

Frankfurter, Felix 1938

~~Daily File~~

H. Handfe

bees

FELIX FRANKFURTER
CAMBRIDGE, MASS.

file
"personal"

Dear Henry - 2

Dear be good
Enough to pass the
on to the President.

Went to see
me see the
Eng. Port for the
Abellous of the
of the. Harriet
in her reserved for -
himself way, thought it
was an outrage for it

enter PSF
January 26, 1934

January 26, 1934

FELIX FRANKFURTER
CAMBRIDGE, MASS.

CAMBRIDGE, MASS.

Bar. Zauck

Let me interrupt you
long enough to tell you how
much you are in my thoughts
and my heart these days.

When I think of the motley
 trek to the White House these
 dogs - the naive, the ignorant,
 the self-seeking, the anxious
 and bewildered ~~who~~ know
 exactly how you should run
 the country, and offer you
 empty slogans and irre-
 levant generalities with
 which to do it, I think of
 all the people, foolish, un-
 informed, self-seeking and
 timid who used to tell Abe
 Lincoln how to win the war.
 No one better than he would un-
 derstand your problems and

and profoundly be with you in
your efforts.

That is the way I have been
feeling all these weeks -
thinking of you, feeling
for you and wishing, for the
country's sake, your una-
bated faith in your fellow-
beings, your antiseptic sense
of humor, your stout heart,
your own complete self. For,
to the great majority of our
body of American men and
women - and beyond to
the democratic peoples of
the world - you continue
to embody their best and
abiding hopes.

Respectfully
Yours

Study file
file
personal

PSF

February 14

[1936]

FELIX FRANKFURTER
CAMBRIDGE, MASS.

FF

Dear Sam 2 - Lu

Happily you do not
need the opiate of topo-
sific reading material,
but this paper, on the
board of the Supreme
Court, is bed-side
material in its most
useful sense.

But - you may
really be interested
in footnote 2, of this, &
perhaps you'd want to
glance over pp. 577-579,
598-637. Ever faithfully
FF

VOLUME LI

NUMBER 4

HARVARD LAW REVIEW

FEBRUARY, 1938

LEADING ARTICLES

THE BUSINESS OF THE SUPREME COURT AT THE OCTOBER TERMS, 1935 AND 1936	{ <i>Felix Frankfurter</i> <i>Adrian S. Fisher</i> }	577
PERPETUITIES IN A NUTSHELL	<i>W. Barton Leach</i>	638
CHANGES IN CORPORATE REORGANIZATION PRO- CEDURE PROPOSED BY THE CHANDLER AND LEA BILLS	<i>Cloyd Laporte</i>	672

COMPLETE TABLE OF CONTENTS OF THIS ISSUE
ON PAGES V AND VI

Published Monthly November to June Inclusive. Entered at Norwood Post Office as second-class matter
\$4.50 PER ANNUM IN ADVANCE 75 CENTS PER NUMBER
FOREIGN SUBSCRIPTIONS, \$5.00, 85 CENTS PER NUMBER

Copyright, 1938, by THE HARVARD LAW REVIEW ASSOCIATION
Printed at 161 Lenox Street, Norwood, Mass., U.S.A.
Editorial and Executive Office Gannett House, Cambridge, Mass., U.S.A.

THE PLIMPTON PRESS

Printed in U.S.A.

NORWOOD, MASS.

BF Frankfurter

ADVERTISEMENTS



PAGING THE FORWARD LOOKING ATTORNEY

The lawyer of tomorrow must be as familiar with federal rights as with local. Even now the better class of clients are asking questions which can only be answered by reference to the decisions of the United States Supreme Court.

Keep ahead of your clients—not behind them; own, study, cite, U. S. Supreme Court Cases.

The set you need is L. Ed. Rose's Notes Edition. Consider these features:—

- (1) Complete Judicial History of the decisions.
- (2) Briefs of Counsel for every case.
- (3) Co-Op. Annotations.

These features offer facilities for study, enjoyment, and use not obtainable elsewhere. Have us forward you information on the many other features which have made L. Ed. the most popular edition of Reports ever published.

The Lawyers Co-operative Publishing Company
Rochester, N. Y.
149 Broadway, New York City

Please mention *THE REVIEW* when dealing with our Advertiser.

ADVERTISEMENTS

THE LAW of CORPORATE MORTGAGE BOND ISSUES

*In conjunction with a typical indenture and deed of trust
securing bonds*

By **RALPH A. McCLELLAND**

of the New York Bar

AND

FREDERICK S. FISHER, Jr.

of the New York Bar

One Volume

Price \$15.00

THIS is one of the most practical law books ever published. Its authors proceeded upon the theory that since the rights and obligations of the parties to the indenture securing a mortgage bond are to be determined from that instrument itself, the most practical manner in which to present the subject is by setting out a typical indenture and dissecting it clause by clause with decisions of the courts and comments construing and showing the application of every provision.

During the past hundred years these indentures have grown in size from a few folios to a lengthy specialized instrument covering hundreds of pages and this is the first thorough study of the rules of law which have their beginning in that instrument.

The authors have taken the deed of trust and examined into all of the relationships which it has created. They have used a typical mortgage indenture and deed of trust to focus the material in relationship to the many persons who are directly or indirectly interested in corporate mortgage securities.

Under the various provisions of this typical instrument they have collected and commented upon the cases that deal with and interpret similar provisions. Thus the framework of the mortgage itself is support for the court decisions which over the past century have construed this form of financing.

Although the scope of the book is limited to a consideration of the problems incident to and arising out of a mortgage bond issue, yet, by the same token, it also considers all of the derivatives of such a transaction.

It analyzes all of the rights and obligations of all parties coming in contact with the issue from the moment the matter is presented to the directors of the issuer for initial consideration to the time of final payment of the bonds and discharge of the lien, or to the commencement of receivership or other reorganization proceedings of the issuing corporation.

For sale by your bookseller or direct from the publisher.

CALLAGHAN & COMPANY

401 EAST OHIO STREET

CHICAGO, ILLINOIS

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

**THE
YALE LAW JOURNAL**
FEBRUARY, 1938

A Discussion of
CURRENT PROBLEMS AND DEVELOPMENTS
IN
ADMINISTRATIVE LAW

BY

FELIX FRANKFURTER

JAMES M. LANDIS

RALPH FUCHS

A. H. FELLER

J. M. COOPER

ROLAND REDMOND

HARVEY MANSFIELD

COMMENTS

REVIEWS BY OLIVER P. FIELD, PATTERSON FRENCH, STEPHAN
RIESENFIELD, PENDLETON HERRING.

Published from November to June, Inclusive
*Subscription, \$4.50 a year; single copies of
current volume, 80 cents; back numbers, \$1.00*

THE YALE LAW JOURNAL
401A YALE STATION, NEW HAVEN, CONN.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

NEW YORK'S FIRST BANK • FOUNDED IN 1784

MACHINES MAKE JOBS

The increasing use of machines in industry has not destroyed jobs. It has created them.

When automobiles were made virtually by hand and the price was high, few people were employed in the motor business. Today the motor industry, directly or indirectly, accounts for the employment of 1 person out of every 6 at work in this country.

Higher wages have always followed increasing use of machines. When the United States was using \$23 worth of machinery per capita, Great Britain was using only \$10 worth and paying $\frac{1}{3}$ the American wage. Germany was using \$9 worth and paying $\frac{1}{4}$ the American wage. China was using 5 cents worth and paying $\frac{1}{20}$ the American wage.

18 new industries, wholly developed by technological advancement since 1880, today account, directly or indirectly, for the employment of 1 out of every 4 people at work in the United States.

As bankers for commercial and industrial enterprises, it is part of our responsibility to contribute something to a better understanding of the facts about private business.

**BANK OF NEW YORK
& TRUST COMPANY**

48 Wall Street • New York

Please mention THE REVIEW when dealing with our Advertisers.

Evidence — In General — Admissibility of Evidence as to Habits of Deceased Where Sole Living Eyewitness is Defendant (<i>Nordman v. Carlson</i> , Ill. App. 1937)	743
Income Taxes — What is Income — Cost Basis on Sale of Stock Dividends Exempt from Taxation on Receipt by Stockholder (<i>Heltner v. Gowran</i> , U. S. Sup. Ct. 1937)	744
Inheritance Taxes — Deduction of All Debts from Gross Estate Which Includes Exempt Insurance Proceeds (<i>Commissioner v. Lyne</i> , C. C. A. 1st, 1937)	745
Labor Law — Picketing — Suit by Buyer of Plant Machinery against Seller's Employees Held within Norris-LaGuardia Act (<i>Diamond Full-Fashioned Hosiery Co. v. Leader</i> , D. C. E. D. Pa. 1937)	746
Labor Law — Statutes and Their Interpretation — Jurisdiction under Anti-Injunction Acts (<i>Reid v. Independent Union of All Workers</i> , Minn. 1937) (<i>People ex rel. Sandnes v. Sheriff of Kings County</i> , N. Y. Sup. Ct. 1937)	747
Mortgages — Foreclosure: Rights of Mortgagor — Determination of Deficiency Judgment with Reference to Market Value (<i>Home Owners' Loan Corp. v. Wood</i> , N. Y. Sup. Ct. 1937)	749
Quasi Contracts — Mistake of Fact — Recovery by Vendor of Deductions from Purchase Price for Valid Tax Assessments Later Cancelled (<i>Coppock v. Nichols Investment Co.</i> , Kan. 1937)	750
Res Judicata — What Judgments are Conclusive — Alternative Ground Held Not Concluded when Decision Affirmed on Other Ground (<i>Moran Towing and Transportation Co. v. Navigazione Libera Triestina S.A.</i> , C. C. A. 2d, 1937)	751
Restraint of Trade — State Antitrust Legislation — Arrangement Whereby Union Worked Only for Those Certified by Voluntary Code Committee (<i>Falciglia v. Gallagher</i> , N. Y. Sup. Ct. 1937)	752
Taxation — Retail Sales Tax — Manufacture and Sale of Glasses as Subject to Tax (<i>State Tax Commission v. Hopkins</i> , Ala. 1937)	753
Trusts — Termination — Consent of Unborn Remaindermen Held Not Required (<i>City Bank Farmers Trust Co. v. Howland</i> , N. Y. Sup. Ct. 1937)	754
Unfair Competition — Appropriation of Another's Labor — Unauthorized Broadcast of Race Results (<i>Victoria Park Racing & Recreation Grounds Co. v. Taylor</i> , New So. Wales, 1936)	755
Wills — Construction — Gift Over on Death of Legatee Given Effect Although Legatee Never Born (<i>In re Fox's Estate</i> , Eng. C.A., 1937)	756

BOOK REVIEWS

Morris: How Lawyers Think	K. N. Llewellyn	757
The British Empire	Robert B. Stewart	761
Hancock and Latham: Survey of British Commonwealth Affairs		
Thurston: Government Proprietary Corporations in the English-Speaking Countries	Charles Bunn	766
Swabey: The Theory of the Democratic State	C. J. Friedrich	767
Derenberg: Trade-Mark Protection and Unfair Trading	Nathan Isaacs	769

BOOK NOTES 771

BOOKS RECEIVED 775

ADVERTISEMENTS

COLUMBIA LAW REVIEW

FOR

FEBRUARY, 1938

THE SECURITIES AND EXCHANGE COMMISSION'S
REFORM PROGRAM FOR BANKRUPTCY REOR-
GANIZATIONS

E. Merrick Dodd, Jr.

"DEMOCRATIZATION" OF CORPORATE REORGAN-
IZATIONS

Robert T. Swaine

THE SECURITIES AND EXCHANGE COMMISSION
AND CORPORATE REORGANIZATION

Joseph L. Weiner

The entire article section of the February issue of the Review is devoted to a Symposium on the Security and Exchange Commission's recommendations for Congressional legislation concerning Reorganization, and the resulting Chandler and Lea bills, now pending. This authoritative analysis and criticism of matters of such immediate importance will prove of great interest to all lawyers and students of the field.

Columbia Law Review
Columbia University
New York, N. Y.

() Please send me the Current Issue for which I enclose check for 85¢.

() Please enter my subscription for the current year and bill me for \$4.50.

Name.....

Address.....

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

A Directory of Casebooks

Advertisements of Casebooks, to occupy five lines or less, will be inserted in this Directory for \$5.00 per year. If three or more casebooks are advertised, the rate will be \$4.00 per year. Advertisements for less than one year will be inserted at the rate of \$1.00 per month, if cash accompanies the order.

- Administrative Law, Cases on, American Casebook Series.** By Ernst Freund, late Professor of Law, University of Chicago. Second Edition, 745 pages, 1 vol., price \$5.00, buckram binding. West Publishing Co., St. Paul, Minn.
- Administrative Law, Cases on, Short Second Edition (University Casebook Series).** By Felix Frankfurter, Byrne Professor of Administrative Law, Harvard University, and James F. Davison, Associate Professor of Law, George Washington University. 650 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Administrative Law, Cases on. National Casebook Series.** By E. Blythe Stason, Professor of Law, University of Michigan. 1937 Edition, 790 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Administrative Law, Cases on (University Casebook Series).** By Felix Frankfurter, Byrne Professor of Administrative Law, Harvard University, and James F. Davison, Associate Professor of Law, George Washington University. 1200 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Admiralty, Cases on, American Casebook Series.** By George de Forest Lord, Lecturer on Admiralty Law, Columbia University, and George C. Sprague, Associate Professor of Law, New York University. 868 pages, 1 vol., price \$5.50, buckram binding. West Publishing Co., St. Paul, Minn.
- Agency (Including Master and Servant), Cases on.** By Eugene Wambaugh, Langdell Professor of Law Emeritus in Harvard University. Second Edition, 8vo, cloth, pp. xv + 1173, \$6.00. Harvard University Press, Cambridge, Mass.
- Agency (Including Cases on Master and Servant), Cases on the Law of.** By Ernest W. Huffcut, late Professor of Law, Cornell University. Third Edition, revised by Horace E. Whiteside; pp. xxv, 915; 353 cases, 8vo, buckram, \$6.50 net. Little, Brown, & Co., Publishers, Boston, Mass.
- Agency, Cases on, American Casebook Series.** By R. T. Steffen, Professor of Law, Yale University. 836 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Agency, Cases on. National Casebook Series.** By Floyd R. Mechem, of the University of Chicago. Second Edition, 1925, revised by Warren A. Seavey, Professor of Law in Harvard University. 845 pages, price \$5.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Agency, Cases on, 1924.** By Edwin R. Keedy, Professor of Law in the University of Pennsylvania. 823 pages, \$5.50. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Air Law, Cases on.** By Carl Zollmann, Professor of Law, Marquette University. Second Edition, 612 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- American Casebook Series.** A series of one-volume casebooks for class use in law schools, covering the following subjects: Administrative Law (Freund), Admiralty (Lord & Sprague), Agency (Steffen), Bankruptcy (Britton), Bills and Notes (Smith & Moore), Carriers (Green), Code Pleading (Throckmorton), Conflict of Law (Lorenzen), Constitutional Law (Dodd), (Hall), Contracts (Corbin), Corporations (Richards), Criminal Law (Mikell), Criminal Procedure (Mikell), Damages (Crane), Domestic Relations (Madden), Equity (Cook), (McClintock), Evidence (Hinton), Federal Jurisdiction and Procedure (Doble), Insurance (Vance), International Law (Hudson), Legal Ethics (Costigan), Mortgages (Parks), Municipal Corporations (Stason), Negotiable Paper and Banking (Algier), Oil and Gas (Kulp), Partnership (Clark and Douglas), Pleading and Procedure (Clark), Property — Future Interests (Kales), (Powell), Property — Personal Property (Bigelow), Property — Rights in Lands (Bigelow), Property — Titles (Aigler), Property — Wills, Descent and Administration (Costigan), Public Utilities (Smith, Dowling & Hale), Quasi-Contract (Thurston), Sales (Woodward), Statutes (de Sloovere), Suretyship (Langmaid), Torts (Hepburn), Trade Regulation (Oppenheim), Trial Practice (McBaine), Trusts (Costigan). West Publishing Co., St. Paul, Minn.
- Appellate Court Practice, Cases on. National Casebook Series.** By Edson R. Sunderland, Professor of Law, University of Michigan, 1924. 573 pages. Price \$5.50, cloth binding. Published by Callaghan & Company, Chicago, Illinois.
- Bailments and Public Callings, Cases on.** Second Edition, revised printing, 1928. By Hugh E. Willis, Professor of Law in Indiana University. 1088 pages, \$6.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Bailments, Carriers & Public Utilities, Cases on. National Casebook Series.** By Edwin C. Goddard, Professor of Law, University of Michigan. Second Edition, 1928, 1060 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Bankruptcy, Cases on, American Casebook Series.** By William E. Britton, Professor of Law, University of Illinois. 769 pages, 1 vol., price \$5.50, buckram binding. West Publishing Co., St. Paul, Minn.
- Bankruptcy, Cases on the Law of.** By Samuel Williston, Dane Professor of Law in Harvard University. Containing the Bankruptcy Acts of 1867 and 1898, and amendments of 1903, 1910 and 1936, together with cases on the law of bankruptcy, including fraudulent conveyances, with annotations. Second Edition, 8vo, cloth. 648 pages, \$5.00. Harvard University Press, Cambridge, Mass.
- Bankruptcy, Cases on. National Casebook Series.** By Evans Holbrook and Ralph W. Aigler, Professor of Law, University of Michigan. Third Edition, 1936, revised by Thomas C. Billig, Professor of Law, Duke University School of Law. 814 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.

