extreme position. The case against the Court rests primarily on this: that it should ever have permitted itself to sit in judgment on the wisdom of legislatures. For the determination of what constitutes due process, when general laws rather than procedure are involved, is not actually a judicial affair at all. It is a political or an economic one. And for the solution of problems such as these a court is not the proper agency.

One group of enemies of the Court believe that the only solution lies in abolishing altogether the power of judicial review. They argue that no constitutional amendment re-defining due process would accomplish the end desired, since the Court would still have the last word in interpreting the


256. For recent discussions of the Supreme Court issue see Clark, The Supreme Court Issue (1937) 26 Yale Rev. 669; Fite and Rubinstein, Curbing the Supreme Court—State Experiences and Federal Proposals (1937) 35 Mich. L. Rev. 762; Lerner, Constitution and Court as Symbols (1937) 46 Yale L. J. 1290; Note, The Supreme Court—Another Word (1937) 32 Ill. L. Rev. 206.


258. International Juridical Association, Curbing the Courts (1937). The newly organized National Lawyers Guild has submitted to a vote of its membership various proposals for dealing with the issues here considered, including a proposal to abolish altogether the power of judicial review, N. Y. Times, July 31, 1937, p. 4, col. 8.
new amendment. But even so, some Court of last resort inevitably will remain, and if deprived of the power of declaring laws unconstitutional, it will retain the power of interpreting them. Even now Congress often fails to correct interpretations which have stirred the country, as when the "rule of reason" emasculated the Sherman Anti-Trust Law.\textsuperscript{259} No matter how supreme the legislature may be, inertia or political shifts will often give the Court the last word.

But, it is argued, it is bad enough that the country may not know for a long time what a law means, but why should there also be the uncertainty as to whether it ever was a valid law at all? This argument is a powerful one, particularly in troubled times. A certain amount of governmental paralysis no doubt exists during the period of challenge. That was notably the situation while the Wagner Act cases wound their way to the Supreme Court. Yet it should be possible to lessen the delay involved in obtaining a decision from the Court.\textsuperscript{260} And, what is more important, it should also be possible to reduce the area of doubt. Why may we not attempt a re-defining of due process, a restoring of it to its original procedural meaning?\textsuperscript{261} If it prove necessary, why may we not extend Congressional power over industry and agriculture?\textsuperscript{262} Perhaps we should even deprive individuals of the right to question Congressional legislation\textsuperscript{263} on the ground that it invades power reserved to the states. And by all means let us simplify the process of amending the Constitution, so that the people may be enabled promptly to correct interpretations by the Supreme Court which run counter to the considered views of the majority.\textsuperscript{264}


\textsuperscript{260} Congress has just accomplished something in this direction by permitting direct appeal to the Supreme Court. Delay might also be avoided by relieving the District Courts of responsibility for passing on the law, at best a futile performance. See suggestion by Fraenkel, Constituting Issues in the Supreme Court, 1935 Term (1936) 85 U. of Pa. L. Rev. 27, 78.

\textsuperscript{261} Any change in the due process clause should, however, be accompanied by an express prohibition against impairment by the states of various rights specified in the First Amendment but now protected against infringement by the states only by virtue of the due process clause, such as freedom of religion, of speech, of the press, and of assemblage. It should be noted that the due process clause has been interpreted to include rights nowhere specifically mentioned in the Constitution, such as the educational rights involved in Meyer v. Nebraska, 262 U. S. 390 (1923); Pierce v. Society of Sisters, 268 U. S. 510 (1925); and Farrington v. Tokushige, 273 U. S. 284 (1927). If it is desired to preserve these rights some express formulation of them would be necessary.

\textsuperscript{262} Clark, Some Recent Proposals for Constitutional Amendment (1937) 12 Wis. L. Rev. 313, 322; Garrison, The Form of a Constitutional Amendment (1937) 27 Am. Lab. Leg. Rev. 17.

\textsuperscript{263} And, for that matter, private persons might even be deprived of the right to contest state laws, on the ground that they were infringing on federal power. For discussion of a provision of this sort in a former Austrian Constitution see Grant, Judicial Review of Legislation under the Austrian Constitution of 1920 (1934) 28 Am. Pol. Sci. Rev. 670.

\textsuperscript{264} An amendment of this kind has been formulated by the author. Fraenkel, What can be Done about the Constitution and the Supreme Court? (1937) 37 Col. L. Rev. 212, 225, n. 92.
The advocates of Congressional supremacy should not forget that majorities in Congress often get out of touch with their constituents, often they are swayed by hysteria, and driven by the illusion of power. The people, though also classic victims of hysteria, being further removed from the exercise of power, are more likely to remember the value of restraints. Each individual voter is, in some respects, a member of a minority group. As such he may be more likely than Congress to heed the rights of minorities when efforts are made to destroy them.

The assumption by some liberals that the abolition of judicial review will permit the forward march toward the desired goal is naive. In a country firmly united toward a progressive goal the power of judicial review, if tempered as suggested, is not to be feared, and without such power repressive and arbitrary acts of government would be much freer from correction. For it is in the field of minority rights, of civil liberties, that constitutional restraints have their greatest significance and judicial review its real value. The people, who might not themselves sanction destruction of liberties when faced with such an issue in a proposed constitutional amendment, might yet tolerate in office an administration which, drunk with power, impaired such liberties. Then power, without the possible check imposed by judicial review, would tend to become irresponsible. Let us remember that certain restraints upon government are wise and necessary; that, though each of us may at times find himself restive under them, he cannot tell when they, and courts to enforce them, will not stand between him and arbitrary power. It took centuries of struggle to build these restraints into the legal structure. Let us not cast them lightly aside. To curb the abuses of judicial review it is not necessary to burn down the house of judgment.