Please mention THE REVIEW when dealing with our Advertisers,

ADVERTISEMENTS

- Bankruptcy, Cases and other materials on the Administration of Insolvent Estates.** *National Casebook Series.* By Thomas C. Billig, Professor of Law, West Virginia University, and Homer F. Carey, Professor of Law, Northwestern University. 1932 Edition, 823 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Bankruptcy, Cases on, (University Casebook Series).** By John Hanna, Professor of Law, Columbia University, 875 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Bills and Notes, Cases on.** By Morton C. Campbell, Professor of Law in Harvard University. 1051 pages, \$7.50. Published by Morton C. Campbell, Harvard Law School, Cambridge, Mass.
- Bills and Notes, Cases on, American Casebook Series.** By Howard L. Smith, formerly Professor of Law, University of Wisconsin, and Underhill Moore, Professor of Law, Yale University. Third Edition, 967 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Bills and Notes, Cases on.** *National Casebook Series.* By William E. Britton, Professor of Law, University of Illinois. Second Edition, 1931. 777 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Business Associations, Cases and Statutes on.** *National Casebook Series.* By Alexander H. Frey, Professor of Law, University of Pennsylvania. 1935 Edition. 1358 pages, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Business Associations, 1937. Cases and other materials on Business Associations.** By Laylin K. James, Professor of Law, University of Michigan. 1490 pages, price \$7.50, fabrikoid binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Business Law, Cases on.** By Wm. Everett Britton, Professor of Law, University of Illinois, and Ralph S. Bauer, Professor of Law, DePaul University. Second Edition, 1219 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Business Law, Cases on.** *National Casebook Series.* By Alfred W. Bays, Professor, Northwestern University School of Commerce. Third Edition, 1931. 1311 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Business Organization, Cases on.** By Roswell Magill, Professor of Law, Columbia University, and Robert P. Hamilton, Associate Professor of Law, Columbia University. Two volumes, fabrikoid binding. Vol. I, 533 pages, price \$5.00. Vol. II, 1340 pages, price \$6.00. West Publishing Co., St. Paul, Minn.
- Business Units, Cases on.** *National Casebook Series.* By William O. Douglas, Professor of Law, Yale University, and Carol M. Shanks, formerly Professor of Law, Yale University. Management, 1248 pages, 1 vol., price \$7.50; Finance, 1218 pages, 1 vol., price \$7.50; Losses, 1026 pages, 1 vol., price \$7.50, cloth binding. Callaghan & Company, Chicago, Illinois.
- Carriers, Cases on, American Casebook Series.** By Frederick Green, Professor of Law, University of Illinois. Second Edition, 850 pages, 1 vol., price \$5.50, buckram binding. West Publishing Co., St. Paul, Minn.
- Civil Procedure, Cases on.** By Austin Wakeman Scott, Story Professor of Law in Harvard University. Price \$5.00 net. Published in 1915, by the Editor, A. W. Scott, Langdell Hall, Cambridge, Mass. Supplement published in 1922, \$0.50.
- Civil Procedure, Cases on, Second edition (University Casebook Series).** By Roswell Magill, Professor of Law, Columbia University. (Part III on Jurisdiction, Process and Appearance by Edmund M. Morgan, Bussey Professor of Law, Harvard University.) 900 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Civil Procedure, Cases on, 1916.** By William H. Lloyd, Professor of Law in the University of Pennsylvania. 950 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Civil Procedure, Cases on.** By James P. McHale, Professor of Law, University of California. 1008 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Code Pleading, Cases on.** By Arthur M. Cathcart, Professor of Law, Stanford University, and Stanley Howell, Professor of Law, University of Southern California. 510 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Code Pleading, Cases on.** *National Casebook Series.* By Edson R. Sunderland, Professor of Law, University of Michigan. 761 pages, price \$4.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Code Pleading, Cases on, American Casebook Series.** By Archibald H. Throckmorton, Professor of Law, Western Reserve University. 1 vol., 913 pages, buckram binding, price \$5.50. West Publishing Co., St. Paul, Minn.
- Code Pleading, Selected Cases on.** *National Casebook Series.* By Edward W. Hinton, Professor of Law, University of Chicago. Third Edition, 1932. 667 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Community Property, Cases on (University Casebook Series).** By William E. Burby, Professor of Law, University of Southern California. 350 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Conflict of Laws, A Selection of Cases on.** By Joseph H. Beale, Royall Professor of Law in Harvard University. Bound in 3 volumes (formerly issued in 3 volumes). Second Edition, 8vo, cloth, pp. 1689, \$8.00. Harvard University Press, Cambridge, Mass.
- Conflict of Laws, A Shorter Selection of Cases on.** Adapted to the use of schools which are unable to give to the course the time necessary for the longer collection. By Joseph H. Beale, Royall Professor of Law in Harvard University. Second Edition, 8vo, cloth, pp. 828, \$6.00. Harvard University Press, Cambridge, Mass.
- Conflict of Laws, Cases on, American Casebook Series.** By Ernest G. Lorenzen, Professor of Law, Yale University. Fourth Edition, 1158 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Conflict of Laws, 1897. Cases and other Materials of Judicial Technique in Conflict of Laws.** By Fowler Vincent Harper, Professor of Law, Indiana University and Charles W. Taintor, II, Professor of Law, University of Nebraska. 1189 pages, price \$6.50, blue kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Conflict of Laws, Cases on.** *National Casebook Series.* By Henry W. Humble, Professor of Law. Second Edition, 1929. 785 pages, price \$5.50, keratol binding. Published by Callaghan & Company, Chicago, Illinois.
- Conflict of Laws, Cases on (University Casebook Series).** By Elliott E. Cheatham, Professor of Law, Columbia University, Noel T. Dowling, Nash Professor of Law, Columbia University, and Herbert F. Goodrich, Dean of the Law School, University of Pennsylvania. 1148 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Constitutional Law, Cases on.** By Eugene Wambaugh, Langdell Professor of Law Emeritus in Harvard University. 8vo, cloth, pp. xxxii + 1068, \$6.00. (Book I, Introductory Topics; Book II, The Contract Clause, Ex Post Facto Laws, The First Ten Amendments; Book III, 13th, 14th, and 15th Amendments; Book IV, State and National Taxation, Money, the Commerce Clause.) Harvard University Press, Cambridge, Mass.
- Constitutional Law, Cases on, American Casebook Series.** By Walter F. Dodd, formerly Professor of Law, Yale University. Second Edition, 1488 pages, 1 vol., fabrikoid binding, price \$6.50. Shorter Selection 911 pages, 1 vol., price \$5.00. West Publishing Co., St. Paul, Minn.
- Constitutional Law, Cases on, American Casebook Series.** By James Parker Hall, late Dean of University of Chicago Law School. One vol. with 1926 Supplement, 1010 pages, fabrikoid binding, price \$6.50. West Publishing Co., St. Paul, Minn.
- Constitutional Law, Cases on.** *National Casebook Series.* By Dr. Lawrence B. Evans, late Counsellor to the Brazilian Embassy. Third Edition, 1913, revised by A. H. Throckmorton, Professor of Law, Western Reserve University. 1285 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Constitutional Law, Cases on.** *National Casebook Series.* By Oliver P. Field, Professor of Political Science, University of Minnesota. Second Edition, 1936. 1133 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Constitutional Law, Cases on, Second Edition, 1933 and Supplement, 1937.** By Dudley O. McGovney, Professor of Law in the University of California. 2060 pages, \$8.50. Blue Kodaleather binding. Original volume 1521 pages, separately \$7.50, supplement 239 pages, separately \$1.50. Bobbs-Merrill Company, Indianapolis, Indiana.
- Constitutional Law, Cases on, 1937 (University Casebook Series).** By Noel T. Dowling, Nash Professor of Law, Columbia University. 1166 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Constitutional Law, Cases on, with 1937 Supplement (University Casebook Series).** By Henry Rottachaefer, Professor of Law, University of Minnesota. 1200 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Contracts, Cases on, 1935.** By William H. Page, Professor of Law in the University of Wisconsin. 1224 pages, \$7.50. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Contracts, A Selection of Cases on.** Edited and annotated by Samuel Williston, Weld Professor of Law in Harvard University; pp. xxii, 909; 415 cases, 8vo, buckram binding. \$6.50 net. Little, Brown & Co., Publishers, Boston, Mass.
- Contracts, A Selection of Cases on the Law of.** A new edition designed to furnish the student with a collection of cases developing the fundamental principles involved in the formation, performance and discharge of simple contracts and contracts under seal. By Judge William A. Keener, late Dean of Columbia University School of Law. Third Edition. Revised, reduced in size and brought to date by I. Maurice Wormser, Professor of Law, Fordham University, and John F. X. Finn, Associate Professor of Law, Fordham University. One vol., 900 pages, bound in red fabrikoid, \$6.50. Publishers, Baker, Voorhis & Co., New York.
- Contracts, Cases on the Law of, American Casebook Series.** By Arthur L. Corbin, Professor of Law in Yale University. Second Edition. 1264 pages, 1 vol., price \$6.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Contracts, Cases on, Third Edition (University Casebook Series).** By George P. Costigan, Jr., late Professor of Law, University of California. 1260 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Contracts, Cases on.** *National Casebook Series.* By Grover C. Grismore, Professor of Law, University of Michigan. 1931. 1271 pages, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Contracts I, Cases on, 1937 (University Casebook Series).** By George W. Goble, Professor of Law, University of Illinois. (Offer, Acceptance, Consideration, Formal Contracts, Third Party Beneficiaries, Assignment, Discharge, and Statute of Frauds.) 769 pages, price \$5.25, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Contracts II, Cases on (University Casebook Series).** By Edwin W. Patterson, Professor of Law, Columbia University. (Volume I, Performance of Contracts, 340 pages, price \$4.50; Volume II, Rescission, Reformation and Quasi-Contracts, 665 pages, price \$5.50.) Blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Conveyances, Cases on.** By Joseph Warren, Weld Professor of Law in Harvard University. 804 pages. Accretion, Lapse of Time, Forms of Conveyances, Boundaries, Estates, Landlord and Tenant, Joint Ownership, Easements, Covenants for Title, Sealing and Delivery, Registration, Estoppel, Abstract of Title. \$5.00 net.
- Conveyances, Cases on (University Casebook Series).** By Marion R. Kirkwood, Dean of the Law School, Stanford University. 800 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Corporate Reorganization, Cases on.** By William O. Douglas, Professor of Law, Yale University, and Carrol M. Shanks, of the New York Bar. 550 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Corporation Finance, Cases on.** By Adolph A. Berle, Associate Professor of Law, Columbia University. 911 pages, 1 vol., price \$6.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Corporations, Municipal, Cases and Other Materials on the Law of.** By E. Blythe Stason, Professor of Law, University of Michigan Law School. 1 vol., 761 pages, price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Corporations, Municipal, Cases on the Law of.** By Joseph Henry Beale, Royall Professor of Law in Harvard University. 8vo, cloth, pp. 685, \$4.00. Harvard University Press, Cambridge, Mass.
- Corporations, Municipal, Cases on the Law of.** By John E. Macy, of the Faculty of Boston University Law School. The most comprehensive casebook on this subject. Second Edition, 1 vol., pp. xiv, 503; 177 cases, 8vo, buckram binding. \$6.00 net. Little, Brown, & Co., Boston, Mass.
- Corporations, Municipal, Cases on the Law of. National Casebook Series.** By Murray Seasongood, Professor of Law, University of Cincinnati. 1934. 731 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Corporations, Municipal, Cases on the Law of, Second Edition (University Casebook Series).** By Charles W. Tooke, Professor of Law, New York University. 900 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Corporations, Private Cases on, American Casebook Series.** By H. S. Richards, Late Dean of the University of Wisconsin Law School. Third Edition by Sveinbjorn Johnson, Professor of Law, University of Illinois. 668 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Corporations, Private, Cases on.** By George F. Canfield and I. Maurice Wormser. Third Edition, 1932, by I. Maurice Wormser. 1132 pages, \$6.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Credit Transactions, Cases on.** By Wesley A. Sturges, Professor of Law, Yale University. Second Edition. 1082 pages, 1 vol., price \$6.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Creditors' Rights, Cases on, Second Edition (University Casebook Series).** (Enforcement of Judgments, Fraudulent Conveyances, General Assignments, Creditors' Agreements, Receiverships and Bankruptcies.) By John Hanna, Professor of Law, Columbia University. 1369 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Criminal Law, Administration of, Cases on, 1938.** By Edwin R. Keady, Professor of Law in the University of Pennsylvania. 586 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Criminal Law, Cases on.** By Joseph Henry Beale, Royall Professor of Law in Harvard University. Fourth Edition. 8vo, cloth, pp. xvi + 1145, \$6.00. Harvard University Press, Cambridge, Mass.
- Criminal Law, Cases on.** Third Edition, 1930. By Augustin Derby, Professor of Law in New York University. 865 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Criminal Law, Cases on, American Casebook Series.** By William E. Mikell, Professor of Law, University of Pennsylvania Law School. Third Edition, 775 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Criminal Law, Cases on. National Casebook Series.** By Albert J. Harno, Dean and Professor of Law, University of Illinois. 1933. 1010 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Criminal Law and Procedure, Cases on, American Casebook Series.** By William E. Mikell, Professor of Law, University of Pennsylvania. Third Edition, 1075 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Criminal Law and Procedure, Cases on, Second Edition, 1937 (University Casebook Series).** By John B. Waite, Professor of Law, University of Michigan. 822 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Damages, Cases on, American Casebook Series.** By Judson A. Crane, Professor of Law, University of Pittsburgh. 508 pages, 1 vol., price \$5.00, buckram binding. West Publishing Co., St. Paul, Minn.
- Damages, Cases on. National Casebook Series.** By Ralph S. Bauer, Professor of Law, DePaul University. Second Edition, 1932. 768 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Damages, Cases on (University Casebook Series).** By Charles T. McCormick, Professor of Law, Northwestern University. 800 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Damages, Cases on the Law of.** By Joseph H. Beale, Royall Professor of Law, Harvard University. Third Edition, pp. xvi, 624; 224 cases, crown 8vo, buckram, \$6.00 net. Little, Brown & Co., Publishers, Boston, Mass.
- Debtors' Estates, Cases and Materials on the Law of.** By Wesley A. Sturges, Professor of Law, Yale University. Second Edition, 1008 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Domestic Relations, Cases on, American Casebook Series.** By Joseph W. Madden, Professor of Law, University of Pittsburgh. 750 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Domestic Relations, Cases on. National Casebook Series.** By William E. McCurdy, Professor of Law, Harvard University. Second Edition, 1933. 915 pages, 1 vol., price \$6.00, cloth binding. Callaghan & Company, Chicago, Illinois.
- Domestic Relations, Cases on (University Casebook Series).** By Albert C. Jacobs, Associate Professor of Law, Columbia University. 1000 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Domestic Relations, Cases on.** By Frederick L. Kane, Professor of Law, Fordham University. 572 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Domestic Relations and the Law of Persons, Cases on.** Third Edition, Enlarged (1920). By Edwin H. Woodruff, Professor of Law at Cornell University. 8vo. Price, law canvas, \$5.00 net. Publishers, Baker, Voorhis & Co., New York.
- Equitable Relief Against Torts, Cases on.** By Zechariah Chafee, Jr., Professor of Law, and Roscoe Pound, University Professor in Harvard University. This includes Relief against Defamation and Injuries to Personality, hitherto published separately. 677 pages, cloth bound, price \$5.00. Published by Z. Chafee, Jr., Langdell Hall, Cambridge, Mass.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Equitable Remedies, Cases on.** By Zechariah Chafee, Jr., Professor of Law in Harvard University. Part 1, Interpleader and Bills of Peace, now ready. 284 pages, paper bound, price \$1.75. Cancellation, Cloud on Title, Reformation and Rescission for Mistake to be included shortly. Published by Z. Chafee, Jr., Langdell Hall, Cambridge, Mass.
- Equity, Cases on, American Casebook Series.** By Walter Wheeler Cook, Professor of Law, Northwestern University. Three-Volume Edition, Second Edition, fabrikoid binding. Vol. I, 680 pages, price \$6.00; Vol. II, 661 pages, price \$6.00; Vol. III, about 900 pages, price \$6.50. One-Volume Edition, Second Edition, 1220 pages, fabrikoid binding, price \$6.50. West Publishing Co., St. Paul, Minn.
- Equity, Cases on, American Casebook Series.** By Henry L. McClintock, Professor of Law, University of Minnesota. 1286 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Equity, Cases on, 1928.** By Edgar N. Durfee, Professor of Law in the University of Michigan. 850 pages, \$6.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Equity, Cases on: Jurisdiction and Specific Performance.** By Zechariah Chafee, Jr., and Sidney P. Simpson, Professors of Law in Harvard University. Vol. I, pp. xiii, 870, Vol. II, pp. vii, 871-1619; illustrated; price \$8.00 for the two volumes, bound in cloth. Published by the editors, Langdell Hall, Cambridge, Mass.
- Equity, Cases on, National Casebook Series.** By William F. Walsh, Professor of Law, New York University. 1937 Edition, 1174 pages, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Equity Jurisdiction, Cases in.** By James Barr Ames, late Dean of the Harvard Law School. Vol. I, Parts I-VI, 8vo, cloth cut flush, pp. ix + 665, \$4.25. Vol. II (first three chapters only), 8vo, cloth cut flush, pp. ix + 450, \$3.00. Vol. II, Parts I-III, 8vo, cloth cut flush, pp. vii + 312, \$2.00. Harvard University Press, Cambridge, Mass.
- Equity Pleading, Collection of Cases on.** *National Casebook Series.* By Edward W. Hinton, late Professor of Law, University of Chicago, 1937, 437 pages, price \$4.25, keratol binding. Callaghan & Company, Chicago, Illinois.
- Evidence, Cases on.** Taken exclusively from the New York Court of Appeals Reports, but citing thousands of cases from all other American and English jurisdictions. By Professor John T. Loughran and John S. Roberts of the Fordham University School of Law. One volume, price \$7.00. Baker, Voorhis & Co., New York.
- Evidence, Cases on (University Casebook Series).** By Edmund M. Morgan, Bussey Professor of Law, Harvard University, and John M. Maguire, Professor of Law, Harvard University. 1263 pages, price \$7.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Evidence, Cases on the Law of, American Casebook Series.** By Edward W. Hinton, late Professor of Law in the University of Chicago. Second Edition, 971 pages, 1 vol., price \$6.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Evidence, Cases on the Law of.** By John H. Wigmore, Dean of the Northwestern University Law School. Third Edition. pp. xxiii, 1419. 8vo. Printed on thin paper. Buckram, \$7.50 net. Little, Brown, & Co., Publishers, Boston, Mass.
- Federal Jurisdiction and Procedure, Cases on, American Casebook Series.** By Armistead M. Dohle, Dean of the Department of Law, University of Virginia. 803 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Federal Jurisdiction and Procedure, Cases on.** *National Casebook Series.* By Felix Frankfurter, Professor of Law, Harvard University, and Harry Shulman, Professor of Law, Yale University. Revised Edition, 1937, 858 pages, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Future Interests, Cases on, American Casebook Series.** By Albert M. Kales, late of the Chicago Bar. Second Edition by Horace E. Whiteside, Professor of Law, Cornell Law School. 800 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Future Interests, Cases on, American Casebook Series.** By Richard R. Powell, Professor of Law, Columbia University. Second Edition 1068 pages, price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Future Interests, Cases on (University Casebook Series).** By W. Barton Leach, Professor of Law, Harvard University. 1025 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Government and Business, Cases on.** *National Casebook Series.* By Gerald O. Dykstra, Ohio University College of Commerce, and L. G. Dykstra. 1937 Edition, 703 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Insurance, Cases on, American Casebook Series.** By William R. Vance, Professor of Law, Yale University Law School. Second Edition, 1020 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Insurance, Cases on (University Casebook Series).** By Edwin W. Patterson, Professor of Law, Columbia University. 850 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Illinois.
- Insurance, Cases on the Law of.** By Edwin H. Woodruff, Professor of Law at Cornell University. Second Edition. 1 vol., 8vo, bound flexibly, \$5.50 net. In use at Cornell, New York University, University of Missouri, Iowa State University, Fordham University Law School, and other law schools. Publishers, Baker, Voorhis & Co., New York.
- Insurance, Cases and Other Materials on, 1931.** By George W. Goble, Professor of Law in the University of Illinois. 900 pages, \$6.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Insurance (Marine, Fire, and Life), Cases on.** By Eugene Wambaugh, Langdell Professor of Law Emeritus in Harvard University. 8vo, cloth, pp. xiv + 1197, in two parts (not sold separately), \$6.00. Harvard University Press, Cambridge, Mass.
- International Law, Cases on, American Casebook Series.** By Manley O. Hudson, Professor of Law, Harvard University. Second Edition. 1218 pages, 1 vol., price \$6.50, fabrikoid binding. Shorter Selection, 622 pages, price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- International Law, Cases on.** By James Brown Scott and Walter H. E. Jaeger, Professors of Law, Georgetown University. 900 pages, price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- International Law, Cases on. National Casebook Series.** By Charles G. Fenwick, Professor of Political Science, Bryn Mawr College, Bryn Mawr, Pennsylvania. 1935. 838 pages, price \$5.25, keratol binding. Callaghan & Company, Chicago, Illinois.
- Introduction to Law and the Judicial Process, Cases and Materials on. National Casebook Series.** By Bernard C. Gavit, Dean and Professor of Law, Indiana University School of Law, 1936. 656 pages, price \$5.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Judicial Administration, Cases and Materials on. National Casebook Series.** By Edson R. Sunderland, Professor of Law, University of Michigan. 1937 Edition, 1443 pages, price \$7.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Labor Law, Cases on.** By Francis Bowes Sayre, Professor of Law in Harvard University. Second impression, 8vo, cloth, \$5.00. Harvard University Press, Cambridge, Mass.
- Labor Law, Cases on, with 1937 Supplement (University Casebook Series).** By James M. Landis, Dean of the Law School, Harvard University. 732 pages, price \$7.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Landlord and Tenant, Cases on.** By Albert C. Jacobs, Associate Professor of Law, Columbia University. 903 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Legal Ethics, Cases on. National Casebook Series.** By Herschel W. Arant, Dean and Professor of Law, Ohio State University Law School. 1933, 700 pages, price \$5.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Legal Profession and its Ethics, Cases and Other Authorities on, American Casebook Series.** By George P. Costigan, Jr., late Professor of Law, University of California School of Jurisprudence. 768 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Mining Law, Cases on, 1914.** With bound-in Supplement, 1928. By George P. Costigan, Jr., late Professor of Law in the University of California. 631 pages and Supplement 134 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Mortgage, Select Cases and Other Authorities on the Law of.** By I. Maurice Wormser, Professor of Law at Fordham University. Bound flexibly, price \$6.50. Publishers, Baker, Voorhis & Co., New York.
- Mortgages, Cases on, American Casebook Series.** By James L. Parks, late Dean and Professor of Law, University of Missouri. 1 vol., buckram binding, 600 pages, price \$5.00. West Publishing Co., St. Paul, Minn.
- Mortgages, Cases on.** By Morton C. Campbell, Professor of Law, Harvard University. 640 pages, \$5.50. Published by Morton C. Campbell, Harvard Law School, Cambridge, Mass.
- Mortgages, Cases on, 1915.** By Edgar N. Durfee, Professor of Law in the University of Michigan. 531 pages, \$4.50. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- National Casebook Series.** A series of casebooks designed for law students' use in the day law schools, covering the following subjects: Administrative Law (Stason), Agency (Seavey's edition of Mechem), Appellate Practice (Sunderland), Bailments, Carriers and Public Utilities (Goddard), Bankruptcy (Holbrook and Aigler), Bankruptcy and Insolvency (Billing and Carey), Bills and Notes (Britton), Business Associations (Frey), Business Law (Bays), Business Units, Management, Finance, Losses (Douglas and Shanks), Code Pleading (Hinton), Code Pleading (Sunderland), Common Law Pleading (Cook and Hinton), Common Law (Field), Contracts (Grismore), Criminal Law (Harno), Damages (Bauer), Equity (Walsh), Equity Pleading (Hinton), Federal Procedure (Frankfurter and Shulman), Government and Business (Dykstra), International Law (Fenwick), Introduction to Law and the Judicial Process (Gavit), Judicial Administration (Sunderland), Legal Ethics (Arant), Municipal Corporations (Seasegood), Partnership (Cherry), Partnership (Mathews Edition of Mechem), Persons (McCurdy), Public Utilities (Robinson), Sales (Llewellyn), Suretyship (Arant), Taxation (Kottschaefer), Torts (Wilson), Trial Practice (Hinton), Trial Practice (Sunderland), Wills (Reppy). Callaghan & Company, 401 E. Ohio Street, Chicago, Illinois.
- Negotiable Instruments — Cases, Statutes, and Authorities.** Edited by Ernest W. Huffcut, late Professor of Law at Cornell University. Second Edition, Revised and Enlarged by Frederick D. Colson, of the New York Bar. 1 vol., 8vo, pp. xvi, 900, law canvas, \$5.00 net. Publishers, Baker, Voorhis & Co., New York.
- Negotiable Paper and Banking, Cases on, American Casebook Series.** By Ralph W. Aigler, Professor of Law, University of Michigan. 1157 pages, price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Oil and Gas, Cases on, American Casebook Series.** By Victor H. Kulp, Professor of Law, University of Oklahoma. Second Edition. 663 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Partnership, Cases on, American Casebook Series.** By Charles E. Clark, Dean of the Law School, Yale University, and William O. Douglas, Professor of Law, Yale University. 743 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Partnership, Cases on. National Casebook Series.** By Floyd R. Mechem, of the University of Chicago. 1935 Edition, revised by Robert E. Mathews, Professor of Law, Ohio State University Law School, 831 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Partnership, Cases on. National Casebook Series.** By James J. Cherry, Professor of Law, DePaul University, 1931 Edition. 720 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Partnership and Other Unincorporated Business Associations, Cases on, 1934.** By Judson A. Crane, Professor of Law in the University of Pittsburgh, and Calvert Magruder, Professor of Law in Harvard University. 934 pages, \$5.50. Blue Kodaleather binding. Shorter Selection, same casebook, 1930. 607 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Personal Property, Cases on, American Casebook Series.** By Harry A. Bigelow, Dean of the University of Chicago Law School. Second Edition, 465 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Pleading, Cases on, 1927.** By William H. Lloyd, Professor of Law in the University of Pennsylvania. 305 pages, \$4.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Pleading, Cases on Common Law.** By James P. McBaine, Professor of Law, University of California. 1 vol., 304 pages, price \$3.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Pleading, Cases on Common Law. National Casebook Series.** By Edson R. Sunderland, Professor of Law, University of Michigan. Second Edition, 1932. 722 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Pleading, Cases on Common Law. National Casebook Series.** By W. W. Cook, Johns Hopkins University, and Edward W. Hinton, University of Chicago. 1923, 574 pages, price \$4.50, keratol binding. Published by Callaghan & Company, Chicago, Illinois.
- Pleading at Common Law, Cases on.** With Notes and Citations. By James Barr Ames, late Dean of Harvard Law School. Second Edition. Parts I-IV, in one volume. Paper, pp. 340, price \$2.00. Harvard University Press, Cambridge, Mass.
- Pleading and Practice, N. Y. Leading Cases on.** Covering all the important steps in a civil action including Jurisdiction of Various Courts, Commencement of the Action, Formulation of the Cause of Action, The Formation of Issues, The Preparation for Trial, The Preliminaries to Trial, The Trial Itself, The Judgment and Its Enforcement, Arbitration and Other Special Proceedings. Second Edition. By Jay Leo Rothchild, A.M., LL.B., Professor of Law, Brooklyn Law School, St. Lawrence University, one volume, price \$10.00. Baker, Voorhis & Co., New York.
- Pleading and Procedure, Cases on, American Casebook Series.** By Charles E. Clark, Dean of the Law School, Yale University. Two vols., vol. 1, 674 pages, price \$5.50, vol. 2, 608 pages, price \$5.50, fabrikoid binding. One-Volume Edition, 904 pages, fabrikoid binding, price \$5.50. West Publishing Co., St. Paul, Minn.
- Possessory Estates, Cases on.** By Richard Powell, Professor of Law, Columbia University. 541 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Property, Cases on.** Third Edition, 1931. By William F. Walsh, Professor of Law in New York University. In two volumes, volume one, 857 pages, price \$5.50. Volume two, 681 pages, price \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Property, Cases on Conveyances (University Casebook Property Series).** By Marion R. Kirkwood, Dean of the Law School, Stanford University. 800 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Property, Cases on Future Interests (University Casebook Property Series).** By W. Barton Leach, Professor of Law, Harvard University. 1025 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Property, Cases on the Law of, American Casebook Series.** Five volumes as follows: Vol. I. Personal Property, by Harry A. Bigelow, of the University of Chicago Law School. Vol. II. Rights in Lands, by Harry A. Bigelow. Vol. III. Titles to Real Property, by Ralph W. Algier, of the University of Michigan Law School. Vol. IV. Future Interests, by Albert M. Kales, late of the Chicago Bar. Vol. V. Wills, Descent and Administration, by George P. Costigan, Jr., late of the University of California. West Publishing Co., St. Paul, Minn.
- Property, Cases and Readings on (University Casebook Property Series).** Volume I (Real). By Everett Fraser, Dean of the Law School, University of Minnesota. 500 pages, price \$5.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Property, Cases and Readings on (University Casebook Property Series).** Volume II (possessory acquisition of interests in chattels and land, accession, confusion, gifts, bailments, fixtures, liens, emblements, waste). By Everett Fraser, Dean of the Law School, University of Minnesota. 700 pages, price \$6.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Property, Cases on the Law of (Property Series).** Five volumes as follows: Possessory Estates, by Richard Powell, Professor of Law, Columbia University; Landlord and Tenant, by Albert C. Jacobs, Professor of Law, Columbia University; Vendor and Purchaser, by Milton Handler, Associate Professor of Law, Columbia University; Trusts and Estates, two volumes, by Richard Powell, Professor of Law, Columbia University. West Publishing Co., St. Paul, Minn.
- Public Service Companies, Cases on.** By Bruce Wyman, late Professor of Law in Harvard University. Third Edition. 8vo, cloth, pp. x + 615, \$4.00. Harvard University Press, Cambridge, Mass.
- Public Utilities, Cases on. National Casebook Series.** By G. H. Robinson, Professor of Law in Cornell University Law School. Second Edition, 1935. 921 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Public Utilities, Cases on, American Casebook Series.** By Young B. Smith, Dean and Professor of Law, Columbia University, Noel T. Dowling, Professor of Law, Columbia University, and Robert L. Hale, Professor of Law, Columbia University. Second Edition, 1930 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Quasi-Contract, Cases on, American Casebook Series.** By Edward S. Thurston, Professor of Law, Harvard University. 625 pages, 1 vol., price \$5.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Quasi-Contracts, Cases on.** By Edwin H. Woodruff, Professor of Law Emeritus in Cornell University. Third Edition, 1933. By Herbert D. Laube, Professor of Law in Cornell University. 750 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Real Property, Cases on. National Casebook Series.** By Joseph D. Sullivan, Professor of Law, Georgetown University, 1921. 1096 pages, price \$6.00, keratol binding. Published by Callaghan & Company, Chicago, Illinois.
- Rights in Lands, Cases on, American Casebook Series.** By Harry A. Bigelow, Dean of the University of Chicago Law School and Joseph W. Madden, Professor of Law, University of Pittsburgh. Second edition, 908 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Sales, Cases on, American Casebook Series.** By Frederic C. Woodward, formerly Professor of Law, University of Chicago. Third Edition by Lawrence Vold, Professor of Law, University of Nebraska. 988 pages, 1 vol., price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Sales, Cases and Materials on. National Casebook Series.** By Karl N. Llewellyn, Professor of Law, Columbia University, 1930. 1116 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Sales, Cases on, (University Casebook Series).** By George G. Bogert, James Parker Hall, Professor of Law, University of Chicago, and William E. Britton, Professor of Law, University of Illinois. 1164 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Security, Cases and Other Materials on (University Casebook Series).** (Pledges, Letters of Credit, Trust Receipts, Chattel Mortgages, Conditional Sales, Suretyship and Real Estate Mortgages.) By John Hanna, Professor of Law, Columbia University. 1100 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Statutes, Cases on the Interpretation of, American Casebook Series.** By Frederick J. de Sloovere, Professor of Law, New York University. 970 pages, 1 vol., price \$7.00. West Publishing Co., St. Paul, Minn.
- Suretyship, Cases on. National Casebook Series.** By Herschel W. Arant, Dean and Professor of Law in the Ohio State University Law School. Second Edition, 1931. 637 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Suretyship, Cases on, American Casebook Series.** By Stephen L. Langmaid, Professor of Law, University of California. 622 pages, 1 vol., price \$5.00, buckram binding. West Publishing Co., St. Paul, Minn.
- Suretyship, Cases on.** By Morton C. Campbell, Professor of Law, Harvard University. 542 pages, \$5.00. Published by Morton C. Campbell, Harvard Law School, Cambridge, Mass.
- Suretyship and Guaranty, Cases on, 1919.** By Clinton DeWitt, Professor of Law in Western Reserve University. 725 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Suretyship, Cases on the Law of. With Notes and Citations.** By James Barr Ames, late Dean of the Harvard Law School. 8vo, cloth. Parts I-IV, pp. 612, \$2.75. Harvard University Press, Cambridge, Mass.
- Taxation, Cases on.** By Joseph Henry Beale, Royall Professor of Law in Harvard University. 1927 Edition, 8vo, cloth, pp. viii + 470, \$4.00. Harvard University Press, Cambridge, Mass.
- Taxation, Cases on. National Casebook Series.** By Henry Rottschaefer, Professor of Law, University of Minnesota. Second Edition, 1932. 673 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Taxation, Cases on, Second Edition (University Casebook Series).** By Roswell Magill, Professor of Law, Columbia University, and John M. Maguire, Professor of Law, Harvard University. 1034 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Titles, Cases on, American Casebook Series.** By Ralph W. Aigler, Professor of Law in the University of Michigan. Second Edition, 1931 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Torts, A Selection of Cases on the Law of.** By James Barr Ames and Jeremiah Smith, revised by Dean Roscoe Pound, Carter Professor of Jurisprudence, and newly edited, 1929, by Joseph Henry Beale, Royall Professor of Law in Harvard University. Bound in two volumes, 8vo, cloth, xiv, 1493 pages, \$8.00. Not sold separately. Harvard University Press, Cambridge, Mass.
- Torts, Cases on. National Casebook Series.** By Lyman P. Wilson, Professor of Law, Cornell University. 1111 pages, 1928, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Torts, Cases on, American Casebook Series.** By William M. Hepburn, Professor of Law, University of Alabama School of Law, and Archibald H. Throckmorton, Professor of Law, Western Reserve University Law School. Second Edition, 1927 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Torts, Cases on. Third Edition, 1930.** By Francis H. Bohlen, Professor of Law in the University of Pennsylvania. 1193 pages, \$7.50. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Torts, Cases on, Short Selection, 1933.** By Francis H. Bohlen, Professor of Law, University of Pennsylvania, assisted by Fowler V. Harper, Professor of Law, Indiana University. 750 pages, \$6.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Torts, Cases on.** By Leon Green, Dean of the Law School, Northwestern University. 1900 pages, 1 vol., price \$7.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Torts, Cases on.** By A. H. Throckmorton, Professor of Law, Western Reserve University. 1932, 467 pages, price \$5.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Trade Regulation, Cases on, American Casebook Series.** By S. Chesterfield Oppenheim, Associate Professor of Law, George Washington University. 1518 pages, 1 vol., price \$6.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Trade Regulation, Cases on, 1937 (University Casebook Series).** By Milton Handler, Associate Professor of Law, Columbia University. 1288 pages, price \$7.00, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Trial Practice, Cases on, American Casebook Series.** By James P. McBaine, Professor of Law, University of California. 1 vol., 1065 pages, buckram binding, price \$6.00. West Publishing Co., St. Paul, Minn.
- Trial Practice, Cases on. National Casebook Series.** By Edward W. Hinton, Professor of Law, University of Chicago. Second Edition, 1930. 653 pages, price \$6.00, keratol binding. Callaghan & Company, Chicago, Illinois.
- Trial Practice, Cases on. National Casebook Series.** By Edson R. Sunderland, Professor of Law, University of Michigan. Second Edition, 1924, 705 pages, price \$5.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Trials, Judgments and Appeals, Cases and Materials On.** By Thurman W. Arnold, Professor of Law, Yale University, and Fleming James, Jr., Associate Professor of Law, Yale University. 269 pages, price \$5.50, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Trials, Notable British Trials Series.** General Editor, Harry Hodge. 65 volumes now published dealing with famous criminal trials. Descriptive pamphlet free. William Hodge & Company, Ltd., 23 Bank Street, Edinburgh, Scotland.
- Trusts, Cases on, American Casebook Series.** By George P. Costigan, Jr., late Professor of Law, University of California. 1039 pages, 1 vol., price \$5.50, buckram binding. West Publishing Co., St. Paul, Minn.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

- Trusts, Cases on.** By Austin Wakeman Scott, Story Professor of Law, Harvard University, pp. xiv, 818. Price \$6.00 net, buckram binding. Published in 1931, by the Editor, A. W. Scott, Langdell Hall, Cambridge, Mass.
- Trusts, Cases on (University Casebook Series).** By Homer F. Carey, Professor of Law, Northwestern University, 700 pages, price \$6.50, blue fabrikoid binding. The Foundation Press, Inc., Chicago, Ill.
- Trusts and Estates, Cases on.** By Richard R. Powell, Professor of Law, Columbia University. Two vols., fabrikoid binding. Vol. I, 1027 pages, price \$6.00. Vol. II, 1040 pages, price \$6.00. West Publishing Co., St. Paul, Minn.
- University Casebook Series.** A series published under the editorial direction of Edmund M. Morgan, Professor of Law, Harvard University, Directing Editor; Everett Fraser, Dean of the Law School, University of Minnesota; Marion R. Kirkwood, Dean of the Law School, Stanford University; Roswell Magill, Professor of Law, Columbia University; Edson R. Sunderland, Professor of Law, University of Michigan. The series comprises: Administrative Law (Frankfurter and Davison), Bankruptcy (Hanna), Civil Procedure (Magill), Community Property (Burby), Conflict of Laws (Cheatham, Dowling, and Goodrich), Constitutional Law (Dowling), Constitutional Law (Rottschaefer), Contracts (Costigan), Contracts I (Goble), Contracts II (Patterson), Corporations, Municipal (Tooke), Creditors' Rights (Hanna), Criminal Law and Procedure (Walte), Damages (McCormick), Domestic Relations (Jacobs), Evidence (Morgan and Maguire), Insurance (Patterson), Labor Law (Landis), Property, Volume I—Real (Fraser), Property, Volume II—Real and Personal (Fraser), Property—Conveyances (Kirkwood), Property—Future Interests (Leach), Sales (Bogert and Britton), Security (Hanna), Taxation (Magill and Maguire), Trade Regulation (Handler), Trusts (Carey). The Foundation Press, Inc., Chicago, Ill.
- Vendor and Purchaser, Cases on.** By Milton Handler, Associate Professor of Law, Columbia University. 944 pages, 1 vol., price \$6.00, fabrikoid binding. West Publishing Co., St. Paul, Minn.
- Water Rights, Cases on, 1916.** By Joseph W. Bingham, Professor of Law, Stanford University. 730 pages, \$5.00. Blue Kodaleather binding. Bobbs-Merrill Company, Indianapolis, Indiana.
- Wills and Administration, Cases on.** By Joseph Warren, Weld Professor of Law, Harvard University. Published in 1917, by the Editor. 1 vol., pp. xiii, 879, with an appendix of selected Probate Forms. Cloth, \$5.00 net.
- Wills, Cases on Law of Succession. National Casebook Series.** By Alison Reppy, Professor of Law, New York University, 1930. 1203 pages, price \$6.50, keratol binding. Callaghan & Company, Chicago, Illinois.
- Wills, Descent, and Administration, Cases on, American Casebook Series.** By George F. Costigan, Jr., late Professor of Law, University of California. Second Edition, 888 pages, 1 vol., price \$5.50, buckram binding. West Publishing Co., St. Paul, Minn.

A UNIFORM SYSTEM OF CITATION

This fifty-page booklet, containing a complete form of citations and abbreviations, is now being offered to the legal public. The work of the editors of the Columbia, Harvard, Pennsylvania, and Yale law reviews, this little volume represents the product of their combined experience. Law firms, students, and legal publications and writers should find it of great assistance in giving them a complete and accurate citation form.

1936 edition

Price 25 cents

Address Order to

HARVARD LAW REVIEW ASSOCIATION
GANNETT HOUSE **CAMBRIDGE, MASS.**

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

R

R

FALL IN LINE

**THE COURTS DO—
YOUR OPPONENTS WILL—**

CITE WILLISTON

WILLISTON CONTRACTS, REV. ED. insert section number here

When only four of the scheduled eight volumes were published they had already proved themselves invaluable. The following list of reported decisions where the new Williston is cited indicates how widely various sections of this work are being used by the Courts and attorneys:

- *Chain v. Wilhelm, 84 F. (2d) 138 (C. C. A. 4) (1936) citing Secs. 58, 62
- Cartmell Paint & Glass Co. v. Cartmell, (Delaware) 186 A. 897 (1936) citing Secs. 593, 595, 597, 631, quoting Sec. 593
- Scarlett v. Young, (Maryland) 185 A. 129 (1936) citing Secs. 47, 49
- Red Star Milling Co. v. Moses (Mississippi), 169 S. 785 (1936) citing Sec. 741
- Holtz v. Western U. Teleg. Co., (1936) (Massachusetts) Advance Sheets 1405; 3 N. E. (2d) 180 (1936) citing Secs. 27, 94
- Hushion v. McBride (1936) (Massachusetts) Advance Sheets, 2085; 4 N. E. (2d) 443 (1936) citing Secs. 281, 283, 287, 288, 289
- Levine v. Blumenthal, 117 N. J. Law 23, 186 A. 457 (1936) citing Secs. 103 B, 120, 130, 139 A, 131
- Griest v. Mortgage Comm., N. Y. App. D. (2d Dept.) 291, N. Y. S. 257, N. Y. L. J., Nov. 17, 1936, citing Secs. 631, 632, 647
- National City Bk. v. Piluso, N. Y. App. D. (2d Dept.) N. Y. L. J., Nov. 7, 1936, citing Sec. 102 A
- *SPECIAL NOTE:—The case of Chain v. Wilhelm was carried to the United States Supreme Court and the Court in its opinion cited Sec. 1253 (Vol. IV. of Williston) three times, (57 S. C. 394)

ORDER FORM

BAKER, VOORHIS & CO.,
119 FULTON STREET, NEW YORK, N. Y. DEPT. A

Please enter my order for the new edition of WILLISTON ON CONTRACTS, 8 vols., price \$85.00. Convenient terms may be arranged.

Name.....

Address.....

State.....

BAKER, VOORHIS & CO.
119 FULTON ST. ~ ~ NEW YORK

Please mention THE REVIEW when dealing with our Advertisers.

HARVARD LAW REVIEW

VOL. LI

FEBRUARY, 1938

No. 4

THE BUSINESS OF THE SUPREME COURT AT THE OCTOBER TERMS, 1935 AND 1936

JUST twenty-five years ago, Mr. Justice Holmes had occasion to say of his Court: "We are very quiet there, but it is the quiet of a storm center. . . ."¹ The Supreme Court has come within the purview of the general historian of the United States only for the intermittent periods when the Court was the country's storm center. There are about half a dozen such periods, dating from the beginning of Marshall's magistracy. These explosive chapters in the life of the Court synchronized with periods of intense economic and political conflicts, and were invariably manifestations of controversy between the Court and other branches of the government. Last term wrote another such chapter. Like all the previous entanglements of the Court in the turbulent currents of politics, the controversy through which the country and the Court have just passed was not an instance of spontaneous combustion but the culmination of a long maturing process.²

¹ February 15, 1913, HOLMES, *Law and the Courts* in COLLECTED LEGAL PAPERS (1920) 292.

² See, for example, the views of former President Wilson in a letter, just published, to John H. Clarke on the occasion of the latter's resignation, on September 1922, as an Associate Justice of the Supreme Court. "Like thousands of other liberals throughout the country, I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow. . . . The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common people's sense of justice and cause a revulsion against judicial authority

These dramatic issues are not the immediate concern of the papers in this series.⁸ The substantive doctrines of constitutional law are not under scrutiny here but the procedure by which the Court speaks—or abstains from speaking—as the ultimate voice of the Constitution. This is a study not of product, but of form and function. To be sure, procedure and substance are interacting forces, especially when the forms and formalities of a technical lawsuit serve as vehicles for adjudicating great public issues. Powerful tensions without are not devoid of influence, however imperceptible, within the judicial process. Procedure is sensitive to these tensions insofar as procedural hurdles must be cleared to reach substantive goals. During the terms under review, the stresses and strains within the political society, of which the Court is so pervasive a part, have not failed to leave their mark in those more recondite phases of the Court's labors which interest the professional student much more than the general historian. These influences and their judicial repercussions are hardly the stuff of statistics, though even in this elusive territory an occasional statistical vein is revealed which deserves refined exploration. But no less important is a quantitative appraisal of the Court's total business. It furnishes leads to inquiry which illumine the judicial habits and practices of the Court, the pressures upon time and energy exercised by different categories of litigation, the modes which the Court evolves for dealing with them, and the exactions which it makes upon bar and lower courts. All these factors, if warily pursued, may yield comprehension of the process by which the Supreme Court exercises its functions in the great body of cases which are outside the orbit of popular interest or understanding, but, in their aggregate, profoundly affect the angles of intersection of government and enterprise, of national authority and the localities. Moreover, the disposition of voluminous undramatic cases—their procedural determination

which may seriously disturb the equilibrium of our institutions, and I see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action." 6 BAKER, WOODROW WILSON (1937) 117.

⁸ Frankfurter and Landis, *The Supreme Court Under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1; *The Business of the Supreme Court* (1929) 43 *id.* 33; (1930) 44 *id.* 1; (1931) 45 *id.* 271; (1932) 46 *id.* 226; Frankfurter and Hart (1933) 47 *id.* 245; (1934) 48 *id.* 238; (1935) 49 *id.* 68.

and the atmosphere which they generate within the Court — inevitably has its reflex bearing upon the disposition of the dramatic cases.

I

Utilizing the control over its business afforded by the Act of 1925, the Court has continued to achieve the result, first realized during the 1930 term,⁴ of keeping abreast of its docket. At the close of the 1935 term 90 cases remained on the docket; and 98 were left from the 1936 term. But every case ready for argument had been argued and every argued case had been decided, except six cases assigned for reargument at the close of the 1936 term.⁵ Barring these rearguments, ordered in cases raising ticklish problems in the application of difficult principles, the Court carried over only those cases in which petitions for *certiorari* had been too recently granted or jurisdictional statements too recently submitted to permit argument on the merits, and those cases in which appeals and petitions for *certiorari* had been docketed but not submitted.

The Court year for both terms lasted 34 weeks, of which 16 were devoted to the hearing of argument and 18 spent in recess. Twice during the 1935 term and once during the 1936 term the Court adjourned in the middle of the week because cases were not ready to be argued. During the last five terms there has been a steady increase in the allowance of extra time. For the 1932 term it was 14 hours, while for the last two terms the extra time was 39½ and 48½ hours, respectively.⁶ The Court continued its almost conclusive practice against rehearings.⁷ Of rearguments on the Court's initiative there were two during the 1935 term and five during the last term. The balance sheet of the

⁴ See Frankfurter and Landis, *supra* note 3, 45 HARV. L. REV. at 274.

⁵ *Atlantic Ref. Co. v. Commonwealth of Virginia*, No. 40; *Kelly v. Washington ex rel. Foss Co.*, No. 552; *Fox v. Dravo Contracting Co.*, No. 625; *Dodge v. Board of Education of Chicago*, No. 713; *Silas Mason Co. v. Tax Comm. of Washington*, No. 773; *Ryan v. Washington*, No. 774.

⁶ During the 1933 term, 19 hours; during the 1934 term, 35 hours.

⁷ In one instance during the 1935 term and in three instances during the 1936 term rehearings were granted of orders denying *certiorari*. *Triplett v. Lowell*, 296 U. S. 570 (1935); *New York City v. Goldstein*, 299 U. S. 522 (1937); *United States ex rel. Girard Trust Co. v. Helvering*, 300 U. S. 643 (1937); *Stone v. White*, 300 U. S. 643 (1937).

Court's most vital activity—adjudication upon full consideration—is as follows: in the 1935 term, the Court decided 210 cases of which only two were submitted wholly on briefs, while in the 1936 term 203 cases were determined of which only five were submitted wholly on briefs. In the 1935 term 146 full opinions were written for 185 cases; these evoked three concurring opinions and 20 dissents. In the 1936 term 149 opinions were written for 181 cases; with one concurring opinion and 17 dissents.

The appropriateness of particular cases for full opinion as against summary disposition, the individualization of opinions according to the issue at stake or the gifts of different members of the Court, invite a critique of juristic and personal factors quite outside the scope of a statistical study. But in view of the summary disposition of a substantial percentage of cases fully argued before the Court, it becomes relevant presently to discuss the considerations which apparently move the Court to dispense with opinions.

In the gross analysis of the Court's business, the past two terms continue tendencies which have been heretofore observed. For all statistical discussion the starting point is the volume of business that confronts the Court. The substantial balance between business presented and business done has been noted. And so, inquiry must direct itself to the problems implicit in the actual volume of cases on the docket—their number, the issues raised, the aid which the Court derives from counsel and from lower courts, the exigencies that may demand more expedition than is normally healthy for wise judicial incubation. These and similar factors inevitably determine the Court's response to its business. They influence the time for deliberation, the feeling of serenity or pressure in exploring and composing differences of view within the Court, the fullness or brevity of opinions, the giving of opinions as against summary disposition, the austerity or generosity with which standards for discretionary jurisdiction are applied. These conditions and activities of the Court's physiology pose the most exciting and crucial inquiries for the student of the Supreme Court's business. Unfortunately statistics afford little illumination except here and there a ray of knowledge, an intimation, an hypothesis to be proved or rejected by future statistics.

TABLE I
DISPOSITION OF APPELLATE BUSINESS

	1932	1933	1934	1935	1936
Total Cases Docketed	1016	1113	1022	1076	1039
A. Business Completed	906	1021	926	986	941
1. Total adjudications	247	270	242	256	260
a. Full opinion	187	179	185	185	180
b. Per curiam after argument or submission	19	31	24	25	23
c. Per curiam before argument or submission	41	60	33	46	57
2. Petitions for certiorari denied or dismissed	649	732	670	717	671
3. Cases disposed of without consideration	10	19	14	13	10
B. Unfinished Business	110	92	96	90	98

The fears raised by the sizable increase in business for the 1933 term — 1021 dispositions as against 906 for the previous term — have, for the time at least, been dispelled. The total appellate work for the 1935 term was 986 and for the last term 941. In conjunction with the prior three years they reveal, for the past quinquennium, a decreasing variation about a mean. From which one may hesitatingly infer that the professional, economic, psychologic factors which control the volume of the Court's business have reached a temporary equilibrium.

Last term's decrease of 45 in the total appellate business is almost identical with the decrease from 717 to 671 in the petitions for *certiorari* denied or dismissed. The number of adjudications increased from 256 to 260, which is the resultant of an increase by 11 of dispositions upon preliminary papers and a decrease by seven of cases in which argument was heard. The latter decrease, in turn, is reflected in a decrease, from 185 to 180, in the number of cases decided by full opinion, and of two in the *per curiam* decisions.

If the past is any guide, the problems raised for the Court by the volume of its business will largely be solved by the use which it makes of the two devices for exercising selective jurisdiction—the jurisdiction which Congress has made discretionary and that which, by the Court's own invention of a procedural device, is attaining likenesses to discretionary jurisdiction. Throughout the last five terms the figures disclose a correspondence between the increases or decreases in total appellate dispositions and increases or decreases in dispositions otherwise than by full opinion after argument. How the Court saves itself from the latter—whether through denials of *certiorari* or through summary dispositions—cannot be expressed mathematically. Such variations as are disclosed by the business of the last two years in the distribution of dispositions on petitions for *certiorari* and under Rule 12, respectively, are due to last term's change in the ratio between obligatory and discretionary business. The increase, last term, in *per curiams* without argument (while all other modes of disposition decreased) must be set against the increase in appeals, both absolutely and proportionately, compared with the 1935 term, from 109 to 121, 42.6% to 46.5%.*

Ever since its promulgation, Rule 12 has had a steadily mounting significance as a means of winnowing good appeals from bad. The importance of the Rule derives from the nature of the factors which the Court is gradually evolving in its tests of an appeal. Rule 12 in action—what lies implicit in hundreds of cases in which appeal has been invoked and summarily denied since July 1, 1928, when Rule 12 became effective—affords one of the most fascinating studies in the history of judicial procedure. It proves in striking fashion how much opportunity for creativeness in judicial administration remains even within a jurisdictional orbit defined by the legislature.

Having persuaded Congress to contract drastically the area of review as of right, the Court inevitably had to protect the avenues of access to it through spurious appearances of appeal. And so

* It cannot be said, however, that this marks a trend toward increasing importance of the obligatory jurisdiction. This increase is caused largely by the fact that the cases which were not reached for a hearing during the 1935 term contained an exceptionally high percentage of appeals. The total appeals docketed decreased from 123 to 112.

Rule 12 was devised.⁹ Its hopes doubtless were to restrict effectively the docketing of cases that have no claim on the Court's time, or to secure their summary disposition once they get into the stream of the Court's business. The Act of 1925 was a measure of judicial conservation, to the end that litigation of the gravity properly requiring the august adjudication of the Supreme Court should be decided with a promptness consonant with the fullest play of the deliberative function. To waste the Court's time reading briefs and records and listening to argument on appeals that are either intrinsically frivolous or that do not satisfy vindicated procedural requirements is to make the Supreme Court the victim of irresponsibility and incompetence. To save the Court, its exclusionary rules must be explicit and comprehensive in their demands. They must enlist the lower courts as well as the bar in the utilization of the sifting process, and must enable the Court itself to test fulfillment of its jurisdictional criteria with accuracy and speed.

Rules of court, like adjudications, reflect an empiric process, a response of doctrine to experience. By the amendment effective May 31, 1932, the Court closed the considerable gap left open by reliance on the bar's own judgment for determining appealability. Fulfillment of the jurisdictional requirements has now to be attested by the judge or Justice who allowed the appeal.¹⁰ Four years more of experience sharpened still further the Court's formulation of the Rule. An amendment, effective July 1, 1936, added to the words "The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on", the far-reaching requisite "including a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U. S. 174, 176, 177)".¹¹ This serves formal notice of the discretionary ingredient even in review as of right. A claim of unsubstantiality inevitably invokes judgment, even

⁹ 275 U. S. 603-04 (1928); see Frankfurter and Hart, *supra* note 3, 47 HARV. L. REV. at 253-62.

¹⁰ 286 U. S. 602-03 (1932); see Frankfurter and Hart, *supra* note 3, 47 HARV. L. REV. at 262; 48 *id.* at 247-49.

¹¹ 297 U. S. 733 (1936). This gives added meaning to the following clause: "and shall cite the cases believed to sustain the jurisdiction."

in those cases where the question is whether its solidity has evaporated in the course of prior decisions. The 1936 amendment to Rule 12 also strengthened its effectiveness by underlining two of the historic technical prerequisites for a review of state court adjudication. Since the Court, in its review of state decisions, does not consider a federal question which was not seasonably raised in the state court, Rule 12 now specifically requires explicit proof of the fulfillment of this requirement.¹² Since the Court does not review state decisions which rest upon an adequate non-federal ground, the amendment prescribes that the satisfaction of this requirement shall be documented.¹³

The part that Rule 12 plays in the business of the Court calls for answer to four questions. How many cases which have no business there does it avert from coming to the Court at all? How many cases are rejected at the threshold without the waste of oral argument because inspection of the brief documentation suffices to disclose that they do not fulfill the relevant jurisdictional requirements? What is the needless drain on the Court's time through testing the existence of the jurisdictional requirements on the preliminary showing? Finally, how effectively does the disposition of cases under Rule 12 guide the bar in bringing itself within the requirements of the Rule so as to avoid waste both to litigants and to Court?

The last two terms confirm the potentialities of Rule 12 as an important means of avoiding the hearing of a sizable percentage of unworthy appeals. Of the 123 appeals in the 1935 term, 41 were dismissed or affirmed on the jurisdictional statement. Of

¹² "If the appeal is from a state court the statement shall specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears, (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) [such] as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." 297 U. S. 733-34.

¹³ "The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases,

the remaining 82 cases,¹⁴ nine had a fate irrelevant to this study,¹⁵ but 16,¹⁶ which had passed the tests of Rule 12, either disclosed jurisdictional lacks on fuller consideration or were decided *per curiam* with a brevity which implies a substantiality so tenuous that dismissal might well have ensued.¹⁷ For the 1936 term, the application of Rule 12 gives this showing: in 55 out of the 112 appeals the jurisdictional statement sufficed for a disposition; of the remaining 57, 45 received consideration before the end of the term, and the Court's treatment of only seven¹⁸ of this number gives rise to the suggestion that they might also have been settled upon the preliminary papers.¹⁹

But the last two terms also indicate the heavy drain upon the Court's time by appeals that have no claim to be heard. To be sure, the inhibitory influence of the Rule in preventing appeals, either through the spontaneous action of counsel or disallowance

reference to which may be necessary to ascertain the grounds of the judgment or decree." 297 U. S. 734 (1936).

¹⁴ These figures include cases which were finally disposed of by the Court during the 1936 term.

¹⁵ Four cases were dismissed on motion of the appellant, two were dismissed *per stipulation*, two were dismissed in vacation pursuant to Rule 35, and one was carried through the 1936 term to the 1937 term.

¹⁶ Not including two cases in which *per curiam* opinions did not indicate a summary disposition, *Corporation Commission of Oklahoma v. Cary*, 296 U. S. 452 (1935); *Wright v. Central Ky. Nat. Gas Co.*, 297 U. S. 537 (1936), and the cases involving the New York Social Security Act which were affirmed by an equally divided Court. *W. H. H. Chamberlin, Inc. v. Andrews*, 299 U. S. 515 (1936) (three cases).

¹⁷ Eleven cases were felt to justify only *per curiam* opinions. Of these, nine were affirmed, one dismissed and one remanded to enable the court below to clarify the grounds of its decision. Five cases were disposed of by *per curiam* orders, of which one was affirmed and four dismissed. Out of the 16 cases, five involved lack of technical requirements for appellate jurisdiction, six involved review of decisions which were clearly right, and five involved rulings of three-judge district courts on interlocutory injunctions, or questions of fact, or application of local law, which the Supreme Court will not reverse unless clear error is shown.

¹⁸ These figures do not include one case affirmed by an equally divided Court. *Railroad Comm. of Calif. v. Pacific Gas & Elec. Co.*, 301 U. S. 669 (1937).

¹⁹ In one case, decided on full opinion, the cause was remanded to enable the lower court to clarify the facts which underlay its decision. Two cases were affirmances by *per curiam* opinions and four were dispositions by *per curiam* orders. Of the seven cases, only one involved lack of technical appellate jurisdiction, five were cases in which the subject of the controversy was well settled, and one was a review of a decision of a three-judge district court turning on state law.

TABLE II *
ADJUDICATIONS ON APPELLATE DOCKET

<i>Adjudications by Full Opinion</i>					
	1932	1933	1934	1935	1936
Affirmed	94	84	93	100	89 *
Reversed	84	87	85	74	89
Dismissed †	5	3	2	3	0
Questions Answered	4	2	3	3	1
Miscellaneous §	0	3	2	5	1
Total	187	179	185	185	180
<i>Adjudications Per Curiam ‡</i>					
Affirmed	8	24 ¶	12	18	18
Reversed	9	8	3	11	5
Dismissed	43	58	41	41	54
Questions Answered	0	0	1	0	0
Miscellaneous	0	1	0	1	3
Total	60	91	57	71	80
<i>Total Adjudications</i>					
Affirmed	102	108	105	118	107
Reversed	93	95	88	85	94
Dismissed	48	61	43	44	54
Questions Answered	4	2	4	3	1
Miscellaneous	0	4	2	6	4
Total	247	270	242	256	260

* Slight corrections in a few of the statistics heretofore employed in this series have been made in this Table.

* Excluding one case (No. 202, October Term 1935) in which *certiorari* was granted during the time limit of the 1936 term.

† Including petitions for *certiorari* dismissed by full opinion.

§ Including partial affirmances, decisions on petitions for *certiorari*, on motions, etc.

‡ Excluding petitions for *certiorari* disposed of *per curiam*.

¶ Excluding four cases (Nos. 18, 19, 20, 21) affirmed by an evenly divided Court, which were set down for argument at the 1934 term on petition for rehearing. See 290 U. S. 591 (1933), 292 U. S. 612 (1934), 293 U. S. 191 (1934).

by lower courts, cannot be measured numerically. But 33.3% of the appeals brought before the Court in the 1935 term were given the short shrift of summary disposition on the basis of the jurisdictional statement,²⁰ and in the 1936 term the percentage of such dispositions was 49.1%,²¹ the highest in the administration of the Rule.²² If a sizable percentage of cases does not satisfy the Court's criteria for jurisdiction, the bar either does not understand the criteria or is indifferent to them, or the Court has not made itself clear in their formulation or precise in their application.

A study of the workings of Rule 12 in detail lays bare nice questions of degree in the enforcement of the more technical requirements of jurisdiction. It is to be expected that there will be a few cases every term that raise legitimate doubts, even in the minds of conscientious counsel, whether the decision of a state court involves the "validity of a statute",²³ whether there was a non-

²⁰ This percentage was made up of 41 out of 123 appeals, six affirmed and 35 dismissed. Nine appeals were dismissed for lack of jurisdiction, nine for want of a substantial federal question, three because of the presence of a nonfederal ground adequate to support the decision below, seven for want of a properly presented federal question, four for want of a properly presented substantial federal question, one for want of a final judgment and two for lack of sufficient interest on the part of the appellant.

²¹ This percentage was made up of 55 out of 112 appeals, three affirmed, 51 dismissed and one vacated, the cause being moot. Ten appeals were dismissed for lack of jurisdiction, 29 for want of a substantial federal question, six because of the presence of a nonfederal ground adequate to support the decision below, two for want of a properly presented federal question and four because the appeal was not from the final judgment.

²² The highest proportion of appeals disposed of upon the jurisdictional statements prior to the 1936 term was 41.6% during the 1933 term. Comparison with the terms immediately following the promulgation of the Rule, however, is dangerous unless the greater number of improper appeals which survived the preliminary tests and received a hearing on the merits is borne in mind.

²³ The statutory formula governing the obligatory jurisdiction of the Court over the judgments of state tribunals—"where is drawn in question the validity of a statute [or treaty] of any State [of the United States]"—has given rise to some of the subtlest problems in federal jurisdiction. *Jett Bros. Distilling Co. v. Carrollton*, 252 U. S. 1 (1920), held that under the 1916 Act an allegedly discriminatory assessment made under a general tax law whose validity was not attacked was reviewable only by *certiorari*. The case created the distinction between the validity of an "authority" and the validity of its exercise. See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 252, n.30. The withdrawal of attacks upon authorities from the Court's obligatory jurisdiction was largely nullified by decisions that municipal ordinances and "legislative" orders of state administrative boards are "stat-

federal ground adequate to sustain such a decision,²⁴ whether the federal question was seasonably raised below,²⁵ whether, in any event, the judgment was final. But the very technicality of such matters tends to fence in the area of doubt. Judgment is more at large when inquiry concerns the substantiality of a legal question otherwise within the ambit of the Court's reviewing power. Here

utes" within the meaning of the Act of 1925. *King Manufacturing Co. v. Augusta*, 277 U. S. 100 (1928); *Sultan Ry. v. Department of Labor*, 277 U. S. 235 (1928). As a result, the *Jett* case continued to be cited to confine these decisions to orders "legislative" in character. The precise effect of the *Jett* case, however, had been made doubtful by a case holding that review as of right lay when a particular application of a statute, as distinguished from the statute itself, was attacked as unconstitutional. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921). In the *Dahnke-Walker* case the question was whether the business of a particular company was interstate so as to be outside the disqualification of foreign corporations from suing in the state, unless they had complied with certain conditions for doing business. The determination of this issue certainly implicated such a range of commercial activities as to involve, in a colloquial sense, the meaning of the statute; hence the decision of the state court holding it applicable was considered to involve its validity. On the other hand, in the *Jett* case, partly through the nature of the subject matter, *i.e.*, the specialized circumstances of a particular claim of discrimination, and partly because these circumstances were adjudged by an intervening administrative agency, the action complained of was not deemed to touch the statute as such but merely the use made of it in a specific, nonrecurring situation. These are, of course, not clear-cut distinctions, and insofar as valid they shade into one another. They are merely suggested as guides for harmonizing the action of the Court in applying the doctrines of these two cases from term to term. See two cases during the 1935 term which were held not properly before the Court on appeal but reviewable by *certiorari*. *Baltimore Nat. Bank v. State Tax Comm.*, 296 U. S. 538 (1935), 297 U. S. 209 (1936) (imposition by state board of tax upon national bank shares owned by RFC); *P. J. Carlin Const. Co. v. Heaney*, 298 U. S. 637, 299 U. S. 41 (1936) (award by state workmen's compensation board for injuries claimed to be within the exclusive jurisdiction of the courts of admiralty). Compare two cases in which appeals were dismissed in which the statutes claimed to be involved were general regulations of court procedure. *Lindway v. Ohio*, 299 U. S. 506 (1936) (statute permitting amendment of indictment); *Mississippi Central R. R. v. Smith*, 299 U. S. 518 (1936) (statute permitting partial reversal upon appeal). It has, however, been suggested that the decision in the prior two cases is due to the fact that the federal claim below was based on the denial of a federal "right, title, privilege or immunity" rather than on the unconstitutionality of the state statute. See ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) § 11; *cf.* *Whitmore v. Salt Lake City*, 300 U. S. 644 (1937) (statute not referred to at time federal question raised).

²⁴ The change from three to six in the number of cases dismissed because of the presence of a nonfederal ground adequate to sustain the decision below does not indicate a failure of Rule 12 to bring this jurisdictional limitation to the attention of counsel. Indeed, in only one out of the six cases of the 1936 term as op-

is the real center of conflict between the standards of the Court and those of the bar. By its recent amendment to the Rule the Court implied admonition to the bar that formal requisites for appeal are not enough. An issue really doubtful on the merits, something rising to the gravity of a matter that the Supreme Court may justly be called upon to adjudicate, must be presented, not a mere gossamer claim or a *chose jugée*. The record of dismissals plainly dictated this admonition. Since the promulgation of the Rule, 170 out of 347 dismissals had been for want of substance. Even with its more explicit directions, Rule 12 is evidently making slow headway in winning the bar to the Court's notions of substantiality. At the 1935 term only nine cases out of 35 were dismissed for want of a substantial question,²⁶ while this figure rose to 29 out of 51 dismissals at the last term, and that, too, after the stiffening amendment.²⁷ The bar now seems to be fully aware of the requirement of substantiality; certainly the jurisdictional

posed to two out of the three cases of the 1935 term did the jurisdictional statement fail to deal with the problem. The cases which were dismissed reveal the difficulties inherent in the application of this jurisdictional limitation. In only one of the cases of each term did the nonfederal ground have no relation to the statute which was claimed to be invalid. In all the other cases the nonfederal ground was either a decision that the principles of estoppel or the local rules of procedure prevented the appellant from attacking the statute, or decisions as to the nature of the rights, dependent upon state law, which underlay the constitutional claim of the appellant. The main significance of these dismissals is a determination that the nonfederal ground by which the state courts satisfied themselves that they were not required to pass upon the federal question, was sufficiently distinct to be independent.

²⁵ There was a marked decrease in the number of appeals which were dismissed because the federal question was not properly raised below. Eleven appeals suffered from this defect during the 1935 term; only two during the 1936 term. This decrease coincided with the amendment of Rule 12 requiring a specific statement of the manner in which the federal question was raised below. At least four of the statements in the cases filed during the 1935 term were drawn on the theory that it was only necessary to show that the state statute whose validity was attacked had been applied below. The statements filed during the 1936 term show an increased awareness of the necessity to show the exact steps by which the federal question was raised below. How much of the decrease in the number of appeals dismissed is due to the amendment in Rule 12 remains a matter of conjecture.

²⁶ These are the figures for the three preceding terms: 1932 term, 15 out of 38; 1933 term, 27 out of 49; 1934 term, 13 out of 33.

²⁷ In only three of these appeals was the jurisdictional statement filed before the amendment became effective, and even these were filed some time after it had been promulgated.

TABLE III
COURTS FROM WHICH CASES CAME

	1932	1933	1934	1935	1936
DISTRICT COURTS	41	39	29	39	32
Affirmed	18	21	13	31	21
Reversed	19	10	13	5	9
Dismissed	4	5	2	2	2
Miscellaneous	0	3	1	1	0
CIRCUIT COURTS OF APPEALS	107	116	121	118	107
Affirmed	52	54	63	51	47
Reversed	49	58	51	55	56
Dismissed	6	3	5	4	0
Questions Answered	0	0	1	3	1
Miscellaneous	0	1	1	5	3
HIGHEST STATE COURTS	70	102	79	84	96
Affirmed	22	31	24	29	27
Reversed	10	19	19	18	17
Dismissed	38	52	36	37	52
COURT OF APPEALS, DISTRICT OF COLUMBIA	15	6	8	7	12
Affirmed	2	0	5	4	7
Reversed	12	6	3	3	4
Questions Answered	1	0	0	0	0
Miscellaneous	0	0	0	0	1
DISTRICT COURT, DISTRICT OF COLUMBIA *	0	0	0	0	1
Affirmed	0	0	0	0	1

* Supreme Court, District of Columbia, prior to Act of June 25, 1936, 49 STAT. 1921.

TABLE III (continued)

	1932	1933	1934	1935	1936
COURT OF CLAIMS	12	7	5	6	11
Affirmed	6	2	0	2	4
Reversed	3	2	2	3	7
Dismissed	0	1	0	1	0
Questions Answered	3	2	3	0	0
COURT OF CUSTOMS AND PATENT APPEALS	2	0	0	0	0
Affirmed	2	0	0	0	0
PHILIPPINE SUPREME COURT	0	0	0	2	1
Affirmed	0	0	0	1	0
Reversed	0	0	0	1	1
Total	247	270	242	256	280

TABLE IV

EXTENT OF DISCRETIONARY REVIEW

	1932	1933	1934	1935	1936
Obligatory Jurisdiction	104	132	92	109	121
Discretionary Jurisdiction	143	138	150	147	139
Total	247	270	242	256	260
Obligatory Jurisdiction	42.1%	48.9%	38.0%	42.6%	46.5%
Discretionary Jurisdiction	57.9%	51.1%	62.0%	57.4%	53.5%

statements of the last term paid it ample lip service. That there should be differences of opinion in appraising an issue as either flimsy or settled must be expected. But, if the last term is to be taken as an index to tendency, the gap between Court and counsel is too wide.

What proportion of this too large number of futile attempts at appeal is attributable to the conscious desire of counsel to prolong hopeless litigation, or to what extent counsel are unaware of the standards by which the Court judges substantially, is largely guesswork. But an intensive study of the cases dismissed for

want of a substantial question leads one to believe that there is much misconception by the bar in judging substantiality. This is due in part to the professional qualities of the miscellaneous bar now practicing before the Court compared with the specialized Supreme Court bar of a century ago, partly to the tradition of the bar in raising futile constitutional objections, partly to the limited utilization of costs as a deterrent to frivolous appeals. Evidently, also, the present mode of dismissing cases for want of a substantial federal question, in situations where prior decisions still leave decent room for argument regarding the applicability of former rulings to a new case, leaves the bar uninformed as to the standards of severity which the Court is evolving in finding unsubstantiality. No doubt the Court has resorted to summary dismissal to save the time that would be necessary to write opinions expounding the ground of dismissal. To be sure, indications of the basis of substantiality are afforded by the recent practice of giving the citation of the opinion below and also by more sharply pointed references to the cases which are avouched for unsubstantiality. Even so, it might, on the long swing, prove an ultimate saving of time for the Court, in the transitional process of educating the bar to its requirements by a knowledge of American constitutional law, to include in its *per curiams* a statement of the facts of the particular case sufficient to show its nature in the light of prior decisions which, even though not necessarily relevant by *stare decisis*, make the case undeserving the Supreme Court's deliberations.

The bulk of the Court's business, in gross as well as adjudicatory, continues to derive from the enlarged scope of discretionary jurisdiction on petitions for *certiorari* conferred by the Act of 1925. *Certiorari* absorbed 90.5% of the total appellate business of the Court during the 1935 term and 87.9% during the 1936 term. *Certiorari* was responsible for 71.9% and 71.8% of the cases in which full opinions were written during the 1935 and 1936 terms, respectively. And the dominance of *certiorari* in the Court's economy is emphasized by its share of that business which is the chief consumer of the Court's time, namely, the cases adjudicated after full argument — for the 1935 term, 67.6%, for the 1936 term, 67.5%. During the last five years, the depth and density of the stream of litigation through *certiorari* have remained substantially

TABLE V

MODE OF ARRIVAL

	1932	1933	1934	1935	1936
DISTRICT COURTS					
Appeal	41	39	29	39	32
CIRCUIT COURTS OF APPEALS					
Appeal	1	2	0	0	1
Certiorari	101	112	117	112	105
Certificate	5	2	4	6	1
HIGHEST STATE COURTS					
Appeal	53	86	56	63	85
Certiorari	17	16	23	21	11
COURT OF APPEALS, DISTRICT OF COLUMBIA					
Certiorari	14	6	8	7	12
Certificate	1	0	0	0	0
DISTRICT COURT, DISTRICT OF COLUMBIA *					
Appeal	0	0	0	0	1
COURT OF CLAIMS					
Appeal	0	1	0	0	1
Certiorari	9	4	2	5	10
Certificate	3	2	3	1	0
COURT OF CUSTOMS AND PATENT APPEALS					
Certiorari	2	0	0	0	0
PHILIPPINE SUPREME COURT					
Certiorari	0	0	0	2	1
Total	247	270	242	256	280

* Supreme Court, District of Columbia, prior to Act of June 25, 1936, 49 STAT. 1921.

the same. During the 1935 term 865 petitions were filed of which 148, 17.1%, were granted. During the 1936 term 824 petitions were filed of which 153, 18.6%, were granted. For the five year period ending with the 1936 term, the petitions for *certiorari* have fluctuated between 797 and 880. The petitions deemed worthy of the Court's attention have fluctuated between 148 and 165, 16.8% and 19.8%.

A continuous disparity, such as these figures indicate, between the Court's notion of review-worthiness and that of the bar, clearly implies a maladjustment. Either the bar is too loose in its conception of issues deserving the attention of the highest tribunal, or the Court too rigid. This is not a matter that lies on the level of statistical proof. Only by quarrying in the hundreds of dreary petitions for *certiorari* which have been denied could pedantic demonstration be made of some of the niggling points, or issues long since set at rest, on which the bar seeks the Court's reviewing power. Enough of these have been sampled to leave no doubt that lawyers moving in the more austere professional atmosphere of the English bar and subject to the restraining influence of heavy costs of the English judicial system for fruitless appeals,²⁸ would abstain from filing many of the petitions for *certiorari* which are annually presented to the Supreme Court. With such a volume of business, it would be strange indeed if petitions were not rejected which raised issues for which responsible and skilled lawyers properly sought the Court's adjudication. And there are doubtless ample instances among the four-fifths of rejected petitions in which the Court's discretionary judgment as to the gravity of an issue was justifiably solicited.²⁹

For the guidance of the bar, the Court has indicated the general direction of its mind when asked to issue the discretionary writ of *certiorari*. Rule 38 indicates "the character of reasons" which will move the Court.³⁰ They vary, of course, according to the

²⁸ E.g., *Mechanical & General Inventions Co. v. Austin*, [1935] A. C. 346; see Goodhart, *Costs* (1929) 38 YALE L. J. 849, 869-70.

²⁹ Mr. Chief Justice Hughes estimated that "There are probably about 20 per cent or so [of the petitions for *certiorari*] in addition which have a fair degree of plausibility but which fail to survive critical examination." See SEN. REP. NO. 711, 75th Cong., 1st Sess. (1937) 40.

³⁰ Of course the reasons stated are "neither controlling nor fully measuring the

court whose action is sought to be reviewed,²¹ but underlying all are two governing considerations for not leaving undisturbed the judgment of one of the inferior federal courts, or of a state court wherein a federal question had been raised.²² The Supreme Court will intervene either to quiet a conflict which it alone can compose, or to declare the law when the intrinsic importance of an issue calls for its most authoritative determination.²³

Conflict — whether between two lower courts or between a lower court and the Supreme Court — represents a relatively well-canal-

court's discretion". See REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (1936) § 38(5).

²¹ Subparagraphs (a) and (c) relating to *certiorari* from state courts and from the United States Court of Appeals for the District of Columbia respectively do not refer to a conflict with the decision of a lower federal court as a reason for granting *certiorari*. Yet the cases show that this reason is operative. *Noble v. Oklahoma City*, 297 U. S. 481 (1936); *Pufhal v. Estate of Parks*, 299 U. S. 217 (1936); *United States ex rel. Girard Trust Co. v. Helvering*, 301 U. S. 540 (1937).

²² Subparagraph (b), relating to *certiorari* from the circuit court of appeals, is as follows: "(1) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; (2) or has decided an important question of local law in a way probably in conflict with applicable local decisions; (3) or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; (4) or has decided an important question of federal law which has not been, but should be, settled by this court; (5) or has decided a federal question in a way probably in conflict with applicable decisions of this court; (6) or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A numerical analysis of the reasons given for the granting of *certiorari* to the lower federal courts during the 1935 term gives the following results: Reason one, 20; reason two, 1; reason three, 0; reason four, 15; reason five, 3. In three cases both one and four were given as the reason, in one case one and five were given, and in one case one and six. For the 1936 term: Reason one, 15; reason two, 1; reason three, 0; reason four, 25; reason five, 4. In one case one and four were the grounds. Reasons for the granting of *certiorari* to state courts were given in eight cases during the 1935 term. A conflict was assigned once, a conflict and the importance of the question once, and the importance of the question six times. During the 1936 term a conflict was assigned once and the importance of the question twice.

²³ Where the conflict is within the federal judicial system, either with the decisions of another circuit court of appeals or with the decisions of the Supreme Court, there is no requirement that the question be also important. Where the conflict is with local courts on a question of local law, or with the weight of authority or the "better view" on a question of general law, the question must be one of importance. Importance alone, apart from any conflict, is sufficient if the question is one of federal law.

TABLE VI
PETITIONS FOR CERTIORARI *

	1932	1933	1934	1935	1936
Granted	148	148	165	148	153
Denied	639	720	664	703	661
Denied for Failure to File in Time	3	0	1	1	1
Dismissed on Motion	2	4	2	7	3
Dismissed per Stipulation	0	3	1	4	3
Dismissed Pursuant to Rules of Court	1	2	0	0	0
Denied for Lack of Juris- diction	0	2	0	2	3
Stricken from Files	4	1	2	0	0
Total	797	880	835	865	824

ized concept. For skilled lawyers the issue of conflict, in the great majority of cases, comes close to a mechanical determination. When the existence of a conflict is legitimately debatable, the question really presents a phase of the dynamic quality of lawmaking through courts. Conflict in this sense becomes an adjustment between abstract logical relevance and the accommodation of logic to varying circumstances. For instance, is an old decision of the Supreme Court to be given an application rigorously consonant with syllogistic reasoning, or should the light of new circumstances permit what mere logic would deem a contraction or departure? Cognate considerations of ultimate juristic philosophy are involved when the Court is asked to resolve a conflict of decisions between two circuit courts of appeals where the conflict is not such a head-on collision as a difference by two circuits regarding the validity of a patent. Here, factors relevant to judicial administration, different from those operative when a claim is made of departure from the Court's own ruling by an inferior tribunal, undoubtedly influence the Court in deciding whether to adjust the conflict or to stay

* Exclusive of appeals treated as petitions for *certiorari* under the provisions of the Act of Feb. 13, 1925; of petitions for *certiorari* denied by full opinion of the Court; of petitions for *certiorari*, when denied, filed in cases in which review by appeal was also sought; and of petitions for *certiorari* granted to enable reversal of a case without consideration. The disposition of these petitions has been excluded from this table in order to prevent duplication in the statistics.

its hand, at least for the moment. All these more subtle cases of conflict present precisely the kind of situation for which the Court's discretion is properly invoked. And concordance between the Court's conception of conflict and that of the litigants is not always to be expected.

The claim of "importance" of necessity is subject to judgment and not to rule. Only by the cumulative effect of the specific instances that convey the Court's notion of importance can the bar be educated to acquire the feel of the expert. Just because the area of discretion is so large, the function of professional self-restraint is dominant. But lawyers are lawyers and not judges, they have the responsibility for pressing the legitimate interests of clients, and unavoidably they look at legal questions with a special focus. Notions of importance through general professional acceptance cannot be left wholly to the bar's own process of induction merely from the nature of the cases taken, and hardly at all from the petitions rejected. Apart from the demands this makes upon professional intellectual disinterestedness, it presupposes time and facilities for study of records quite beyond the reach of active practitioners. On the negative side, experience does not call for a modification of the belief that the reasons for the device of *certiorari* would be defeated if the Court, in any appreciable number of instances, had to state, however briefly, the reasons for the denial of *certiorari*.³⁴ But the wherefore of importance, except in cases of obvious public significance, if suggestively articulated, would help to adjust the particularistic slant of the bar.³⁵ The density of litigation dependent upon the ruling in a

³⁴ See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 275. The value of an occasional full opinion upon the denial of a petition for *certiorari* has been adumbrated. See *ibid.*

³⁵ See, for example, the statement of Mr. Justice Roberts in *United States v. Constantine*, 296 U. S. 287, 290 (1935). "In its petition for *certiorari* the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other Circuit, called attention to diverse decisions in the district courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly."

The practice of stating at least a formal ground on which *certiorari* was granted varies among the Justices. The following table shows the relationship between the

particular case²⁵ and its repercussion upon affairs, governmental or economic, are the chief determinants of importance. And these will vary according to time and circumstance. An issue for which *certiorari* once seemed inopportune may, through the accumulation of similar instances or in the clearer perspective of the ramifications of the particular problem, later emerge as obviously important. Such shift in emphasis or keener sensitiveness to implications is, perhaps, most felt in tax litigation. The exigencies of the docket play their part, the impact of the arguments in support of a petition, and the respondent's concurrence in or opposition to the granting of the writ can hardly be without weight. These delicate imponderables, like the nuances of a great chef, can neither be measured nor conveyed. But the major elements of importance — what general interests, from the point of view of national law, are represented by a particular case — are certainly susceptible of brief and guiding formulation.

2

Inevitably law reflects the forces of economic and social dislocation implied in a great depression and its consequent readjustments. This is true not merely of substantive legal doctrines. A

number of cases in which a reason was given and the number of opinions in *certiorari* cases:

	1935 Term		1936 Term	
	Reasons	Cases	Reasons	Cases
Hughes	9	13	7	17
Van Devanter	1	2	0	6
McReynolds	1	15	2	14
Brandeis	7	7	7	7
Sutherland	0	11	3	12
Butler	1	8	3	11
Stone	11	14	5	8
Roberts	11	20	6	14
Cardozo	11	13	16	17

These figures must be read with the qualification that in some cases the obvious importance of the case would have made a statement redundant. *E.g.*, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

²⁵ *Del Vecchio v. Bowers*, 296 U. S. 280 (1935) (sufficiency of evidence under District of Columbia Workmen's Compensation Act; *certiorari* granted only because decision would also be a precedent for Longshoremen's and Harbor Workers' Compensation Act).

general tendency toward enlarged governmental activity and the centripetal influences within economic enterprise which make for increasing exercise of national authority, have their repercussions in judicial organization and administration. The broader questions of jurisdiction and procedure affecting the federal courts have always presented some of the most delicate problems in the working of our constitutional government. It would indeed be surprising if the recent stresses and strains in our national life had not reflected themselves in the workings of the federal judicial system. All the devices by which procedural changes come to pass have played their part. Rules of the Supreme Court for the conduct of its own business and that of the "inferior courts", resourceful employment of the Court's discretionary powers, fluctuations in the Court's attitude toward its jurisdiction, are all registered in the latest volumes of the United States Reports. In addition to these readjustments through judicial self-determination, Congress, during the last term of Court, deemed it necessary to intervene by redistributing power within the federal judicial system. By modifying, in an important way, the Judiciary Act of 1925, Congress has illustrated the historic truth that every judiciary enactment since the great statute of 1789 is but one of a series, a part of the continuous living process of making the federal courts appropriate instrumentalities for the changing needs of the Union.

Ordinary problems of judicial administration make little appeal to the imagination of legislators. The Supreme Court is entangled as much as it is in the political history of the United States because its work is so largely an expression of statecraft and interwoven with the political problems of our national life. Except on the rare occasions when the Court itself needs congressional relief to master its docket, judiciary legislation invariably is the political answer of Congress to what are believed to be judicial obstructions to needed activities of government. Barring the tariff and land grants, the establishment of the Interstate Commerce Commission, in 1887, was the first major intervention of the Federal Government in the area of economic enterprise. For the past half century our major domestic issues have been phases of a single central problem, namely, the interplay between enterprise and government. Taxation, utility regulation, control of the security market, banking and finance, industrial relations, agricultural controls, are

TABLE VII

SUBJECT MATTER OF PETITIONS FOR CERTIORARI
DURING THE 1935 AND 1936 TERMS

	<i>1935 Term</i>		<i>1936 Term</i>	
	<i>Total</i>	<i>Granted</i>	<i>Total</i>	<i>Granted</i>
Admiralty	27	4	24	2
Antitrust Laws	4	2	10	4
Bankruptcy	88	16	101	19
Bill of Rights (other than Due Process)	14	2	8	4
Commerce Clause				
1. Constitutionality of Federal Regulation	7	6	11	7
2. Constitutionality of State Regulation	6	3	5	1
3. Construction of Federal Regulation				
a. General	6	1	7	1
b. Federal Employers' Liability Act and Related Acts	30	5	23	3
Common Law Topics	116	6	112	13
Constitutional Law *	11	4	21	9
Construction of Miscellaneous Statutes				
1. Federal	38	6	58	17
2. State	6	0	2	0
Crimes and Forfeitures	52	2	40	7
Fifth Amendment	10	1	22	7

* Not otherwise classified.

TABLE VII (continued)

	1935 Term Total Granted		1936 Term Total Granted	
Fourteenth Amendment				
1. Substantive	17	1	37	0
2. Procedure	39	1	30	1
Full Faith and Credit	10	4	9	1
Immigration and Naturalization	9	0	8	1
Impairment of Contract	6	0	4	0
Indians	11	3	8	3
International Law	5	3	1	1
Jurisdiction, Practice, and Procedure				
1. Supreme Court	0	0	0	0
2. Inferior Federal Courts	58	13	70	11
Land Laws	6	1	2	0
National Banks	23	4	21	6
Patents, Copyrights, and Trademarks	45	10	31	3
Right to Raise Constitutional Question; Prematurity	0	0	19	3
Suits against Government	3	1	4	1
Taxation				
1. Federal	202	46	120	27
2. State	16	3	16	1
Total	865	148	834	153

issues that derive from the circumstances of modern, large-scale, industrialized society, and ultimately turn on conceptions of the relation of individuals one to another in the context of our society. For Congress they present a blend of law and policy; to the Supreme Court, under our Constitution, they come as legal problems. Clashes between courts and Congress affecting the ultimate fate of such legislation often have their origin in procedure. Who may raise legal questions about laws, what tribunals may dispose of them and when they will be finally adjudicated, are all contingencies of legislation. To effectuate its own policies — as well as those of the states when challenged in the federal courts — Congress has deemed it necessary, from time to time, to modify procedural practices of the federal courts, to exercise its constitutional power to define the authority of the inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court.

Since the intermediate federal appellate tribunals were established in 1891,⁸⁷ they have been utilized to relieve the Supreme Court of its obligatory jurisdiction, leaving with the circuit courts of appeals final adjudication in those types of cases for which *certiorari* was a sufficient safeguard of the national interest. First by the Act of 1916⁸⁸ and then by the more comprehensive measure of 1925,⁸⁹ the flow of cases coming to the Court as of right was greatly dammed. What issues may, as a matter of course, be brought before the Supreme Court is partly a technical, professional matter, but also, by touching the feelings of the general community, becomes a more dominant concern of legislative policy. In placid periods, when the distribution of jurisdiction is pre-eminently a matter of the internal economy of the judicial system, Congress is naturally responsive to the authoritative wishes of the Court. And so, the adjustments of 1891, 1916 and 1925, to enable the Court to meet adequately the swelling tide of its business, were made by Congress at the Court's own insistence.

On the other hand, for different categories of litigation, Congress had to formulate its own notions of jurisdictional policy to give effect to the social and economic movements which got

⁸⁷ Act of March 3, 1891, 26 STAT. 826.

⁸⁸ Act of Sept. 6, 1916, 39 STAT. 726.

⁸⁹ Act of Feb. 13, 1925, 43 STAT. 936.

under way in the administration of Theodore Roosevelt. Orders of the Interstate Commerce Commission often have ramifying economic consequences. Such issues have special claims for prompt, final adjudication, and their complexity, as well as their prior scrutiny by the Commission, requires at *nisi prius* the wisdom and experience of more than a single judge. By the Act of February 11, 1903, in cases involving orders of the Interstate Commerce Commission, Congress initiated the device of an original court of three judges and direct review by the Supreme Court.⁴⁰ In other spheres, the ignition of public excitement through judicial action deemed adverse to the public interest, has led to successive extensions of the Supreme Court's historic scope of review and to a recession from the general tendency to curtail its obligatory jurisdiction.

First, the traditional practice against reviewing rulings in favor of the accused, even where no double jeopardy was at stake,⁴¹ had consequences unknown to the common law when Congress affixed

⁴⁰ 32 STAT. 823 (1903), amended, 36 STAT. 854 (1910), 15 U. S. C. §§ 28, 29, 49 U. S. C. §§ 44, 45 (1934). By this Act, suits in equity brought by the United States under the antitrust and interstate commerce laws, when designated by the Attorney General as of "general public importance", have precedence and must be tried by a three-judge court. It also provided for a direct appeal to the Supreme Court in all suits in equity brought by the United States under these statutes. For a background of the Expedition Act, see 36 CONG. REC. 1679, 1747, 1871 (1903); 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) § 2, n.24. The Hepburn Act, having provided penalties for disobedience of the orders of the Interstate Commerce Commission, extended the Expedition Act to suits to enjoin the enforcement of Commission orders and gave direct review by the Supreme Court from interlocutory injunctions. 34 STAT. 584, 592 (1906). The Mann-Elkins Act vested jurisdiction of all suits to enjoin the enforcement of the orders of the Commission in the Commerce Court. 36 STAT. 1146, 1149 (1911). When this Court was abolished, the jurisdiction reverted to the three-judge district courts. 38 STAT. 219 (1913), 28 U. S. C. §§ 46, 47 (1934). The considerations of public interest which introduced the district court of three judges and direct review by the Supreme Court in litigation arising under the Interstate Commerce Act and the Sherman law were, of course, relevant when Congress fashioned the procedure under the Shipping Act, the Packers and Stockyards Act, the Perishable Agricultural Commodities Act and the Federal Communications Act. And so, the provisions applicable to orders of the Interstate Commerce Commission were incorporated by reference in each one of these statutes. 39 STAT. 738 (1916), 46 U. S. C. § 830 (1934), superseded by, 49 STAT. 1987, 46 U. S. C. § 1114 (Supp. II 1936); 42 STAT. 168 (1921), 7 U. S. C. § 217 (1934); 46 STAT. 535 (1930), 7 U. S. C. § 499k; 48 STAT. 1093, 47 U. S. C. §§ 401(a), 402(a) (1934).

⁴¹ United States v. Sanges, 144 U. S. 310 (1892); cf. United States v. Dickinson, 213 U. S. 92 (1909).

TABLE VIII
DISTRIBUTION OF OPINIONS

<i>Opinions of the Court</i>					
	1932	1933	1934	1935	1936
Hughes	24	21	22	20	23
Van Devanter	1	8	3	3	8
McReynolds	18	14	13	18	18
Brandeis	16	15	13	13	12
Sutherland	18	16	15	16	17
Butler	23	19	18	13	14
Stone	21	22	26	20	13*
Roberts	22	20	21	24	22
Cardozo	25	23	25	19	22†
Total	188	188	186	146	149

<i>Concurring Opinions</i>					
Hughes	0	0	0	0	0
Van Devanter	0	1	0	0	0
McReynolds	1	0	0	0	0
Brandeis	0	0	0	3	0
Sutherland	0	1	0	0	0
Butler	0	1	0	0	0
Stone	0	1	2	0	1
Roberts	0	0	0	0	0
Cardozo	0	0	2	0	0
Total	1	4	4	3	1

<i>Dissenting Opinions</i>					
Hughes	1	1	1	2	0
Van Devanter	0	0	0	0	1
McReynolds	0	3	3	2	4
Brandeis	1	0	0	0	0
Sutherland	1	1	0	0	5
Butler	3	2	0	0	3
Stone	5	5	6	6	0
Roberts	1	2	1	3	2
Cardozo	5	4	3	7	2
Total	17	18	14	20	17

* Because of illness, Mr. Justice Stone did not sit between October 13, 1936 and February 1, 1937.

† Including No. 910, *Helvering v. Davis*, 301 U. S. 619 (1937), in which Mr. Justice Cardozo wrote the opinion of the Court upholding the old age provisions of the Social Security Act, but, speaking for himself and Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Roberts, found an absence of those requirements for equitable relief which are indispensable to the adjudication of a constitutional question.

TABLE VIII (continued)

Total Opinions Delivered

	1932	1933	1934	1935	1936
Hughes	25	22	23	22	23
Van Devanter	1	9	3	3	9
McReynolds	19	17	16	20	22
Brandeis	17	15	13	16	12
Sutherland	19	18	15	16	22
Butler	26	22	18	13	17
Stone	26	28	34	26	14
Roberts	23	22	22	27	24
Cardozo	30	27	30	26	25
Total	186	180	174	189	167

Dissenting Votes

	3	4	3	4	2
Hughes	3	3	5	2	9
Van Devanter	8	9	5	7	19
McReynolds	11	9	10	16	5
Brandeis	5	5	5	5	12
Sutherland	10	9	7	4	17
Butler	14	13	11	17	3
Stone	3	4	3	4	4
Roberts	13	11	11	17	7
Cardozo	70	67	60	76	78
Total					

penal sanctions to legislation involving far-reaching issues of policy.⁴² The Criminal Appeals Act of 1907 put an end to the power of a single judge to hold up the enforcement of a law for years by invalidating it improperly.⁴³ Then, the growing range of economic control by the states brought them into conflict with the federal courts. The initial shift from a fundamentally *laissez-faire* emphasis in government to its modern regulatory activities largely affected public utilities. At first it expressed itself through legislative rate regulation. To federal judges the invalidation of such measures presented only a simple application of conventional doctrines to prevent irreparable damages. To the general public it was nullification of vital state policy by a single federal judge.

⁴² See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 115-17.

⁴³ 34 STAT. 1246, 18 U. S. C. § 682 (1934).

Congress promptly responded to this feeling,⁴⁴ and by the Act of 1910⁴⁵ applied the safeguards against too irresponsible judicial restraint of the Interstate Commerce Commission to the protection of state laws. Thereafter "no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state" because of unconstitutionality could be issued except by a three-judge district court, and an appeal could be taken directly to the Supreme Court. That Congress should have used this device only when statutes were called into question, and not for orders of state commissions, is a striking instance of the narrowly empiric nature of the legislative process. For by 1910 it had become abundantly clear that effective utility regulation demanded expert administration, and the movement for the establishment of utility commissions was well under way.⁴⁶ But for many judges these new administrative agencies only served to render the trend towards social legislation still more uncongenial. Courts seemed as unaware of the emergence of modern administrative law as an indispensable evolution of the Rule of Law, as the great common-law judges in the days of Coke were unresponsive to the proper rôle of emerging equity.⁴⁷ And so, by the Act of March 4, 1913,⁴⁸ protection against frustration of state

⁴⁴ See 45 CONG. REC. 7253-58 (1910).

⁴⁵ 36 STAT. 557 (1910).

⁴⁶ See MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) 22-26. The Wisconsin and New York Public Service Commissions were established in 1907.

⁴⁷ American scholars early called attention to the social-economic phenomena which were bound to give impulse to an Anglo-American administrative law, see GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893); Freund, *The Law of the Administration in America* (1894) 9 POL. SCI. Q. 403, and, some twenty years later, the present Chief Justice and eminent leaders of the bar sounded warning. See Hughes, *Some Aspects of the Development of American Law* (1916) 39 N. Y. B. A. REP. 266, 269-70; Root, *Public Service by the Bar* (1916) 41 A. B. A. REP. 355, 368-69; Sutherland, *Private Rights and Government Control* (1917) 42 A. B. A. REP. 197. The powerful influence of Professor Dicey's *The Law of the Constitution* (But cf. JENNINGS, *THE LAW AND THE CONSTITUTION* (1933) *passim*) tended to obfuscate understanding of the actual development of English law, but *Local Gov't Board v. Arlidge*, [1915] A. C. 120, compelled Dicey to acknowledge (See Dicey, *The Development of Administrative Law in England* (1915) 31 L. Q. REV. 148) what Maitland, with his usual eye for reality, had been expounding at Cambridge as early as 1887. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1908) 415 *et seq.* See COMMONWEALTH FUND STUDIES IN ADMINISTRATIVE LAW; HARVARD STUDIES IN ADMINISTRATIVE LAW; Frankfurter, *The Task of Administrative Law* (1927) 75 U. OF PA. L. REV. 614.

⁴⁸ 37 STAT. 1013. The Act was amended in 1925 to extend the requirement of

regulation by a single federal judge and direct review by the Supreme Court was extended to administrative as well as legislative action.

Shortly after the amendment of 1913, the general movement of social legislation led to the first extension of the Supreme Court's appellate jurisdiction over state court decisions. Probably no single episode in American judicial history illustrates better the limited relevance of doctrines derived from specialized political preoccupation in legal arrangements when the emphasis of government shifts from politics to economics. The authority of the Supreme Court to review state decisions was, naturally enough, confined by the famous Section 25 of the first Judiciary Act to instances where the state courts denied a federal claim. The assumption that state courts would not find in the Federal Constitution a bar to state laws was valid enough at a time of historic jealousy against national authority. Moreover, the psychological environment in which state court judges move is very different from what it was a hundred years ago, now that economics and law have become more closely interrelated and the vague contours of the Fourteenth Amendment have greatly extended the orbit of judicial discretion. And so, when, in 1911, the New York Court of Appeals temporarily arrested the progress of the now commonplace workmen's compensation legislation,⁴⁹ partly by invoking the Fourteenth Amendment, the inability to secure authoritative interpretation of that clause from the Supreme Court inevitably led to legislation.

three judges and the right of appeal to the Supreme Court to the final hearing in such suits. 43 STAT. 938, 28 U. S. C. § 380 (1934). The statute does not apply, however, where an interlocutory injunction is not sought. *Ex parte Buder*, 271 U. S. 461 (1926). The relation between federal courts and state public utility regulation remained a perplexing problem. The statutory proceeding staying proceedings in the federal courts, if, any time before final hearing, a suit is brought in the state court to enforce the order and the order was stayed pending determination, was not adequately utilized by the states. See Pogue, *State Determination of State Law and the Judicial Code* (1928) 41 HARV. L. REV. 623. But hostility to federal curbs on local utility regulation led to still further curtailment of the power of the lower federal courts. The Johnson Act deprived the district courts of jurisdiction in such cases where a "plain, speedy and efficient remedy may be had at law or in equity in the courts of such state". 48 STAT. 775, 28 U. S. C. §§ 41 (1), (1a) (1934).

⁴⁹ *Ives v. South Buffalo Ry.*, 201 N. Y. 271, 94 N. E. 431 (1911). This case was deemed contrary to the implications of the Supreme Court decision in *Noble State Bank v. Haskell*, 219 U. S. 104, 575 (1911).

TABLE IX
SUBJECT MATTER OF OPINIONS

	1932	1933	1934	1935	1936
Admiralty	6	5	9	3	3
Antitrust Laws	4	4	1	3	0
Bankruptcy	8	7	9	10	12
Bill of Rights (other than Due Process)	1	2	2	0	3
Commerce Clause					
1. Constitutionality of Federal Regulation	1	0	2	1	5
2. Constitutionality of State Regulation	2	1	1	5	3
3. Construction of Federal Regulation					
a. General	13	9	6	4	3
b. Federal Employers' Liability Act, etc.	6	4	1	5	1
Common Law Topics	6	15	8	11	13
Constitutional Law *	0	1	4	10	6
Construction of Miscellaneous Statutes					
1. Federal	20	13	10	6	8
2. State	0	0	0	1	0
Crimes and Forfeitures †	0	4	3	5	8
Due Process and Equal Pro- tection					
1. Regulation and Economic Enterprise	6	8	12	7	15
2. Relating to Procedure	7	7	2	2	0
3. Relating to Liberties of the Individual Citizen	1	0	4	1	2

* Not otherwise classified.

† Exclusive of cases under the Prohibition Acts.

TABLE IX (continued)

	1932	1933	1934	1935	1936
Full Faith and Credit	0	2	3	1	1
Immigration	0	2	0	1	0
Impairment of Contract	0	3	3	2	3
Indians	0	2	3	2	4
International Law	1	2	0	2	2
Jurisdiction, Practice, and Procedure					
1. Supreme Court	5	1	3	2	1
2. Inferior Federal Courts	19	15	13	8	13
3. State Courts	0	1	0	0	0
Land Laws	0	0	2	2	1
National Banks	0	3	8	2	3
Patents, Copyrights, and Trademarks	1	2	7	5	4
Prohibition Acts	3	1	1	0	0
Separation of Powers	2	0	3	0	0
Suits against Government	2	3	0	0	0
Suits by or against States	3	4	3	0	0
Taxation					
1. Federal	40	24	22	30	23
2. State	11	13	11	15	12
Total	168	158	156	146	149

The Act of March 23, 1914,⁵⁰ sponsored by Senator Elihu Root, extended the Supreme Court's review to a state court ruling even when it sustained a claim under the United States Constitution. This was accomplished by allowing the use of *certiorari* to the Supreme Court in such cases.

Although today dramatic ingredients may bulk large, the Judiciary Act of August 24, 1937⁵¹ will surely take its place as part of the sequence of congressional adjustments of judicial administration which begot the Acts of 1903, 1910, 1913, 1914. That the fate of acts of Congress should depend, even temporarily, upon the view of a single judge; that the United States should have no standing to defend effectively a law of the utmost national importance simply because the canons of legal procedure make the controversy merely a private litigation; that the ultimate validity of a statute may be a long drawn out process depending in part upon the state of the Supreme Court's docket and its notions of exigency,⁵² have long been sources of anxiety to students of public

⁵⁰ 38 STAT. 790, 28 U. S. C. § 344(b) (1934). However, since the New York Court of Appeals in the *Ives* case had rested its decision partly on the state constitution, the Supreme Court would have been without jurisdiction to reverse the judgment. *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934). But cf. *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936). But the incongruity of having state and federal courts give different meaning to the same concept of "due process" contained in different constitutions eliminated fine shadings in jurisdictional learning as to the availability of such a statute as that of March 23, 1914. As a matter of history, New York immediately adopted a constitutional amendment legalizing workmen's compensation legislation, and a statute passed under this amendment was upheld by the Supreme Court. *New York Central R. R. v. White*, 243 U. S. 188 (1917). Accord: *Arizona Employers' Liability Cases*, 250 U. S. 400 (1919).

⁵¹ 50 STAT. 811. See Legis. (1937) 51 HARV. L. REV. 148. To govern appeals under this Act the Court, January 10, 1938, promulgated Rule 46½. "Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under Section 2 of the Act the service required by paragraph 2 of Rule 12 shall be made on all parties to the suit other than the party or parties taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

⁵² Delay in settling the constitutionality of important statutes is not confined to the United States. The Canadian Industrial Disputes Investigation Act of 1907 was declared *ultra vires* the Dominion Parliament by the Privy Council after it had been in operation for eighteen years. *Toronto Electric Comm. v. Snider*, [1925] A. C. 396.

law⁵³ and have occasioned remedial proposals in Congress. To be sure, in a period when legislative energies run strong and the judiciary interposes powerful and persistent restraints, the pace of procedural reform is accelerated. At no time in the country's history did the judiciary play a more permeating part in the affairs of the country. At no time in the country's history was there a more voluminous outpouring of judicial rulings in restraint of acts of Congress than the body of decisions in which the lower courts, in varying degree, invalidated every measure deemed appropriate by Congress for grappling with the great depression. Friction between Congress and the judiciary was intensified by the atmosphere which enveloped some of the opinions of the lower court judges. There were utterances more appropriate to the hustings than to the bench,⁵⁴ reminiscent of political harangues by early Federalist judges which involved the federal judiciary for the first time in the conflict of politics.⁵⁵

As in similar periods when the judiciary interposed obstacles to legislative policies having wide popular support, the traditional scope of judicial review in constitutional controversies came under scrutiny and numerous bills proposing drastic modifications were introduced in both houses of Congress.⁵⁶ The past further re-

⁵³ See, e.g., BORCHARD, DECLARATORY JUDGMENTS (1934) 301; Arnold, *Trial by Combat and the New Deal* (1934) 47 HARV. L. REV. 913; Notes (1937) 25 GEO. L. J. 967, (1936) 45 YALE L. J. 649, 659-61.

⁵⁴ See, e.g., *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16, 28 (W. D. Ky. 1934); *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854, 865-66 (W. D. S. C. 1935); *Stout v. Pratt*, 12 F. Supp. 864, 867, 869-70 (W. D. Mo. 1935). But see *Bemis Bros. Bag Co. v. Fiedelson*, 13 F. Supp. 153, 154-55 (W. D. Tenn. 1936); cf. *Industrial Mercantile Marine Co. v. Stranahan*, 155 Fed. 428, 430 (S. D. N. Y. 1907).

⁵⁵ See 3 BEVERIDGE, LIFE OF MARSHALL (1919) 30, n.1; 2 McREE, LIFE OF IREDELL (1857) 505; 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926) 165, 274.

⁵⁶ Several years prior to the President's message on Feb. 5, 1937 concerning reform of the federal judiciary, a large number of bills were proposed to deprive the courts altogether of their power to declare federal statutes unconstitutional. 74th Cong., 1st Sess., H. R. 4534, 8123; H. J. Res. 287, 296, 329; S. 1381; S. J. Res. 147. 74th Cong., 2d Sess., H. R. 10315; H. J. Res. 462, 509, 565. 75th Cong., 1st Sess., H. R. 44, 50, 51, 2265, 3895, 4279. The proposal to require the concurrence of various percentages of the Justices to declare acts of Congress unconstitutional was also revived. 74th Cong., 1st Sess., H. R. 8100, 8123, 8168; H. J. Res. 301. 74th Cong., 2d Sess., H. R. 10102, 10196, 10362; S. 3739. 75th Cong., 1st Sess., S. 1098, 1276.

peated itself in that narrower measures for reform were urged to remove inadequacies in the existing federal procedure when applied to cases of large public moment.⁸⁷ Speedy justice has been the aim of Anglo-American law reformers since Magna Carta, and evils entailed through avoidable delay in adjudication were deemed to be especially far-reaching when the operation of economic measures affecting large regions or even the whole nation depended upon judicial validation. The motive power for such reform is usually some concrete experience, close to the interests of a particular legislator. The prosecution of its program by the Tennessee Valley Authority had a strong regional hold on Senator Black of Alabama.⁸⁸ The decision of Judge Grubb on November 28, 1934,⁸⁹ put at hazard a scheme of public development which, after more than a decade of political struggle, received overwhelming congressional approval. Clothed as abstract issues of governmental power, the litigation affected vast investments and touched the lives of millions of people. Yet ultimate decision, argued Senator Black, had to take the tortuous path of reaching the Supreme Court through the circuit court of appeals.⁹⁰

By a bill introduced on March 6, 1935, Senator Black addressed himself to the single, narrow purpose of securing prompt, definitive disposition of decrees restraining the operation of federal laws. The crux of his proposal was to eliminate the circuit court of appeals in these cases and to route them from the district court

⁸⁷ 74th Cong., 1st Sess., H. R. 3433, 8309; H. J. Res. 317, 344, 374; S. 2176, 3211. 74th Cong., 2d Sess., H. R. 9478, 10128, 10839. 75th Cong., 1st Sess., H. R. 2260, 2284, 3593, 3902; S. 1180.

⁸⁸ The fight over Muscle Shoals had been under way for years when Senator Black entered the Senate, in the 70th Congress, 1st Session (1927). During four sessions of Congress, Senator Black was active in support of this legislation. 69 CONG. REC. 2521-29, 3425-44, 4087-94, 4179-90, 4252-55, 4310-34, 4391-93, 4449-68, 4510-34, 4536-51, 9698, 9823-24 (1928); 70 CONG. REC. 2312 (1929); 71 CONG. REC. 1962, 2148, 3786, 5591, 5753 (1929); 72 CONG. REC. 584, 6373-77, 6400-04, 6427-40, 6495-508, 6564, 10849-52, 10995, 11177-78, 11313, 11672, 11965-70, 12382-85 (1930); 74 CONG. REC. 317-18, 1902-04, 2920, 3276-304, 3376-91, 3675, 3691, 5017, 5169-85, 5710-15, 7070-93 (1931).

⁸⁹ *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893 (N. D. Ala. 1934), 9 F. Supp. 965 (N. D. Ala. 1935), *rev'd*, 78 F.(2d) 578 (C. C. A. 5th, 1935), *aff'd*, 297 U. S. 288 (1936).

⁹⁰ See *Hearings before the Committee on Judiciary on S. 2176*, 74th Cong., 1st Sess. (1935) 13 *et seq.*

directly to the Supreme Court.⁶¹ The bill was referred to the Senate Committee on Judiciary and the Court invited to express its views. On behalf of the Court, the Chief Justice appeared with two of his colleagues and gave reasons against the enactment of the measure.⁶² The public interest with which Senator Black was concerned seemed to the Court sufficiently safeguarded through its power to jump a circuit court of appeals by the discretionary use of *certiorari*.⁶³ To open the door to every case that came within the ambit of the Black bill, seemed to the Chief Justice to be an inroad on the philosophy of selective jurisdiction underlying the Act of 1925 without compensating advantage.⁶⁴ Not to have its docket thrown out of balance was a driving consideration with the Court. Probably, also, it regarded the illumination which serious questions should derive from passing through a circuit court of appeals as valuable to the perspective and thoroughness of the Court's own deliberative process. The bill never emerged from Committee.

The fate of acts of Congress in the lower courts and some of the circumstances attending their invalidation were not calculated to allay congressional concern over procedural inadequacies. The

⁶¹ S. 2176, 74th Cong., 1st Sess. It provided direct appeal to the Supreme Court from any "restraining order, decree, judgment, or injunction prohibiting any Federal official or employee, or Federal agency or bureau" from carrying out a federal statute.

⁶² Mr. Justice Van Devanter and Mr. Justice Brandeis appeared with the Chief Justice. Mr. Justice Van Devanter briefly reiterated the views of the Chief Justice; Mr. Justice Brandeis merely expressed concurrence with what had been said by his colleagues.

⁶³ See *Hearings before the Committee on Judiciary on S. 2176*, 74th Cong., 1st Sess. (1935) 2-4. The Chief Justice pointed to the exercise of this power in the Gold Clause and Railroad Retirement Act cases and assured the Committee that there was every probability of similar action in future cases involving the constitutionality of important acts of Congress.

⁶⁴ See *id.* at 6-8. The Chief Justice also stated that the provision for appeals from restraining orders and interlocutory injunctions would cause the bill to delay decisions upon the constitutionality of statutes. Senator Black controverted the force of all three points made by the Chief Justice. He stated that every case mentioned by the Chief Justice to prove that the bill was unnecessary had taken two or three months before it reached the Supreme Court after decision by the district court, and that under the proposed bill that could be accomplished in ten days. He also denied that the statute would have a dilatory effect or unduly burden the Court, stating that reliance could be placed upon the Attorney General to exercise the right of appeal only when an important issue would be presented to the Court. See *id.* at 13 *et seq.*

existing scheme of procedure did not preclude delay in securing the final word from the Supreme Court. Thereby uncertainty hung over many of the most important activities of government. Moreover, the ability of the government adequately to represent the national interest within the framework of purely private litigation, while an old problem,⁶⁵ emerged with new intensity. Chairman Sumners of the House Committee therefore renewed the proposal of the Black bill and widened its scope. His bill provided both for direct review and for participation by the United States in litigation in which, under settled practice, it would have no standing as a party.⁶⁶ But attention was diverted from these attempts to

⁶⁵ Attempts to meet this problem in the past have been through the device of allowing the United States to appear as *amicus curiae*. E.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 469, 499 (1895); *First Employers' Liability Cases*, 207 U.S. 463, 490 (1908); *Ex parte Grossman*, 267 U.S. 87, 108 (1925). But the increasing importance of facts in constitutional decisions and the difficulties inherent in the process of establishing them before the appellate tribunal keeps this expedient from being a satisfactory solution. See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 310-18. For a prior statutory provision regarding the appearance of state officers in private suits, see NEW YORK EXECUTIVE LAW § 68 (1913).

⁶⁶ H. R. 2260, 75th Cong., 1st Sess. This bill was introduced in the House and referred to the Committee on Judiciary on January 8, 1937. 81 CONG. REC. 139 (1937). The bill did not contain Section 3, but in other respects was similar to the present Act. The bill was amended and reported favorably by that Committee, debated in Committee of the Whole, reported favorably, and passed by the House on April 7. H. R. REP. NO. 212, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 3273.

In the meantime, on February 5, 1937, President Roosevelt addressed a special message to the Congress recommending the enactment of legislation for judicial reform and attached a draft bill embodying his suggestions. The proposed bill was introduced, as S. 1392, by Senator Ashurst, and was referred to the Committee on Judiciary. After extensive hearings this committee made an adverse report on June 14. *Hearings before Senate Committee on Judiciary on S. 1392*, 75th Cong., 1st Sess. (1937); SEN. REP. NO. 711, 75th Cong., 1st Sess. (1937). On July 6, Senator Robinson introduced an amendment to S. 1392, in the nature of a substitute, which had been proposed by Senator Logan for himself and for Senators Hatch and Ashurst on July 2. After a debate lasting through July 13, a motion to recommit the bill to the Committee on Judiciary was passed on July 22. 81 CONG. REC. 7375-81 (1937). A bill similar to S. 1392 was introduced in the House as H. R. 7765, on July 6, and was referred to the Committee on the Judiciary. 81 CONG. REC. 6869 (1937).

On July 28, the Senate Committee on the Judiciary reported out H. R. 2260 with amendments, and recommended that the bill pass. SEN. REP. NO. 963, 75th Cong., 1st Sess. (1937). The bill was debated on August 7, amended and passed as amended. 81 CONG. REC. 8515 (1937). On August 9, the House disagreed to the amendments, requested a conference and appointed conferees. 81 CONG. REC. 8557

adapt the ways of private litigation to their serious public implications by the dramatic emergence of the great political controversy to which the President's proposal regarding the Supreme Court gave rise. Only after this issue was no longer before Congress, did the Senate address itself to these seemingly technical aspects of litigation. Their important relation to the whole process of constitutional litigation then became manifest, and the Senate Committee on the Judiciary unanimously reported the Judiciary Act of 1937 in substantially its present form.

In sum, the new Act gave matured expression to the combined aims of the Black and Sumners bills. The decision in *In re American States Public Service Co.*⁶⁷ vividly demonstrated that the power of the United States to share in the control of litigation, whereby the constitutionality of legislation of the profoundest national import would be effectively tested, ought not to be thwarted by the use of subtle legal forms available to a private litigant. Section 1 of the Act therefore put the exclusion of the United States from such litigation beyond the power of any judge.⁶⁸ Again, the denial

(1937). The Senate, having insisted on the amendments, appointed conferees the same day. 81 CONG. REC. 8527 (1937). On August 10, the Senate conference report was made, and was adopted by the Senate. 81 CONG. REC. 8609 (1937). The House conference report, made on the same day, was adopted on August 11 after debate. 81 CONG. REC. 8705 (1937). On August 24, the President approved the bill with an explanatory memorandum. 81 CONG. REC. 9679 (1937).

⁶⁷ 12 F. Supp. 667 (D. Md. 1935), *aff'd sub nom.* Burco, Inc. v. Whitworth, 81 F.(2d) 721 (C. C. A. 4th, 1936). In this case the lower courts considered the constitutionality of the Public Utility Holding Company Act of 1935 upon a trustee's petition for instructions under 77B. The Government did not receive notice of the proceedings until the petitions had been filed, and the issues joined and largely concluded by admissions of fact and law in the pleadings. Counsel for the Government appeared as *amicus curiae* ten days after the filing of the petitions, but were denied a continuance for the purpose of investigation. The Government was allowed to cross-examine on the issue of jurisdiction but was not allowed to share in building the record of the substantive issues. The district court held the Act unconstitutional in its entirety; the circuit court of appeals held the Act unconstitutional as applied to the particular company. When *certiorari* was asked the Government submitted a statement in opposition, fundamentally because under the circumstances of the litigation the record was inadequate for a decision upon the constitutional problem. It was urged that the parties, through collaboration in the pleadings and in the presentation of testimony, had not made an accurate representation of the facts underlying the relation of the Act to the reorganization and the constitutionality of the Act as applied to the debtor. The Supreme Court denied *certiorari*. 297 U. S. 724 (1936).

⁶⁸ Whenever the constitutionality of an Act of Congress affecting the public in-

by the Supreme Court of a speedy test of the Public Utility Holding Company Act of 1935, sought both by the utility interests and by the Government in the *Electric Bond & Share* case, reinforced the momentum of the proposals for direct review.⁶⁰ This is the essence

interest is drawn into question, the United States is entitled to intervene and become a party for the presentation of evidence and argument upon the constitutionality of the Act.

⁶⁰ A deluge of injunction suits had made it necessary for the Securities & Exchange Commission practically to suspend the operation of the Public Utility Holding Company Act of 1935 until a decision upon its constitutionality could be obtained in an adequate test of the law such as was involved in its suit against the Electric Bond & Share Co. The Supreme Court upheld the staying of suits to enjoin the enforcement of the Act until the decision of the district court in that case. *Landis v. North-American Co.*, 299 U. S. 248 (1936); see Note (1937) 50 HARV. L. REV. 655. Upon a stipulated record, the result of a year's negotiation between the parties, Judge Mack upheld the validity of the registration provisions. *Securities & Exchange Comm. v. Electric Bond & Share Co.*, 18 F. Supp. 231 (S. D. N. Y. 1937). An appeal was taken to the Circuit Court of Appeals for the Second Circuit and a petition for *certiorari* filed in the Supreme Court. The Government joined in a request for *certiorari*, setting forth the necessity for speedy determination and pointing out that the nature of the record made intermediate review by the circuit court of appeals superfluous. The Supreme Court, however, denied *certiorari* and postponed by at least six months the earliest possible time at which the Act could become effective. 301 U. S. 709 (1937). In *Davis v. Boston & Maine R. R.*, 299 U. S. 614 (1937), there was an attempt to secure *certiorari* to review the action of a district court upholding the constitutionality of the unemployment provision of the Social Security Act. No questions of fact were involved in the case and it was desirable to have a quick decision upon the constitutionality of the statute, both from the standpoint of the large number of people who had to make returns and pay the tax within six and a half weeks, and from that of the Government, faced as it was with large expenditures in setting up administrative machinery and with the possibility of a multiplicity of suits for want of a speedy decision. *Certiorari* was, however, denied. The denial of *certiorari* to the Court of Claims in *Continental Mills, Inc. v. United States*, 299 U. S. 614 (1936), delayed a decision upon the constitutionality of the provisions of the Revenue Act of 1936 dealing with the recovery of taxes paid under the Agricultural Adjustment Act. Here, too, the Government joined in the request for *certiorari*.

Certiorari was granted prior to decision by the circuit court of appeals in the cases involving the Gold Clause, the First Railroad Retirement Act, the Bituminous Coal Conservation Act and the processing tax on Philippine coconut oil. The Government did not seek review prior to decision by the circuit court of appeals in cases involving the validity of the Agricultural Adjustment Act, Titles I and II of the National Industrial Recovery Act and the Tennessee Valley Authority Act. Cases involving the validity of the National Labor Relations Act and the Silver Purchase Act of 1934 reached the Supreme Court as speedily as possible. The Government did not file memoranda on the question of *certiorari* in the cases between private persons involving the validity of the Bankhead Cotton Control Act, the first and second Frazier-Lemke Acts and the Railway Labor Act.

of Section 2 of the Act.⁷⁰ Finally, the inevitable irritation of Congress at the free-handed way in which single judges throughout the country enjoined the enforcement of some of the most vital meas-

⁷⁰ Section 2 gives all parties a right to appeal to the Supreme Court from any interlocutory or final judgment or decree involving a decision against the constitutionality of an act of Congress made by any court of the United States in a case to which the United States, any agency, officer or employee thereof was a party or to which the United States had intervened pursuant to Section 1.

The legislative history of the first two sections of the Act is extremely enlightening. The bill which was originally passed by the House was not drafted on the theory that the United States should become a party but gave the United States the right to appear in any proceeding in which it was not already represented in which the constitutionality of a federal statute was drawn into question, provided that the court deemed the question substantial. The right of direct appeal to the Supreme Court of the United States was given to the United States alone, and this right existed whether or not the United States had appeared in the lower court. 81 CONG. REC. 3273 (1937). The fact that the right of direct appeal was given to the United States alone, whether it was a party or even whether it had appeared, raised constitutional difficulties. *Muskra v. United States*, 218 U. S. 346 (1912); *Columbus & Greenville Ry. v. Miller*, 283 U. S. 95 (1931); see *Legis. (1937) 51 HARV. L. REV.* 148, 149-51. Aware of these doubts, the Senate Committee on Judiciary changed the theory of the bill to provide that the United States should become a party, but only on showing that it had a legal interest in the case. The Committee stated, however, that the interest was not limited to a pecuniary interest but covered the rights and duties relating to sovereignty. See SEN. REP. NO. 963, 75th Cong., 1st Sess. (1937) 2; cf. *Texas v. Interstate Commerce Comm.*, 258 U. S. 158 (1922); *In re Debs*, 158 U. S. 564, 584 (1895). The Senate Committee retained the requirement that the lower court find the question substantial, and eliminated many objections to the House bill by putting the section relating to appeals in its present form. SEN. REP. NO. 963, *supra*. The bill was passed by the Senate, after the requirement that the lower court find the question substantial had been eliminated. 81 CONG. REC. 8515 (1937). The conference report, adopted by both houses, retained the theory of the Senate bill that the United States become a party but eliminated the requirement that the United States have a legal or probable interest; it inserted the requirement that the statute involved affect the public interest. 81 CONG. REC. 8527, 8705 (1937).

This compromise eliminated many of the defects of both House and Senate bills. Through its provision that the United States alone could appeal, the House bill rested upon the incorrect assumption that the interest of the United States in a favorable decision as to the constitutionality of a federal statute, in a case to which neither it nor any of its agents is a party, is sufficient to create a case or controversy. By providing that the original party injured by the decision against constitutionality could appeal, the Senate bill made it unnecessary in any case in which this right was exercised to consider the Government as the only party whose interests could sustain a case or controversy. In such cases it would be possible to support the participation of the United States as being merely auxiliary to a controversy already in existence. But the provisions inserted by the Senate Committee which limited the right of the United States to intervene to cases in which it had a legal interest made

ures ever enacted, made inevitable the requirement of Section 3 for a court of three judges to set aside the will of Congress.⁷¹ This feeling fused with considerations derived from the gravity of the issues presented by such litigation and from the desire for their thorough exploration before they reached the Supreme Court.⁷²

The new Judiciary Act contains inevitable frailties of draftsmanship. Like all its predecessors, it will have to be supplemented by authoritative construction.⁷³ But the operations of the new

it possible that, as a matter of construction, the statute was dependent upon the right of the United States to maintain an independent suit. The conference amendment eliminated this difficulty. Under the bill as passed, the right of the United States to participate in a controversy already in existence and the right of the United States to maintain a suit of its own are clearly separated, the latter problem arising only when the United States attempts to appeal by itself.

⁷¹ Injunctions by single judges practically forced suspension of the Public Utility Holding Company Act of 1935 and of the construction of power projects under Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935. Approximately one quarter of the taxes due under the Agricultural Adjustment Act were impounded by injunctions. There was considerable injunctive interference with the operation of the National Labor Relations Act although there seemed to be no grounds for equitable relief. There was not a great deal of equitable interference with the operation of Title I of the National Industrial Recovery Act of 1933 or with the taxing provisions of the Social Security Act. See *Injunctions in Cases Involving Acts of Congress*, SEN. DOC. NO. 42, 75th Cong. 1st Sess. (1937).

Probably the greatest single psychological impression was created by the extremely broad preliminary injunction issued by Judge Gore in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, M. D. Tenn., Dec. 14, 1936, *rev'd*, 90 F.(2d) 885 (C. C. A. 6th, 1937). It was estimated, in a letter by the Chairman of the Authority, that the injunction cost the Authority \$1,500,000 in power revenue alone. See *Injunctions in Cases Involving Acts of Congress*, SEN. DOC. NO. 44, 75th Cong., 1st Sess. (1937) 7-8. For the feelings which the Gore injunction aroused in Congress, see 81 CONG. REC. 235, 248, 480-82, 2142-43 (1937). Whatever may have been the specific justification as a matter of substantive law of this or that individual decision, the cumulative effect of this barrage of injunctions by single judges on the wide front of governmental activity aroused a sense of disquietude regarding the potentialities of the existing procedural situation.

⁷² Section 3 provides that interlocutory or permanent injunctions restraining the enforcement or operation of an act of Congress as unconstitutional shall be issued only by three-judge district courts, and that there shall be an appeal to the Supreme Court from any decree granting or denying an interlocutory or permanent injunction in such a case.

⁷³ The relation of the right of appeal to the Supreme Court granted by the new Act to the right of appeal to the circuit court of appeals is not explicitly treated. The right of appeal to the Supreme Court from the decision of a single judge under Section 2 probably should not preclude an appeal to the circuit court of appeals. On the other hand an appeal to the circuit court of appeals from a three-judge

procedure, as has been true of all important judiciary acts, will depend mostly on the general environment in which it moves. Thus it becomes sheer speculation to estimate the extent to which clashes between Congress and the judiciary would have differed had the enactment of last August governed constitutional adjudications since March 4, 1933. The materials for prophecy of its future consequences for American constitutional law are no less exiguous. Some obvious factors in the administration of the Act will limit the freedom of the federal courts and that of the Government as litigant. The requirement of three judges entails an absorption of judicial resources which may have unexpected repercussions upon judicial efficiency, should there be a plethora of litigation.⁷⁴ Again, the course of litigation is not automatic. It depends not a little on the strategy of litigants. To the extent that the new Act makes mandatory appeals to the Supreme Court from rulings adverse to the validity of legislation, it circumscribes the discretion of the Attorney General. But these are all factors contingent upon larger forces quite outside any judiciary act. They depend upon the future of legislation, its range and volume; they depend on the impregnating political and psychological atmosphere. The Judiciary Act of 1937 is part of a continuous history of interplay between the judiciary and the other branches of the government. Insofar as the Act leaves creative scope for the courts, its ultimate significance in that historic process will be determined by the Supreme Court's attitude toward the inarticulate major premise which underlay the enactment of that statute.

district court would be futile and would doubtless be found to be precluded by Section 3.

⁷⁴ The device of a stay order which was used in *Landis v. North American Co.*, 299 U. S. 248 (1936), may be used to prevent the waste of effort involved in simultaneous consideration of the same issue by more than one three-judge court. This may be supplemented by the holding that a plaintiff is not entitled to a three-judge court when the complaint plainly does not state a case. *Ex parte Poresky*, 290 U. S. 30 (1933). The increase in the obligatory jurisdiction of the Court naturally directs attention to the effect which it will have upon the docket of the Court in a period of legislative exuberance. An examination of the cases of the last four years suggests that the increase in the number of appeals caused by the Act will largely be absorbed by an increase in those disposed of on the jurisdictional statement.

3

If it be true that substantive common law was "gradually sequestered in the interstices of procedure"⁷⁵ it is no less true that procedure, in large measure, has determined the course of American constitutional law. To utilize the technical forms of litigation devised originally for relatively narrow controversies between man and man in the adjustment of great public issues, is one of the most creative achievements of lawyers. The transference of ordinary legal procedures and modes of thought to such politico-legal controversies could not have been accomplished, and certainly could not have maintained itself, but for procedural safeguards devised partly by the Supreme Court itself and partly by Congress, by which the course of constitutional adjudication was to be confined. With full consciousness of the terrific implications of the power of judicial review over legislation, particularly in view of the silences and spacious phrasing of the Constitution, the Supreme Court evolved criteria and practices for the exercise of its "delicate" function. And so it has come to pass that the history of substantive constitutional law is intertwined with professions and practices delimiting the controversies which the Court will take, as well as the scope of its decision when it takes them.

Despite the most tempting appeals of patriotism, the Supreme Court at the very outset of its career declined the rôle of adviser even on legal aspects of policy, and defined its function strictly as that of a court of law. In 1793 the first Chief Justice, on behalf of himself and his Associates, in graceful Addisonian language, abstained from advising Washington "extra-judicially", "being judges of a court in the last resort".⁷⁶ Nor could its opinion be solicited merely because invited through the formalities of a legal

⁷⁵ See MAINE, *EARLY LAW AND CUSTOM* (1883) 389, quoted in MAITLAND, *EQUITY* (1909) 295.

⁷⁶ 3 JOHNSTON, *CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* (1891) 486. The Court might easily have "slipped into the adoption of a precedent that would have engrafted the English usage upon our system." J. B. THAYER, *Advisory Opinions in Legal Essays* (1908) 53-54; cf. FRANKFURTER, *Advisory Opinions* (1930) 1 ENCYC. SOC. SCIENCES 475. In at least two instances, both affecting Monroe, the Court departed from this principle. 1 HUNTER MILLER, *TREATIES AND OTHER INTERNATIONAL ACTS* (1931) 178; 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1926) 595-97.

proceeding. Before their reply to Washington, the Justices individually, in matters coming before them on circuit, had refused to share in the enforcement of an act of Congress which did not leave them finality of adjudication.⁷⁷

"Judicial power", however large, has an orbit more or less strictly defined by well-recognized presuppositions regarding the kind of business that properly belongs to courts. Their business is adjudication, not speculation. They are concerned with actual, living controversies, and not abstract disputation.⁷⁸ While adjudication has phases of lawmaking, legislatures not courts are policy-makers in the large meaning of the term.⁷⁹ Courts, therefore, act within relatively narrow bounds of discretion. Their jurisdiction is contingent upon the means of illumination and the resources for judgment to which the technique of an Anglo-American litigation limits them.⁸⁰ To be sure, these are the historic deposits of the operations of courts in the English-speaking world for centuries. That is precisely the strength of the doctrines of judicial self-limitation. But these considerations, rooted as they are in the profound empiricism of the common law, have special significance when applied to the peculiar function of the Supreme Court in our federal scheme.

It is true enough, as a matter of doctrine, that the Supreme Court, like every other Anglo-American court, only adjudicates

⁷⁷ *Hayburn's Case*, 2 Dall. 409, 410n. (U. S. 1792).

⁷⁸ *United States v. Ferreira*, 13 How. 40 (U. S. 1851); *Gordon v. United States*, 2 Wall. 561 (U. S. 1864), 117 U. S. 697 (1864); *Pelham v. Rose*, 9 Wall. 103 (U. S. 1869); *Singer Manufacturing Co. v. Wright*, 141 U. S. 696 (1891); *Muskat v. United States*, 219 U. S. 346 (1911); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274 (1928). There must be an actual adverse interest between the litigants. *Lord v. Veazie*, 8 How. 251 (U. S. 1859); *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339 (1892); *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.*, 145 U. S. 300 (1892); see *Atherton Mills v. Johnston*, 259 U. S. 13, 15 (1922).

⁷⁹ See GRAY, *NATURE AND SOURCES OF THE LAW* (1909) 211-30, 495-512; Holmes, J., dissenting, in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917). "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

⁸⁰ See Taney, C. J., dissenting, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 592 (U. S. 1851); Brandeis, J., dissenting, in *International News Service v. Associated Press*, 248 U. S. 215, 264-67 (1918); Brandeis, J., dissenting, in *Pennsylvania v. West Virginia*, 262 U. S. 553, 618-24 (1923).

the rights of litigants, even though a particular litigation may implicate a constitutional issue. But howsoever inescapable the duty cast upon the Court,⁸¹ the consequences of invalidating legislation necessarily involve a clash within the different organs of government.⁸² The legislature of a state or its governor, the Congress or the President, has affirmed and the Supreme Court has denied: that is the essence of an adjudication of unconstitutionality. This makes the decisive difference between litigation enmeshed in affairs of state and the staple business of adjudicating ordinary private rights. To observe the traditional conditions binding Anglo-American courts in the exercise of their jurisdiction has, in constitutional controversies, the added and vital sanction

⁸¹ BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912) *passim*; J. B. THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) 48 *et seq.*

⁸² In an address as president of the American Bar Association, John W. Davis, Esq., said: "But august as are the functions of the court, surely they do not go one step beyond the administration of justice to individual litigants. . . . Shall we say that when an American stands before the court demanding rights given him by the supreme law of the land, the court shall be deaf to his appeal? Shall wrongs visited upon him by the illegal excesses of Congresses or legislatures be less open to redress than those which he may suffer from courts, or sheriffs, or military tyrants or civilian enemies? If this be so, if in any such case the ears of the court are to be closed against him, it is not the power of the court that has been reduced but the dearly-bought right of the citizen that is taken away." Davis, *Present Day Problems* (1923) 48 A. B. A. REP. 193, 204.

Upon these comments by Mr. Davis, Lord Birkenhead made the following observations: "Your constitution is expressed and defined in documents which can be pronounced upon by the Supreme Court. In this sense your judges are the master of your executive. Your constitution is a cast-iron document. It falls to be construed by the Supreme Court with the same sense of easy and admitted mastery as any ordinary contract. This circumstance provides a breakwater of enormous value against ill-considered and revolutionary change. Whether if the forces behind revolutionary change become menacing and strong enough the breakwater will serve must be left for the future to determine. But an outsider must fully and absolutely admit that up to the present its strength has seemed extremely adequate. Your President is one for whom intellectually I have a great admiration; and personally a deep affection. His masterly address today carried me entirely with him. But surely one refinement was a little subtle. He said that the Supreme Court had not the right *in abstracto* to construe your fundamental constitutional document; but only in relation to the issues presented by an individual litigation. But is this in ultimate analysis a very serious derogation? When an issue challenged by an individual raises the question whether a law is constitutional or not, the decision of the Supreme Court decides this question for all time; and if the decision is against the legislature, the attempted law is stripped of its attempted authority." Birkenhead, *The Development of the British Constitution in the Last Fifty Years* (1923) 48 A. B. A. REP. 224, 226.

of avoiding undue political conflicts. To this end the common-law attitude of judicial empiricism has expressed itself in procedural doctrines more sharply relevant to constitutional cases. In myriad instances the Supreme Court has announced rules of self-limitation to avoid entering unduly into an area of political conflict or enlarging that area needlessly.

The Court is not the forum for a chivalrous or disinterested defense of the Constitution. Its business is with self-regarding, immediate, secular claims. Legislation will not be struck down except to vindicate a legally protected interest;⁸³ damage alone is insufficient.⁸⁴ But an assailant of legislation can only urge his interest, not another's.⁸⁵ One cannot object to a state tax as an infringement of the commerce clause when the taxed transactions are outside the bounds of interstate commerce. To be sure, this oversimplified generalization smothers subtleties presented by a statute which apparently covers both intrastate and interstate dealings in a single, unseparated provision.⁸⁶ These subtleties explain the confusion and fluctuation in applying the generality.⁸⁷

⁸³ *Stearns v. Wood*, 236 U. S. 75 (1915); *Fairchild v. Hughes*, 258 U. S. 126 (1922); *Massachusetts State Grange v. Benton*, 272 U. S. 525 (1926). A merely official interest is not enough. *Smith v. Indiana*, 191 U. S. 138 (1903); *Braxton County Court v. West Virginia*, 208 U. S. 192 (1908); *cf. Texas v. Interstate Commerce Commission*, 258 U. S. 158 (1922). Neither is the interest of a federal taxpayer in funds in the federal treasury sufficient. *Frothingham v. Mellon*, 262 U. S. 447 (1923); *cf. Crampton v. Zabriskie*, 101 U. S. 601 (1879).

⁸⁴ *Marye v. Parsons*, 114 U. S. 325 (1884); *Alabama Power Co. v. Ickes*, U. S. Sup. Ct., Jan. 3, 1938; *cf. Truax v. Raich*, 239 U. S. 33 (1915); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

⁸⁵ *Austin v. The Aldermen*, 7 Wall. 694 (U. S. 1867); *Tyler v. Judges of the Court of Registration*, 179 U. S. 405 (1900); *New York ex rel. Hatch v. Reardon*, 204 U. S. 152 (1907).

⁸⁶ There are two main aspects of the problem. The first arises where a party affected by a statute argues that in a different situation the same statutory language would be unconstitutional. The second arises when the party argues that in the particular situation in which the statute is being applied it is unconstitutional as to some third person. This was dealt with in *Holden v. Hardy*, 169 U. S. 366, 397 (1898): "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class."

⁸⁷ Compare *People ex rel. Hatch v. Reardon*, 204 U. S. 152 (1907), with *Liggett*

Just as equity, at common law, created its own jurisdictional problems with special reference to the avoidance of friction between two tribunals, so resort to equity for invalidating legislation generates its special problems, if needless friction between the judiciary and other branches of government is to be avoided. The evasion of the requirement for damage that cannot be compensated has a pungency of consequences in these public law controversies which strikingly underlines traditional equity practice. Public interest, however, exerts contradictory pressures. Considerations for abstention from decision, unless technical equity requirements are satisfied, are met with the temptation to make use of the flexible facilities of equity for prompt allaying of uncertainty. And so the cases reflect an oscillation between a very strict and a very easy-going attitude toward taking equity jurisdiction to decide constitutionality.⁸⁸ Even where Congress for obvious fiscal reasons has withdrawn power to enjoin the collection of federal taxes, the Supreme Court has grafted exceptions upon the statute.⁸⁹

The fecund possibilities of equity have been skilfully utilized in proceedings which introduce distorting elements when employed for a constitutional adjudication. The ordinary stockholder's suit invented for the adjustment of internal corporate difficulties, operates in an environment very different from its com-

Co. v. Lee, 288 U. S. 517 (1933); compare *Tyler v. Judges of the Court of Registration*, 179 U. S. 405 (1900), with *Wuchter v. Pizzutti*, 276 U. S. 13 (1928); compare *Cronin v. Adams*, 192 U. S. 108 (1904), with *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). See also, Stern, *Separability and Separability Clauses in the Supreme Court* (1937) 51 HARV. L. REV. 76, 82-106. The question arose during the 1935 term in *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226 (1936).

⁸⁸ *Moor v. Texas & New Orleans R. R.*, 297 U. S. 101 (1936), represents a healthy limitation upon the scope of injunctive relief in constitutional cases. A cotton grower sought a mandatory injunction to compel a railroad to accept for shipment cotton which lacked the bale tags required by the Bankhead Cotton Control Act. There was no showing that the plaintiff was unable to move the remaining cotton; his main embarrassment was that if he moved it by the cheapest method, by buying exemption certificates from private persons, he would be unable to recover what he had paid in the event that the Act was subsequently declared unconstitutional. The Supreme Court upheld the decision of the lower courts that there was an adequate remedy at law and refused to consider the constitutionality of the statute.

⁸⁹ See *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1932); see Note (1935) 49 HARV. L. REV. 109.

mon-law habitat as the offspring of a friendly procedure to have legislation declared unconstitutional.⁹⁰ The time-honored right of a receiver to ask instructions from his judge is invoked in a wholly different context when he asks his court to pass on the validity of an intricate and far-reaching statute which may affect the estate.⁹¹ Plainly in these situations the deciding factors have been views on the deeper problems of jurisdiction. Intensity of conviction concerning the Court's duty to abstain from constitutional adjudication until decision is really unavoidable, rather than knowledge of recondite equity learning, has determined the fate of these modern equitable devices for securing constitutional review.

The Court has not merely been alert against the use of common-law procedural forms when they are ill-adapted for constitutional adjudications. It has also built up a body of precepts derived from its general postulate of avoiding constitutional adjudication unless the case compels. That means an adequate disclosure in the record of facts which make the constitutional issue an exigent and not a hypothetical problem,⁹² as well as absence in the record

⁹⁰ See pp. 628-32, *infra*.

⁹¹ In *Burco, Inc. v. Whitworth*, 81 F.(2d) 721 (C. C. A. 4th, 1936), *cert. denied*, 297 U. S. 724 (1936), cited *supra* note 67, a petition for instructions as to the constitutionality of the Public Utility Holding Company Act of 1935 was filed for the avowed purpose of determining whether the trustee should register under the Act and whether any of the proposed plans of reorganization would be feasible. The Government, not a party to the proceeding, felt that it challenged the validity of vital legislation on wholly speculative assumption presented by an inadequate and specious record. One ground upon which the Government opposed *certiorari*, in a statement filed as *amicus curiae*, was that no justiciable controversy over the constitutionality of the Act was presented. The Government denied that the Act compelled registration by the trustee or foreclosed the possibility of reorganization, and further stated that the only effect of a decision upon the constitutionality would be to serve as an advisory opinion for the benefit of one of the opposing groups which were jockeying for strategic positions in the ultimate disposition of the estate. Even this effect, it was urged, would be minimized by the fact that the financial condition of the corporation was such that any reorganization would be merely temporary and would probably result in dissolution before the more vital provisions of the Act had become operative.

⁹² *Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33 (1885); *Hammond v. Schappi Bus Line, Inc.*, 275 U. S. 164 (1927); *Abrams v. Van Schaick*, 293 U. S. 188 (1934); *Wilshire Oil Co. v. United States*, 295 U. S. 100 (1935); *Villa v. Van Schaick*, 299 U. S. 152 (1936); *cf. Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194 (1934), Note (1936) 49 HARV. L. REV. 641; *Honeyman v. Hanan*, 300 U. S. 14 (1937).

of a legal ground other than constitutional on which a claim may rest.⁹³

The Court's general doctrine of avoidance of constitutional adjudication brought in its train special canons of statutory construction. Needless clash with the legislature is avoided by construing statutes so as to save them, if it can be done without doing violence to the habits of English speech.⁹⁴ Indeed, so wary has the Court been at times of entering the domain of constitutional discussion that it has given constricted meaning to legislation.⁹⁵ When a constitutional issue must be faced, the common-law hostility against dicta, against deciding more than has to be decided, is reinforced by admonitions of the highest statesmanship against seeking to foreclose the future.⁹⁶ Finally, of course, there is the overriding doctrine of judicial review in constitutional controversies derived from the "delicate" nature of this power and its inevitable political consequences. Marshall gave it its magistral formulation,⁹⁷ and James Bradley Thayer, in his classic essay "The Origin and Scope of the American Doctrine of Constitutional Law",⁹⁸ its most luminous exposition.

But the course of constitutional law does not run smooth, either

⁹³ *Siler v. Louisville & Nash. R. R.*, 213 U. S. 175 (1909); *Light v. United States*, 220 U. S. 523 (1911); *Tennessee Publishing Co. v. American Nat. Bank*, 299 U. S. 18 (1936); cf. *Berea College v. Kentucky*, 211 U. S. 45 (1908); *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935). But cf. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

⁹⁴ See Holmes, J., dissenting, in *First Employers' Liability Cases*, 207 U. S. 463, 541 (1908). "I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows." Compare Holmes, J., in *Towne v. Eisner*, 245 U. S. 418 (1918), with Holmes, J., dissenting, in *Eisner v. Macomber*, 252 U. S. 189, 219 (1920).

⁹⁵ E.g., *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909).

⁹⁶ Compare *Myers v. United States*, 272 U. S. 52, 135, 171-72 (1926), with *Humphrey's Executor v. United States*, 295 U. S. 602 (1935); compare *Ex parte Bakelite Corp.*, 279 U. S. 438, 450 (1929), with *O'Donoghue v. United States*, 289 U. S. 516 (1933); see *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821); *Hughes, C.J.*, dissenting, in *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 375 (1935).

⁹⁷ See *Fletcher v. Peck*, 6 Cranch. 87, 128 (U. S. 1810).

⁹⁸ (1893) 7 HARV. L. REV. 130, reprinted in THAYER, *LEGAL ESSAYS* (1908) 1.

as to procedure or substance. Fluctuations from period to period in the application of unquestioned doctrines, or divisions regarding their incidence within the same Court, affecting the scope of the commerce clause or the "silence of Congress" or due process, have their analogues in the application of procedural doctrines of abstention. The business of the last two terms was rich in opportunities for observance of adjective rules of constitutional law but also in departures from them. Numerous cases added new strength to old reasons for finding them outside the periphery of immediate, unambiguous constitutional controversies. Either the record was dubious regarding the adequate presentation of an issue⁹⁹ or the right of a particular party to urge it,¹⁰⁰ or the judgment below could amply be supported on a nonconstitutional ground.¹⁰¹

In the whole history of the Court there are few more striking examples of the interplay between explosive political issues and intricate technicalities of procedure than several cases at the last two terms. To the general public and to party leaders the *Ashwander*¹⁰² case challenged the TVA program and, derivatively, the entire national power policy. For the student of federal jurisdiction it presented a threshold inquiry quite removed from the tensions of politics and the hopes of a social program. The right of George Ashwander, a preferred stockholder in the Alabama Power Company, to question a bona fide business arrangement between the Company and the United States was a hurdle which had to be cleared before the road was open to inquiry into the scope of national power immanent in a national waterway system. Again, to the general understanding, the *Carter*¹⁰³ case brought before the Supreme Court a scheme of Congress, enacted after years of agitation and investigation, for dealing with the

⁹⁹ *Villa v. Van Schaick*, 299 U. S. 152 (1936); *Honeyman v. Hanan*, 300 U. S. 14 (1937), both *supra* note 92.

¹⁰⁰ *Moor v. Texas & New Orleans R. R.*, 297 U. S. 101 (1936), cited *supra* note 88; *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226 (1936), cited *supra* note 87; *Burco, Inc. v. Whitworth*, 81 F.(2d) 721 (C. C. A. 4th, 1936), *cert. denied*, 297 U. S. 724 (1936), cited *supra* note 91.

¹⁰¹ *Tennessee Publishing Co. v. American Nat. Bank*, 299 U. S. 18 (1936); *cf. Fox Film Corp. v. Muller*, 296 U. S. 207 (1935), both *supra* note 93.

¹⁰² *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936).

¹⁰³ *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

chronic difficulties of the bituminous coal industry. But consideration of the diverse legal problems with which the congressional solution was entangled was dependent on the answer to the preliminary inquiry whether the Carter Coal Company could raise them in the specific litigation before the Supreme Court.

In both litigations the Court found jurisdiction. In one case it sustained legislation and thereby avoided conflict with congressional policy; in the other it frustrated congressional policy by denying its legality. But, if rules of procedure are modes for assuring the wise exercise of the deliberative process and are independent of the desirability of what is decided on the merits in a particular case, the procedural issues in the *Ashwander* and *Carter* cases must be isolated from the fate of the legislation on which they passed. They must be subjected to a critique based on the Court's procedural professions regarding complainants situated as were *Ashwander* and the Carter Coal Company, but in cases which were unembarrassed by grave political or economic consequences.

Since a single vote decided the jurisdictional issue in both cases,¹⁰⁴ presumably they permitted differentiation from controlling precedents. Where the procedural issue is so delicately balanced it would not be without historic warrant to conclude that the scales were turned in favor of taking jurisdiction by the imponderable pressure of the public importance of the statutes under review.

The *Ashwander* case is the latest in a series of cases showing the penetrating influence of the corporate form of enterprise even upon the procedural phases of law. One of the most interesting chapters in the history of the federal judiciary is the successive enlargement of its jurisdiction through imaginative use of the stockholder's suit. It was first employed as a means of creating diversity of citizenship.¹⁰⁵ After a while, the Supreme Court curbed the excesses of this circumvention of state courts to avoid undue burdens on federal courts and to mitigate the hostility of

¹⁰⁴ In the *Ashwander* case, Brandeis, Stone, Roberts and Cardozo, JJ., joined in dissent on the jurisdictional point. Hughes, C.J., and Brandeis, Stone and Cardozo, JJ., dissented on procedural grounds in the *Carter* case.

¹⁰⁵ *Dodge v. Woolsey*, 18 How. 331 (U. S. 1855).

local communities.¹⁰⁶ Gradually, the stockholder's suit emerged as a conventional instrument of litigation in wider fields of controversy than ordinary corporate squabbles.¹⁰⁷ In the development of this procedure the Supreme Court at times showed a tendency toward its restriction by requiring a serious breach of director's duty which the stockholder, threatened with serious loss, was powerless otherwise to prevent.¹⁰⁸ However, in assuming jurisdiction in the *Pollock* case, the Supreme Court gave powerful momentum to the modern practice of contesting the validity of regulatory and revenue statutes through a stockholder's suit although the directors, as a matter of fair business judgment, preferred obedience to the statute.¹⁰⁹ While jurisdiction cannot be conferred by consent, it would be surprising if the Government's desire for a decision on the merits of the income tax was without influence upon the Court's sanction of the practice in the *Pollock* case.¹¹⁰

The *Pollock* case is clearly a relaxation of some of the rigorous doctrines of the Court against constitutional adjudication except, as it were, *in extremis*.¹¹¹ It thus introduces the opportunity for considerable management in bringing constitutional conflicts to a judicial issue. If it be suggested that the practice is merely a mode of accelerating the test of the validity of a statute that sooner or later will be tested, the Court's whole history of avowals against anticipating adjudication and the profound conceptions of government on which they are based, give conclusive answer.

¹⁰⁶ Equity Rule 94, 104 U. S. ix (1882); Equity Rule 27, 226 U. S. 656 (1913).

¹⁰⁷ *Greenwood v. Freight Co.*, 105 U. S. 13 (1882); *Smyth v. Ames*, 169 U. S. 456 (1898); *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (1901); *Chicago v. Mills*, 204 U. S. 321 (1907).

¹⁰⁸ *Hawes v. Oakland*, 104 U. S. 450 (1881); *Huntington v. Palmer*, 104 U. S. 482 (1881); *Detroit v. Dean*, 106 U. S. 537 (1882); *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455 (1903).

¹⁰⁹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895); *Brushaber v. Union Pacific R. R.*, 240 U. S. 1 (1916); *Hill v. Wallace*, 259 U. S. 44 (1922). These cases, by widening the area between action by the directors sufficient to justify a stockholder's suit and action so unreasonable as to show that it was not bona fide, have naturally increased the difficulty of discovering collusive suits.

¹¹⁰ See 157 U. S. at 554.

¹¹¹ The interests of the stockholders could have been sufficiently protected by a decree prohibiting the payment of the tax voluntarily and thus, under the then statute, barring recovery.

But in *Smith v. Kansas City Title & Trust Co.*,¹¹² decided in 1921, the Supreme Court passed on constitutionality in a stockholder's suit when the likelihood of the issue otherwise coming before it was much more doubtful than in the *Pollock* case. As a measure for agricultural relief, the Federal Farm Loan Act¹¹³ sought to reduce interest on agricultural loans through a system of Federal and Joint Stock Land Banks. In brief, tax exempt bonds were to be issued against farm mortgages. Claiming that the Act was invalid and that, therefore, the bonds were worthless, Smith brought a stockholder's suit against the Trust Company to enjoin it from buying these bonds.¹¹⁴ It would appear that an eventual determination of the invalidity of the bonds — were that issue ever to get before the Court in some other proceeding — would not necessarily eliminate the value of the underlying mortgages. Therefore, the claim of threatened loss to the stockholder was a preliminary question which should have been canvassed. Instead, the Court sustained the statute on its merits. Here again considerations extrinsic to the procedural analysis of the case encouraged a disregard of jurisdictional austerity. The bonds could not be successfully marketed with a cloud overhanging their validity. Moreover, all parties assumed the claim of the stockholder that the invalidity of the statute was decisive upon his interest.¹¹⁵ It is in the context of these qualifications that the assumption of jurisdiction in the *Smith* case must be placed, and they attenuate the force of its authority.

These qualifications were disregarded by the majority in the *Ashwander* case and the scope of the *Smith* case was extended. The Alabama Power Company contracted to sell property to the Tennessee Valley Authority, and arranged for an interchange of power and a division of territory between them for the sale of power. In response to a protest from a group of preferred stockholders, the directors of the Company, although expressing belief in the invalidity of the Tennessee Valley Authority Act, relied

¹¹² 255 U. S. 180 (1921).

¹¹³ 39 STAT. 360 (1916), amended, 40 STAT. 431 (1918).

¹¹⁴ The statement of the stockholder that "The tax exemption question is the real issue sought to be settled here" casts light upon the true nature of the attack. Brief for Appellant, p. 2.

¹¹⁵ See 255 U. S. at 199, 201; Brief for Joint Stock Land Bank of Chicago, Intervenor-Appellee, p. 11.

upon the difficulties of successful litigation to support the contract as a wise business adjustment. Thereupon Ashwander and his group brought suit against the Company and the Tennessee Valley Authority to enjoin enforcement of the contract and for a declaration of invalidity against the Tennessee Valley Authority Act. Speaking for himself and four of the Justices, the Chief Justice found jurisdiction. Ashwander was allowed to sue, not because of any threatened acts of his corporation; it was sufficient that he challenged the lawfulness of the authority of those with whom the corporation was proposing to deal.¹¹⁶

The Chief Justice relied heavily upon *Smith v. Kansas City Title & Trust Co.*¹¹⁷ But whatever impairment of the common stockholder's interest was threatened in the *Smith* case by his Company's investment in \$20,000 worth of bonds of possible invalidity, the preferred stockholder of the Alabama Power Company could show no such danger through consummation of his Company's contract.¹¹⁸ Moreover, in all previous stockholder's suits to test constitutionality, with the exception of the *Smith* case, the stockholder was merely insisting on a constitutional right belonging to the corporation. The stockholder was pressing a derivative claim. In the *Ashwander* case the Court assumed jurisdiction at the behest of a preferred stockholder although at best it was extremely doubtful whether the Company itself could disaffirm its contract.¹¹⁹

¹¹⁶ See *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 319 (1936).

¹¹⁷ See 297 U. S. at 320, 322.

¹¹⁸ The effect of the transaction upon the margin of safety of the preferred stockholders was negligible. The Court stated that there was a possibility of injury to the corporation in that, if the Tennessee Valley Authority Act was unconstitutional, the corporation would have no remedy on the contract against the Authority. Even if such a risk to the corporation could threaten injury to the preferred stockholders, it was eliminated by the cash terms of the contract.

¹¹⁹ It is difficult to see how the Alabama Power Company could rescind the contract as *ultra vires* the TVA without proving any likelihood that the TVA would not live up to its obligations. Since the Alabama Power Company had been purchasing power from Muscle Shoals since 1925, it is even more difficult to see how it could claim rescission on the ground that the Government was without authority to manufacture this power. Cf. *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581 (1888); *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407 (1917); *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469 (1925). The provisions in the contract restricting the areas which the TVA and the Power Company could serve indicate a conclusive answer to any claim that the Power Company could test

Against this conclusion Mr. Justice Brandeis, Mr. Justice Stone, Mr. Justice Roberts and Mr. Justice Cardozo vigorously protested. In what is perhaps the most notable opinion expounding the rationale of jurisdiction in constitutional controversies, Mr. Justice Brandeis found infringement of those rules of judicial self-limitation which alone gave coherence to the great body of precedents which he passed under review.

In *Carter v. Carter Coal Co.* the Court had before it suits on behalf of coal operators to enjoin the regime established by the Guffey Coal Act¹²⁰ for the rationalization of the bituminous coal industry. Of the companies for which relief was sought one sold 75% of its total output in interstate commerce, the rest not less than 96%. Part I of the Guffey Act formulated a code of fair practice and price stabilization; Part II outlawed unfair labor practices and provided that collective labor agreements regarding wages and hours entered into between operators and men under defined conditions should be binding on all code members. The device of a coal tax with a drawback of 90% in favor of those who accepted the code was employed for the enforcement of the regime.

In the posture of the litigation before the Court, the only im-

the constitutionality by a suit to enjoin competition, as was done in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, E. D. Tenn., Jan. 21, 1938. But cf. *Alabama Power Co. v. Ickes*, U. S. Sup. Ct., Jan. 3, 1938.

The Ashwander case was not the last pronouncement by the Supreme Court on the use of stockholder's suits in constitutional litigation. In *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), the Court apparently abandoned the requirement of a breach of discretion by the directors by upholding one stockholder's suit brought to enjoin the directors of a corporation from accepting the Bituminous Coal Code and another brought to enjoin the directors of a second corporation from not accepting it. Compare *Carter v. Carter Coal Co.*, 63 Wash. L. Rep. 986 (Sup. Ct. D. C. 1935), with *Clark v. R. C. Tway Coal Co.*, 12 F. Supp. 570 (W. D. Ky. 1935). In *Helvering v. Davis*, 301 U. S. 619 (1937), the Court, by a five to four decision, in an opinion delivered by one of the dissenters, held that the validity of the taxes imposed by Title VII of the Social Security Act for Old Age Benefits was raised by a stockholder's suit to enjoin their payment although the directors had four years in which to sue for refund. The Court relied upon the fact that the Government waived, so far as was within its power, all procedural defects. Mr. Justice Cardozo referred with respect to the opinion of Judge A. N. Hand in *Norman v. Consolidated Edison Co.*, 89 F.(2d) 619 (C. C. A. 2d, 1937), which reached an opposite result on similar facts where the method of raising the question was challenged by the Government.

¹²⁰ 49 STAT. 991, 15 U. S. C. §§ 801 et seq. (Supp. I 1935).

mediately operative features of the Act were the provisions dealing with unfair trade competition and price fixing. There was no showing that the operators were affected by the code provisions defining unfair labor practices and the Court found no agreement touching hours or wages, or the threat of any, which would adversely affect the operators. Furthermore by the express terms of the statute, operators were not estopped from contesting in the future the validity of the labor provisions by present acceptance of the code. But a majority of the Court, finding that the labor provisions exceeded the power of Congress, invalidated the whole Act. Four members of the Court dissented. Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo observed the jurisdictional proprieties. Finding the price-fixing provisions valid and not dependent upon the labor provisions, they refused to consider the validity of the latter, until a concrete dispute should come before the Court. The Chief Justice agreed with the majority concerning the invalidity of Part II but agreed with the other three Justices concerning the validity of Part I and its separability.

The assumption of the majority that Congress would not have enacted Part I dis severed from Part II, despite the amplest separability clause, was promptly disproved by the re-enactment, in substance, of Part I as an independent statute.¹²¹ But even on its own assumption, the majority included very disparate situations within the single concept of inseparability. To enforce a valid portion of a statute after a more or less closely connected portion has been found invalid is one thing. To refuse to enforce a valid portion of a statute before any judicial necessity has arisen for passing on the constitutionality of the remainder, quite another. Precisely on such distinctions depends observance of the Court's canons for constitutional jurisdiction.

Of the numerous cases during the last two terms which will pass into history, *Morehead v. New York ex rel. Tipaldo*¹²² represents

¹²¹ Shortly after the decision in the Carter case, the House of Representatives passed a statute containing the price-fixing provisions of the Guffey bill. The bill was reported favorable by the Senate Committee on Interstate Commerce but, due to a filibuster, the Senate adjourned before its passage. Substantially the same statute was promptly re-enacted during the first session of the Seventy-Fifth Congress. 18 U. S. C. A. §§ 828-51 (Supp. 1937).

¹²² 298 U. S. 587 (1936).

the most striking fusion of public explosiveness and procedural technicalities. In that case the majority employed jurisdictional restraints not as means for avoiding conflict with legislative policy but as a self-created disability against the removal of such conflict. The Court had granted *certiorari* without restriction,¹²³ to review a decision of the New York Court of Appeals¹²⁴ invalidating a minimum wage law drawn specifically to meet the opinion in the *Adkins* case.¹²⁵ Despite the changes in the language of the statute, the New York Court of Appeals deemed itself controlled by the ruling in the *Adkins* case.¹²⁶ The Supreme Court invoked two procedural considerations in affirming the Court of Appeals. According to correct appellate practice, so ruled the majority, the only issue before the Court was whether the case at bar could be distinguished from the *Adkins* case.¹²⁷ And that issue was sub-

¹²³ 297 U. S. 702 (1936).

¹²⁴ *People ex rel. Tipaldo v. Morehead*, 270 N. Y. 233, 200 N. E. 799 (1936).

¹²⁵ *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

¹²⁶ See 270 N. Y. at 236-39, 200 N. E. at 801-02.

¹²⁷ See 298 U. S. at 604-05. A rule of practice limits review upon *certiorari* to the scope of the petition. *Gunning v. Cooley*, 281 U. S. 90 (1930); *New York v. Irving Trust Co.*, 288 U. S. 329 (1933); *Helvering v. Taylor*, 293 U. S. 507 (1935); see ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1937) § 389. The considerations underlying this rule are the same as those which require an assignment of errors on appeal. Opposing counsel and Court should be informed of the issues to be reviewed so that the adjudicatory process may be properly canalized. The discretionary nature of review by *certiorari* intensifies the importance of this practice. See Frankfurter and Hart, *supra* note 3, 47 HARV. L. REV. at 284-85. In all prior cases in which the rule had been applied the conception of a legal issue was derived from the reasons underlying its formulation. E.g., *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240 (1918) (title as opposed to Statute of Limitations); *Steele v. Drummond*, 275 U. S. 199 (1927) (illegality of a contract as opposed to its discharge). In the *Tipaldo* case, however, the Court's view implies that counsel must set forth not the legal issue which would give adequate notice to the Court and opposing counsel but the range of argument in their support. The issue in the *Tipaldo* case was whether the statute was such a limitation on the "freedom of contract" as to violate the Fourteenth Amendment.

An examination of the contents of the petition for *certiorari* affords a conclusive answer to the views of the majority. It shows that the petitioner took the broad position that the statute was constitutional irrespective of anything decided in the *Adkins* case. And such statements as the sixth reason relied upon for the allowance of the writ, that "The circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in light of the New York Act and conditions deemed to be remedied thereby", raised the argumentative claim that the *Adkins* case should no longer be followed, expressed as euphemistically as the tactful language of advocacy would naturally convey it. For an illuminating

stantially foreclosed because the Supreme Court interpreted the decision below to establish an identity between the New York statute and the statute in the *Adkins* case and thereby to bar an examination by the Supreme Court of the fact of identity.¹²⁸ But, despite these iron-clad procedural confinements,¹²⁹ the Court deduced from the *Adkins* case the constitutional invalidity of any minimum wage regulation. The *Adkins* case was then approved, and the New York Act, and with it all minimum wage legislation, necessarily held outside constitutional bounds.

The Chief Justice challenged neither the limited scope of review nor the *Adkins* decision. But he denied the majority's construction of the state court's construction of the state statute.¹³⁰ Free to differentiate the *Adkins* case, he did not find it controlling and sustained the new statute. In his dissent the Chief Justice had the concurrence of Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo. But these three Justices, speaking through a trenchant opinion by Mr. Justice Stone, denied the existence of any limitation of appellate practice which imprisoned the Court within its own ruling in the *Adkins* case.¹³¹ Having found that case, on full consideration, to be without reasonable foundation, they desired it overruled.¹³²

That a Justice who found technical barriers of appellate practice against even considering whether the specific objections to minimum wage legislation made by the *Adkins* case had been met by a later statute should, within less than a year, make the ma-

analysis of this ruling, see a letter of Mr. Edward F. Prichard, Jr., in the Boston Herald, March 31, 1937, reprinted in 81 CONG. REC. app. 729 (1937).

¹²⁸ See 298 U. S. at 607-09.

¹²⁹ The majority stated that the state court "held the Act repugnant to the due process clauses of the state and federal constitutions". See 298 U. S. 603. This statement was passed over in silence by the dissenting Justices. But if it was true, the Court would have been without jurisdiction to review the action of the state court. *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934).

¹³⁰ See 298 U. S. at 621-22.

¹³¹ See 298 U. S. at 636.

¹³² The mystic doctrine whereby the House of Lords is disabled from overruling itself (*London Street Transit Co. v. London County Council*, [1898] A. C. 375) has never had the slightest tolerance in the Supreme Court of the United States. The history of the Supreme Court of the United States in no small measure is a process of doctrinal rejuvenation through explicit overruling of decisions which have lost the validity of reason. See *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932).

jority necessary for overruling the *Adkins* case, cannot have many parallels in the history of the Supreme Court. But, within less than a year, the *Adkins* case was overruled.¹²²

A veritable Nemesis seems to have pursued the litigation to test minimum wage laws. And the vicissitudes of procedure have played no inconsiderable role in the drama. *Stettler v. O'Hara*, the first minimum wage case, was argued on December 16 and 17, 1914. While the case was under advisement important changes in the composition of the Court had occurred, and, on June 12, 1916, it was restored to the docket for reargument. It was reargued on June 18 and 19, 1917, and on April 9, 1917, affirmed by an equally divided Court.¹²⁴ Minimum wage legislation in some dozen states was thus given a precarious lease of life. On June 6, 1921, a majority of the Court of Appeals of the District of Columbia sustained a congressional minimum wage statute for the District.¹²⁵ But on July 1, 1921, by a strange rearrangement in the personnel of the Court of Appeals, a rehearing was granted. On November 6, 1922, a new majority of the Court of Appeals invalidated the legislation.¹²⁶ In the year intervening between these last two decisions, the membership of the Supreme Court had again greatly changed. On April 9, 1923, the new majority of the Court affirmed the Court of Appeals;¹²⁷ Mr. Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissented; Mr. Justice Brandeis took no part.

Thus the span between the first argument on minimum wage laws in the Supreme Court and their sanction covers nearly a quarter century. This is only a partial accounting. For surely history will not gainsay the opinion of Mr. Chief Justice Taft that *Muller v. Oregon*¹²⁸ really controlled the validity of minimum wage legislation.¹²⁹ And the *Parrish* case came nearly thirty years after the then Mr. Louis D. Brandeis had, in the *Muller* case, won the Supreme Court to his view of the appropriate constitutional attitude toward industrial legislation. The end crowns all. But surely it would require the author of *Bleak House* to do justice

¹²² *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

¹²⁴ 243 U. S. 629.

¹²⁵ See 284 Fed. 613, 623.

¹²⁶ See 284 Fed. 613.

¹²⁷ 261 U. S. 525 (1923). See Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 HARV. L. REV. 545.

¹²⁸ 208 U. S. 412 (1908).

¹²⁹ See 261 U. S. at 566.

to a course of litigation whereby it took thirty years for the states to be allowed to deal through minimum wage legislation with some of the deep social problems created by the entry of women in large numbers into industry.

The Court has written its own comment on the wisdom behind its doctrines of abstention from needless expression of constitutional views. Less than a year after the *Carter* case the Chief Justice and Mr. Justice Roberts supported decisions sustaining the Wagner Act hardly reconcilable with some of the views they sponsored regarding the invalidity of the labor provisions under the Guffey Act.¹⁴⁰ The circumstances which entered into a change of the Court's outlook and of its specific rulings between the 1935 and the 1936 terms are among the arcana of history. But one thing is patent to every informed reader of the Court's opinions. A disregard of settled doctrines of constitutional procedure dangerously borrows trouble. It adds excessive friction to the complicated workings of our government; it weakens the responsibility of Congress in shaping policy; it undermines vital confidence in the disinterested continuity of the judicial process.

Felix Frankfurter.
Adrian S. Fisher.

HARVARD LAW SCHOOL.

¹⁴⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937). For the effect of the *Carter* case on the judges in the lower federal courts, see *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 83 F.(2d) 998 (C. C. A. 5th, 1936); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 85 F.(2d) 1 (C. C. A. 2d, 1936); *Foster Bros. Mfg. Co. v. National Labor Relations Board*, 85 F.(2d) 984 (C. C. A. 4th, 1936); *Eagle Pitcher Lead Co. v. Madden*, 15 F. Supp. 407 (N. D. Okla. 1936).

PERPETUITIES IN A NUTSHELL *

WE school teachers have delighted to make a mystery of the Rule against Perpetuities. We love to tell the old, old story of its tangled history; we love to trace its development through English cases which deal with settlements of incredible complexity; we love to point the finger of scorn at the mistakes of courts on both sides of the Atlantic; and most of all we love to spin out our webs of theory on relatively obscure points.¹ The result is a very highly elaborated field of the law — a great advantage to those who know their way around in it, but precious little help to the ordinary practitioner who has had no particular occasion to explore this terrain but who finds himself with a perpetuities problem to handle. Such a one needs a guide book to the law of perpetuities which will enable him to analyze his case and acquire a sound background without unreasonable expenditure of time and effort. This paper seeks to supply that need.

We teachers, moreover, have neglected sufficiently to notice that the greatest importance of the Rule in the practice of the profession does not lie in the argument of cases. It lies in the drafting of the instruments which must measure up to the requirements of the Rule or fail. And for this purpose it is less important that the law of perpetuities be elaborated in the magnificent detail of Gray's treatise (Did anyone ever read Gray through?) than that it be stated in so small a compass that the elements of the Rule can be grasped as a whole and retained as a background of knowledge against which effective dispositive instruments can be created. This paper seeks to perform this function of simplified statement.

And let us not forget the bedeviled law student. There are limits to the principle that that learning is best which he has to sweat most to obtain.

* If this paper fails of its purpose it has, at least, eminent company. Lord Thurlow undertook to put the Rule in *Shelley's Case* in a nutshell. "But", said Lord Macnaghten, "it is one thing to put a case like *Shelley's* in a nutshell and another thing to keep it there." *Van Grutten v. Foxwell*, [1897] A. C. 658, 671.

¹ I plead guilty on all counts. See Leach, *Powers of Sale in Trustees and the Rule against Perpetuities* (1934) 47 HARV. L. REV. 948.

ADVERTISEMENTS

COMMEMORATING A GOLDEN ANNIVERSARY
THE HARVARD LAW REVIEW ASSOCIATION OFFERS

The entire
Harvard Law Review
1887 TO 1937

In 50 Bound Volumes . . . 400 Issues . . . 60,000 pages
with a new, revised Cumulative Index

for \$100

The remarkably low price is the result of nominal reproduction costs made possible by the foresight of the Editors over the past fifty years in electrotyping every issue.

As a reader of the Review, you are familiar with the unique value of its content. A full set of the Review with over 1000 Leading Articles, 2000 Editorial Notes, and 6000 Recent Case Notes will give you both a broad survey of the Law and the intensive scholarly analysis that many hundreds of dollars spent on Treatises, Digests, and Encyclopedias would fail to supply.

For those who already have certain volumes of the Review, a reduction of \$1.00 for each volume not taken will be made.

**This is a limited offer; only a few
hundred sets have been printed.**

Address orders to:

Harvard Law Review Association
Cambridge, Mass.

All prices F. O. B. Norwood, Mass.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

Delaware Corporations

• • •
We assist lawyers in and furnish approved precedents for Incorporation, Qualification, Amendment, Merger, Reduction of Capital, Dissolution and Renewal.

A dependable service, combining speed and accuracy, based upon 38 years' experience under the guidance of experienced officers and experts, is furnished lawyers at reasonable scheduled fees.

Corporation Service Company

DELAWARE TRUST BLDG. WILMINGTON, DELAWARE
Telephone 8305 Cable Address: CORPSERV

PUBLISHERS OF

Marvel on DELAWARE CORPORATIONS AND RECEIVERSHIPS
(6th Ed. by Christopher L. Ward, Jr. and Josiah Marvel) \$5.00 postpaid
Annotated with all American Decisions

DIGEST of law, pamphlet on "Stock Without Par Value" and revised organization forms sent free to lawyers on request.

Labor Relations Report

A New Weekly Publication
Surveying the Entire Field of
Labor Relations

A subscription to Labor Relations Reports will bring you coverage of the news and the law of the entire field of labor relations.

Subscription \$52.00 a year which includes copy of Labor Relations Reference Manual.

Sample copy will be sent upon request

BUREAU OF NATIONAL
AFFAIRS, INC.

2233 M Street, N. W.
WASHINGTON, D. C.

HOTEL COMMANDER

CAMBRIDGE
Off Harvard Square

For a light lunch or a
complete meal visit the

DRUM GRILL

Suites Furnished or Unfurnished
Dinette-Kitchenette. Hotel Service
Full Transient Accommodations
From \$3 Daily — \$60 Monthly
Complete Facilities for Social
Functions, Banquets, Meetings
KIR kland 4900

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

*A Ready Reference to Judicial Opinion—
on the Problem of Patentable Invention*

INVENTION AND THE LAW

BY

HARRY AUBREY TOULMIN, JR.

J.D., Litt.D., LL.D.

of the Ohio Bar

Member of the Bar of the Supreme Court of the United States

INVENTION AND THE LAW makes at once available
to the user —

- a) Statements of the Rules of Seven Hundred Cases used
in determining what is Invention or what is not Inven-
tion, based upon pronouncements of the United States
Supreme Court;
- b) Pertinent extracts from that Court's opinions;
- c) A reference to the leading cases of the United States
Circuit Courts of Appeal and the English Courts.

"Veritable repository of usable quotations . . . Novel arrangement can-
not fail to be useful in the conduct of litigation." — *Boston University
Law Review*.

"A reference to abundant authority." — *University of Pennsylvania
Law Review*.

"Method of approach is peculiarly helpful in dealing with the subject of
invention." — *Commercial Law Journal*.

"Interesting and instructive reading." — *Notre Dame Lawyer*.

"This reviewer believes that . . . this chapter ought to be read by every
lawyer who is at all interested in one of the things which has greatly
contributed to this country's economic development—the American
patent system." — Edward S. Rogers, *American Bar Association Journal*.

*We will be pleased to send you INVENTION AND
THE LAW for five-day free examination. 347 pages,
6 x 9 inches, bound in cloth, \$5.00 postpaid.*

PRENTICE-HALL, INC.

70 FIFTH AVE. DEPT. 1P-30 NEW YORK, N. Y.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

BINDING

of separate volumes of the

HARVARD LAW REVIEW

in uniform buckram with red and black labels
stamped in gold, on the back

\$2.50 per volume

Postage extra.

THE HARVARD LAW REVIEW ASSOCIATION

GANNETT HOUSE

CAMBRIDGE, MASS.

CYRUS BREWER & CO.

New England Underwriters
For Several Substantial
And Progressive Insurance
Companies Writing All
Forms of Insurance

44 KILBY STREET

ARTHUR K. POPE
FRANCIS S. SNOW

Tel. Cap. 6090

BOSTON, MASS.

STEPHEN J. HALLAHAN
HOLTEN B. PERKINS

REPRINTS

Selected Essays on the Law of Trusts	Austin W. Scott	\$1.00
Selected Essays on the Law of Evidence		1.00
Legislative Changes in the Law of Equitable Conversion by Contract	Sydney P. Simpson	.15
(Reprinted from the <i>Yale Law Journal</i>)		

THE HARVARD LAW REVIEW ASSOCIATION

GANNETT HOUSE

CAMBRIDGE, MASS.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

ESTABLISHED 1818

Brooks Brothers
CLOTHING
 Men's Furnishings, Hats & Shoes

MADISON AVENUE COR. FORTY-FOURTH STREET
 NEW YORK

Outfits
 for
 Winter
 Sport



© Brooks Brothers

BRANCHES
 NEW YORK: ONE WALL STREET
 BOSTON: NEWBURY COR. BERNARD STREET

CONSTITUTIONAL LAW OF THE UNITED STATES

BY HUGH EVANDER WILLIS

A book used by justices of the United States Supreme Court.
 A book which practitioners find gives them materials for their briefs and is so interesting that they read it from cover to cover.
 A book which is indispensable for students who desire a complete grasp of all the principles of constitutional law.
 The first text-book which has the "correct approach" to constitutional law.
 The only book which sets forth that part of the Constitution made by the Supreme Court.
 The one book which has accurately forecasted Supreme Court decisions.
 A book which "ranks today where Cooley's Constitutional Limitations ranked fifty years ago and Story's Constitutional Law ranked one hundred years ago."
 A book which should be in the library of every first-class lawyer.

THE PRINCIPIA PRESS, INC.
 BLOOMINGTON, INDIANA

1200 pages \$10.00 postpaid

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS.

With the Compliments

of

The Plimpton Press

NORWOOD · MASSACHUSETTS · U · S · A



Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

RECENT HARVARD BOOKS

ESSAYS IN HISTORY AND POLITICAL THEORY

IN HONOR OF CHARLES HOWARD MCILWAIN

"Few volumes compiled in honor of a scholar and teacher really do him honor in so spontaneous and even unconscious a way." — *American Historical Review*. \$3.50

FORCE OR REASON

By HANS KOHN

"In the whole season's literary output it would be difficult to find a more timely or significant work . . . Its perfectly plain and convincing conclusions come with a positively startling force." — *New York Herald Tribune*. \$1.50

MARKET CONTROL IN THE ALUMINUM INDUSTRY

By DONALD H. WALLACE

The first broad economic history of this industry. The book is a valuable treatment of some of the perplexing problems presented by modern industrial organization. \$5.00

THE MASSACHUSETTS FIRST NATIONAL BANK OF BOSTON, 1784-1934

By NORMAN S. B. GRAS

Stressing policy and management rather than charters and officials, Mr. Gras's historical outline shows how by vigorous leadership this metropolitan commercial bank has become one of America's great institutions. \$5.00

HARVARD LEGAL ESSAYS

IN HONOR OF JOSEPH H. BEALE AND SAMUEL WILLISTON

"Dignified, impressive, scholarly, and inspiring." — *Virginia Law Review*. "Full of good articles by good men." — *Georgetown Law Journal*. "Constitutes a notable addition to the literature of American law and its history." — *Illinois Law Review*. \$5.00

JUDICIAL ASPECTS OF FOREIGN RELATIONS

By LOUIS L. JAFFE

"With all who have a live interest in such questions of international law, I am deeply grateful to the author for this very valuable and thought-provoking book." — *New York Times*. \$3.50

HARVARD UNIVERSITY PRESS

Publishers of the Loeb Classical Library

26 RANDALL HALL CAMBRIDGE, MASS.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

*Citable in Every Court
in America*

FEDERAL CODE ANNOTATED
PERPETUAL REVISION PLAN



All Titles and Section Numbers are the same as in the U. S. Code adopted by Congress.

Laws and annotations in F. C. A. are instantly accessible from a citation to any U. S. Code.

F. C. A. shows the Federal Law as it literally exists in the language of the Official Statutes at Large.

Annotations are Complete and Exhaustive with Parallel References to all Series of Reports.

Contains Complete Annotations for All Uncodified Laws.
Each Volume Separately Indexed.

Many Other Exclusive Features.

In Step With The Times

Reasonably Priced — More Convenient — Inexpensive Service

Full information on request

THE BOBBS-MERRILL COMPANY

PUBLISHERS • INDIANAPOLIS

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

The Spirit of 1873

The ideal of perfection—the spirit which this business inherited from its founder Frank Shepard—remains the goal of the publishers of Shepard's Citations today.

No other goal will do. All others imply an end of effort. And to Shepard craftsmen, as to leaders in every field of endeavor, each new achievement marks a fresh beginning.

It does not alter matters that Shepard's holds acknowledged supremacy in the furnishing of a complete citation service . . . nor that Shepard has set an unsurpassable standard of quality . . . nor that the Bench and Bar have honored this service with the final and unmistakable reward of preference.

These facts bear witness to leadership. But the leader is a true leader only when he merges the thought of leadership in a greater thought of continued service and advancement. The builders of Shepard's will always endeavor to improve upon their own standards—to build better and better—to give greater and greater value, month after month and year after year.

Shepard supremacy is more apparent today than ever before because Shepard service is better than at any time since this business was established in 1873—sixty-five years ago.

Shepard's Citations

The Frank Shepard Company
76-88 Lafayette Street
New York

ADVERTISEMENTS

**NOW PUBLISHED
THE
HARVARD LAW SCHOOL
YEARBOOK**

Makes Its First Appearance

This very complete and interesting directory of law students and the law faculty, featuring the individual pictures of members of the school and a "*History of the Harvard Law School*" by Roscoe Pound, is now ready for distribution.

**Authentic biographies of the faculty.
Photographs of the law buildings.
Group pictures of honor students.
Articles about clubs and activities.
Student indices by states, schools, etc.**

The publication is of infinite practical value to all persons interested in the school.

Price \$5.25 Postpaid

**PUBLISHED BY
THE YEAR BOOK COMMITTEE, OF PHILLIPS BROOKS
HOUSE ASSOCIATION
CHARLES W. STEADMAN, *Chairman*
CAMBRIDGE, MASSACHUSETTS**

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

LAW SCHOOL
OF
HARVARD UNIVERSITY

TERMS OF ADMISSION

Graduates of approved colleges presenting scholastic records which meet the standards set by the Committee on Admissions will be admitted.

No student will be registered before July 1, 1938, but as the number of those seeking admission much exceeds the number that can be admitted, applications with transcripts of college records should be sent for approval to the Secretary prior to July 15th. Records complete to the second half of the senior year will be accepted until July 1st.

FOR FURTHER INFORMATION APPLY TO

THE SECRETARY
Harvard Law School

CAMBRIDGE, MASS.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

Why The Courts Cite The North Eastern Reporter States

New York, Massachusetts, Illinois
Indiana and Ohio

The Basic Law of most of the States is drawn from that of these outstanding Code and Common Law States whose construction of similar laws is usually followed.

The diversified activities of these States with their great population, wealth and varied industries have produced a wide diversity of litigated questions.

It is the Reporter To Which the Courts Turn

When looking for the cases which are just in point, when their own courts have not passed on a question or when it is desired to supplement local authorities.

Begin Now

You can add the few volumes of the new
North Eastern Reporter, 2d Series
At a very moderate cost.
Ask for particulars.

WEST PUBLISHING CO.

St. Paul, Minn.

Please mention THE REVIEW when dealing with our Advertisers.

ADVERTISEMENTS

**Stare
decisis**

Great law books are hallowed by use. Like the opinions of great judges, they are continually creative in the present. Lawyers have decided that they are good. The decision stands.

Among such authoritative books on our list, the following merit continuing consideration:

- Wigmore, Treatise on Evidence, \$65
- Wigmore, Code of Evidence, \$7.50
- Wigmore, Science of Judicial Proof, \$10
- Holmes, The Common Law, \$4
- Warren, The Making of The Constitution, \$3.75
- Warren, Congress, The Constitution and The Supreme Court, \$3.50
- Warren, History of The Supreme Court, \$10
- Holdsworth, History of English Law, \$87

**Little, Brown and Company
34 Beacon Street
Boston**

Please mention THE REVIEW when dealing with our Advertisers.

106

ANNOUNCING ~
THE NEW CUMULATIVE
INDEX
of the
Harvard Law Review

ready for delivery this month

All the material in the fifty volumes
of the Review is indexed under one
or more of the following headings:

Author Index of Leading Articles
Subject Matter Index of Leading Articles
Author Index of Books Reviewed and Noted
Subject Matter Index of Books Reviewed and Noted
Index Digest of Articles, Notes, and Recent Cases
Table of Cases Noted or Discussed

Bound in Buckram . . . Price \$8.50 Delivered

Address Order to
HARVARD LAW REVIEW ASSOCIATION
GANNETT HOUSE CAMBRIDGE, MASS.

file
personal

~~Full File~~

[1938]

PSF February 23

FELIX FRANKFURTER

CAMBRIDGE, MASS.

Dear Lane -

It would be a great
surprise were if I
did not hear of kind
deeds by you, amidst
all the terrible exactions
of your office, these days.
And so, it is just like
you to find time to
send Julian Mack
a cheering note. And
I do want to thank
you for it - He wrote
me of the very great

it brought him.
joy. He himself is
such a golden-hearted
man, that I want
to send you this
word of gratitude
for bringing him
warmth and solace
now that he is in
the valley of deep
shadows.

My affectionate
regards to you.

Ever faithfully yours

108

~~Letter File~~

RF March 10, '38

FELIX FRANKFURTER
CAMBRIDGE, MASS

Dear Hank -

Arthur Morgan is
not Quincy Walker.
But I am greatly hoping
that you will do
another one of your
Quincy Walker in-
vestigations & public
educations. Of course
it's full of difficulties,
but you will know
how to take the trouble

to school on it. I don't
don't have to tell you
how confused even
Boston folk are, &
how much confusion
muddying of the
stream is going
on. But you have
the power of public
elucidation and
exposition — and
Arthur Morgan
may give you a
real chance.

The time you are talking is
just right - a distance on
specifications, on details,
and opening the windows
wide to let out the hot air.

I think much of you these
days, and rejoice in your
serenity through it all. Warm
joint me in affectionate regards
Ever faithfully
M. J.

Dear Luigi

file
personal

Please put this
into the President's
hands, and oblige,
with warm regards,

VI

~~Handwritten~~ PSF ~~July Box 37~~ Monday

Dear Sir

Have been good
Enough to put
the letter into
the President's
hands, and oblige
always with Cordial
Regards
Yours
J. H.

62
FELIX FRANKFURTER
CAMBRIDGE, MASS.

TVA Follett. 1938
192 Brattle Street
March 14, 1938

Dear Mr. President:

1. Now that I have read the stenographic minutes of your T. V. A. Hearing last Friday I can hardly express in words of moderation my admiration for the extraordinary, Lincoln-like patience which you showed to Arthur Morgan's contumacy, as well as for the skill with which you developed complicated issues under the most trying circumstances. I do not know when I have read the full text of a proceeding of inquiry which left me with anything like as much admiration for its conduct. If these minutes were fairly disseminated throughout the country and widely read, there would be nothing left of the matter, and people generally would feel as Frank Buxton of the Boston Herald felt after he and I talked about it at length, when he said, "After that hearing it's all over with Arthur Morgan."

2. But it's not all over, because, in their present form, the Hearings will not be widely read, and a great deal of confusion and misrepresentation will remain in the air. Therefore the business raises very practical problems for the future. It would be very surprising indeed if the Chairman should change his attitude. The minutes make abundantly clear that Arthur Morgan is fanatically self-righteous and is altogether a pathological case. He will, therefore, be obstinate in his recalcitrancy, counting on vindication from Congress.

3. Bob La Follette was here yesterday and we had a long

talk canvassing the situation, the result of which he hopes to put before you in person. On the assumption that Bob is right in his conviction that a Congressional investigation is inevitable, I am sure you agree to the importance of maintaining the initiative which you now have, of having any further investigation come through you and not against your seeming wishes, and of having the issues framed by you so clearly that there can be no possibility of misunderstanding. In other words, the present situation can all be turned to your account.

4. This can easily be accomplished by a message from you to Congress, which in simple, lucid, and inescapable language will convey the substance of the facts and the atmosphere, which so clearly emanate from the stenographic minutes, together with the full text of the Hearing. If the record will substantially remain as it is now, as I assume it will be, it is easily susceptible of formulation to Congress by enumerating the specific issues that cut across all questions of T. V. A. policy--the "factual matters" that relate to elementary standards of honesty and honor--together with your conclusion that, on the record, the charges by the Chairman affecting the honor and honesty of his colleagues are wholly without foundation. That much vindication of the other two members of the Board is, of course, essential in order to enable them to carry on the work of T. V. A. In such a summary of the record I think it would be particularly well to emphasize the charge, in effect, of attempting to suborn perjury and John Lord O'Brien's letter to the Chairman regarding that charge.

5. I am sure such a message would so impregnate the atmos-

679
- 3 -

phere with the true situation that it would dominate opinion. Neither any hostile members of Congress nor Arthur Morgan would be able to change the atmosphere except by dealing specifically with those "factual matters" to which you so effectively kept the Hearing last Friday.

I am venturing to write as I have because I have thought a great deal about the matter.

With warm regards,

Faithfully yours,

Wm. F. Fitzgerald

The President

~~Sally Hill~~

RSF

FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Bra Rd Sheet

March 26, 1938

Dear Rachel -

Let me break in on your vacation just long enough to thank you from the bottom of my heart and head for the hope that your action and your words must be bringing to literally hundreds of thousands of victims of brute unreason. Most of them won't find a haven of refuge, either here or elsewhere. But what you have done will help sustain their souls in their material enslavement. And your noble leadership is no less important for the spiritual well-being of this country.

Darkness is descending over so much of the earth's surface, that it becomes all the more essential to keep our own sacred light burning brightly. You have given a practical con-

FELIX FRANKFURTER
CAMBRIDGE, MASS.

firmness of the faith in which the
United States was founded in a
way that would make Franklin
and Emerson and Lincoln
feel that the aesthetic, tradi-
tional American spirit still
flourishes vigorously.

The enclosed from Emory
Buckner will amuse and in-
terest. You know how I
feel about the mastery with
which you guided that situa-
tion.

Marion and I wish for you
the best possible refresh-
ment at the Springs.

Ever devotedly yours
F.F.

Hon. Franklin D. Roosevelt.

POI

150 East End Avenue

Mch 25

F. F.

"Now, Doctor, you say it was three o'clock when this happened and your co-directors deny this. Please tell me upon what you base your statement; what fact or series of facts cause you to think it was three o'clock?"

"With great respect, Mr. President, and thanking you for your consideration, I decline to state in this inquiry. I could tell it to a Congressional Committee."

"But Doctor, what possible difference can it make to a fact as to who asks the question? A fact is a fact, isn't it, whether I ask the question or a Congressional Committee or Tom Dewey or a traffic cop?"

"By no means, Mr. President, you see my facts are highly sensitive. They can only live and breathe in the life giving oxygen of a Republican interrogator. Your questions are monoxide gas to them."

"But listen, Doctor, did you look at your watch or hear the town clock strike or meet a train or what? What impressed the time on your mind?"

"I am sorry Mr. President but I can only repeat my position."

"Then get the hell out of here!"

F. R. B.

1
File personal

PSF

192 Brattle Street

FELIX FRANKFURTER
CAMBRIDGE, MASS.

(Sunday

[April 1931]

Dear Frank -

You must be getting many letters, these days, to remind you of the one that Lincoln received and filed with the endorsement: "From a young man on how to win the war". I don't want to be among those correspondents - but I do want to say a word in confirmation of what must be in your own mind. Just that is the importance of having the people hear from you again directly, and very soon.

Just I hope that you will give them a long, full fireside talk. Spell things out for them, and trust their patience to listen longer for ^{or so} fifty minutes, that it will take to spell things out. If the matter is England and all the Continent can

FELIX FRANKFURTER
CAMBRIDGE, MASS.

listen that long, so can ^{over}
And they would have a ^{renewed} ^{renewed}
sense of communion with you,
of having been taken into
your confidence. Such a
talk would revive happy
old memories, and would
deepen their sense of iden-
tification with you. And to
have you do this in your high,
quiet, good spirits, full of
buoyancy and faith and
good temper, despite the House
action, would give them a
new pride in their leader,
for your gallantry and
gayety would communicate
itself, in a contagious way,
to them over the air. Let
Coughlin lightly to see what
the Reorganization Bill
really was & why you wanted
that out of the way to get

FELIX FRANKFURTER
CAMBRIDGE, MASS.

on to more essential things for the
national well-being, would
easily lead into an analysis
of where we are and whether
you are tending. If you don't
mind my saying so, I have never
been more confident of the
rightness of anything than I
am of the importance of an
ample, warming, explanatory
talk, addressed to the plain
people, such as you are capable
of bringing to them, and of the
invigorating feeling that you
thereby would convey.

In the meantime, I thank the
mercies for your deep inner
resources of serenity - for
your own sake & the nation's.

As Marion wrote you, I in-
tend down here for a few
weeks - but I crave to
see you.

Ever affectionately &
faithfully yours, F.

PSF
Frankfurter

April 4, 1938.

Dear Felix:-

It is good to get your cheery note in the middle of all kinds of weird doings by the boys in Washington while I was away. The trouble with the people in the country who keep crying "wolf, wolf" is that some day a wolf might appear from the opposite direction when they least expect it.

I do hope to see you and Marion soon. Is there any chance of your coming to Washington during the Easter vacation?

As ever yours,

Professor Felix Frankfurter,
122 Brattle Street,
Cambridge,
Massachusetts.

4-2-1938
FELIX FRANKFURTER
CAMBRIDGE, MASS.

PST
192 Brattle Street
March 31, 1938

Dear Mr. President:

The following, which has just come to me from one of the most distinguished Republican editors in the land, will interest you:

"What has happened in Austria has distressed me profoundly and I am overjoyed that President Roosevelt has the imagination and courage to pledge this country to help in the one way that is possible. One point that I feel should be stressed by those who desire to help the President is the fact that the refugees from Austria are inevitably bound to be of a high type intellectually and regardless of financial status, highly unlikely to become a charge upon this country. I am thinking of people like the Stolpers from Berlin, for example. Such recruits to Americanism are precious, I feel. It would be an extraordinarily effective move, for example, if Freud could be persuaded to come to this country, assuming that he is strong enough to travel and can escape. Some sacrifice is involved in accepting immigration of any kind at the present time of national unemployment on a wide scale. I think it important, therefore, as a practical matter, to stress the riches of mind and imagination which must ultimately far outweigh any economic cost in the present."

Faithfully yours,
17

The President

P.S. I have just read your "dictator" letter - a framed bit of writing & exposition. Of all the silly Hitlerian rubbish begotten, the Hitlerian which the Reorganization Bureau have given them is the silliest - and among the wickedest.

Society Files *F. Frankfurter*
PSF
FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Brattle Street
April 12, 1938

Dear Mr. President:

The enclosed letter from Dr. Walter Cannon has just come. I don't have to tell you that Cannon is perhaps the most distinguished member of the Harvard Medical School Faculty and a physiologist of world-wide reputation. His account of the plight of Professor Loewi, a Nobel prize winner--"the plight of a great scholar, a man who has done to humanity an immeasurably great service"--is just a striking illustration of the hundreds of men and women who are among the finest flowers of our contemporary civilization, in whose behalf you are trying to lead the noblest traditions of this country and the civilized sentiment of the world. From numerous letters that I have had from non-Jews I have every confidence that our own people will respond to your noble efforts. More strength to your powers.

Faithfully yours,
F. Frankfurter

The President

THE DEPARTMENT OF PHYSIOLOGY
HARVARD MEDICAL SCHOOL
25 SHATTUCK STREET, BOSTON, MASS.

April 11, 1938

Professor Felix Frankfurter
Harvard Law School
Cambridge, Mass.

My dear Professor Frankfurter:

I am enclosing herewith a copy of the letter which I received from Dr. Hans J. Loewi, the son of Otto Loewi, Professor of Pharmacology at the University of Graz. There is no doubt that Otto Loewi is one of the most fruitful and eminent investigators in biology. His simple experiments performed in 1921 opened a new field of scientific investigation. The facts which have sprung from these experiments have already revolutionized our ideas of activities in the nervous system and the relations of the nervous system to muscles, and they promise to give us deep insight into the complex functioning of the brain. It was because of his classical and fundamental discoveries that Loewi was made a Nobel Laureate in 1936.

When I heard that Loewi had been arrested I was appalled because I knew of his extreme sensitiveness. Some years ago, as Chairman of the Dunham Lectureship Committee, I had the pleasure of inviting him here to give the Dunham Lectures. He told me that on his way to Graz he intended to spend two weeks visiting relatives in Frankfurt. On reaching home he wrote to me that he found conditions in Frankfurt so depressing that he was not able to stay more than a few days. I can imagine the distress which he experiences now while in prison.

Here you have presented the plight of a great scholar, a man who has done to humanity an immeasurably great service. Surely some action ought to be taken to relieve his present indignity and humiliation. If there is any influence which you can bring to bear that may have that effect, I most sincerely trust that you will use it.

Yours sincerely,

Walter B. Cannon

WBC/W
Enc.

P.S. I am sending a copy of these two letters to Alfred Cohn.
P.P.S. I have just been talking with one of my advanced students, Dr. Colman Lissak, of Hungary. He worked in Loewi's laboratory in 1936-37. Dr. Lissak testifies that Loewi expressed stern disapproval of the sending of Nazi professors away from Austrian universities into Germany and declared that scientific men should not suffer disturbance of their labors because of differences of political opinions. Furthermore, Dr. Loewi advised Dr. Lissak to go to Berlin for extension of his experience in learning physiological technique, which indicates an absence of animosity toward Germany under the Hitler régime.

COPY

Zagreb, Jugoslavia
March 29, 1938

Prof. W. B. Cannon
Physiological Laboratory
Harvard Medical School
Boston, Mass., U.S.A.

Dear Sir,

I am the eldest son of Otto Loewi, Graz, and just by chance outside of the country, called Austria before. I remember that my father very often has spoken about you. I hope this will authorize me to call on you in this very moment my father being in distress.

My father has been arrested the 12th March. The authorities give as reason that they found communists material in a Jewish commonwealth society. I am sure that this can't be true and even if it would be, my father had no responsibility about, as he was a simple member of this society. Nevertheless I remember that jealous people tried to blame him for having taken part in the International Congress of Physiology in Russia, where you have been also, if I am right. My father was never interested in politics. An honest judge would be unable to find any fault with him. Although I hear now, that it is intencioned to keep him in prison for three months at least. These are the facts.

Being myself in a very bad situation in this moment I cannot do more in favor of my father, then to inform you and Sir Henry Dale. Therefore I would ask you, if you could do something for him. I only see one way. A carefully prepared action of the American Government, any attack by newspapers would surely be most dangerous and I think the only effective way to speak to the German authorities might be the American Embassy.

I thank you in advance for your kindness.

Yours very sincerely,

(Dr.) Hans J. Loewi

PSF:Frankfurter ✓

THE WHITE HOUSE
WASHINGTON

April 21, 1938.

MEMORANDUM FOR

F. F.

FOR YOUR INFORMATION

F. D. R.

Letter from Sumner Welles in re
the arrest of Professor Lowi.

PSF:Frankfurter

FF

file

DEPARTMENT OF STATE
WASHINGTON

April 19, 1938.

My dear Mr. President:

With reference to your memorandum to me of April 18 concerning the arrest of Professor Loewi, it would seem to me that there was little that we could do of a specific character.

I have, however, as a result of the facts contained in the correspondence you sent me with your memorandum under reference, sent a telegram to Hugh Wilson in Berlin asking him to seize an appropriate occasion to explain to the proper officials of the German Government the interest which is felt in this country with regard to distinguished scientists like Professor Loewi and to indicate his belief that the release with permission to leave German territory of such distinguished men would undoubtedly create a favorable impression on public opinion everywhere. Direct intercession on our part on behalf of persons like Professor Loewi would probably have the opposite effect from that desired.

If you think there is anything further that should

The President,

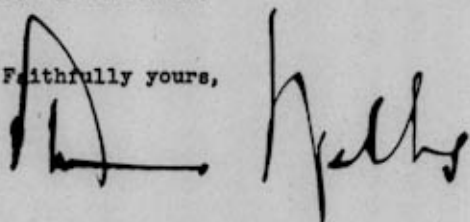
The White House.

-2-

properly be done, please let me know.

Believe me

Faithfully yours,

A handwritten signature in dark ink, consisting of a stylized first name followed by a surname, written in a cursive script.

Truly Sincere

FELIX FRANKFURTER
CAMBRIDGE, MASS.

*file
personal
Frankfurter* PSF

192 Brattle Street
April 27, 1938

Dear Cannon:

1. The ultimate deposit in history, I suspect, of the work of a statesman, derives from the sheer humanness of his simple, unostentatious daily deeds. His letter to Mrs. Bixby reveals the true Lincoln, and history, I am sure, will see you in the same light through such spontaneous, compassionate responses as that which you made to Dr. Cannon's appeal on behalf of Professor Loewi. I sent it on to you merely because it furnished a striking glimpse of what Nazi rule means to the heritage of civilization. But, characteristically, you read it as a human appeal, and sought to help with the full reach of your powers. I am deeply grateful and you will, I hope, not disapprove the discretion that I exercised in letting your interest be known to a few dependable people like Dr. Cannon. Such interest as yours in these dark days, in matters dear to men like Dr. Cannon, means much.

2. Your remarks to the D. A. R. the other day did not constitute one of those half-hour speeches which it takes ten hours to prepare. What you said was much better than that--it was one of those deep summaries behind which was the preparation of a lifetime. For your "text" to the ladies put in one pithy sentence that which sets this nation apart from all others. It may have jolted them a little to have ^{been} reminded ~~them~~ that you and they are descendants of "immigrants and revolutionists". But the implications of these

few words go to the heart of American history. In this connection don't you think that the enclosed card from Borgese announcing his American Citizenship is touching?

3. And your message on governmental tax immunities was an admirably quiet but effective lesson in your continuous educational process on the proper place of the Supreme Court in our national life. It was all so deftly done, but its meaning will not have been lost to the priests in the Temple of Karnak. Aren't you a bit afraid though, that you are making some of the "lads", as Holmes used to call them, jittery!? I certainly didn't expect to live to see the day when the Court would announce, as they did on Monday, that it itself has usurped power for nearly a hundred years. And think of not a single New York paper--at least none that I saw--having a nose for the significance of such a decision. How fluid it all makes the Constitution!

4. Speaking of the Constitution, you will be interested in the enclosure regarding your dismissal of Arthur Morgan. At least the Harvard Law Review in its forthcoming number will announce to the world the clear legality of your act. The note was written by two pet students of mine. I think they've done a fine job.

I am very glad you are going off for a few days. Have a good time.

With warmest regards

Ever devotedly yours
W.

G. A. BORGESE
AMERICAN CITIZEN

CHICAGO, APRIL 12, 1938

THE PLIMPTON PRESS
DATE ~
DUPLICATE PROOFS
Do not contain Proofreader's Marks
PLEASE HOLD

MORGAN V. UNITED STATES:¹ THE PRESIDENT'S POWER OF REMOVAL. — During the fall of 1937 differences of opinion concerning the proper disposition of Senator George Berry's damage claims against the Tennessee Valley Authority led to the first major public outburst of the antagonism which had long been festering within the TVA board. Charges of dishonesty were made and countered with charges of obstruction. Feeling that the TVA was imperiled by this dispute, President Roosevelt ordered the members of the board to appear before him personally and to substantiate their charges. Despite the presentation of evidence by Directors Lillenthal and H. A. Morgan to refute the charges made by Chairman Arthur E. Morgan and to support the charges which they had made, Chairman Morgan persistently refused to participate in the inquiry, claiming that the facts could adequately be brought out only by a congressional investigating committee. President Roosevelt thereupon told Chairman Morgan that his action in making charges against his colleagues, his obstruction of the work of the TVA and his refusal to take part in the hearing made it necessary that he be removed as a member and chairman of the board of the Tennessee Valley Authority. Only one more event need be added to necessitate an adjudication of the controversy by the Supreme Court. Claiming that the President had no power to remove him, Arthur E. Morgan sues in the Court of Claims for salary subsequently accrued. The possibility that this step will be taken and the wide range of conjecture as to the probable result renders appropriate an inquiry into the problems of statutory and constitutional construction which Dr. Morgan's suit would raise.

The location and distribution of the power to remove officers of the United States has seldom been adjudicated by the Supreme Court. In 1886, in *United States v. Perkins*,² the Court held that Congress could constitutionally deprive the Secretary of the Navy, in whom the appointing power was vested by statute, of the power to remove Naval Cadet-Engineers. In *Blake v. United States*,³ a statute provided that an army chaplain could be removed only by court-martial. By a strained construction, the Court held that the statute did not limit the President's power where he obtained the advice and consent of the Senate, and consent to removal was implied from the Senate's confirmation of a successor.⁴ Difficult constitutional questions as to the removal power were thereby avoided. Concurrence by the Senate was not relied upon in *Parsons v. United States*,⁵ which involved the removal of a United States Attorney by the President in the face of a statute which established a four-year term for the office and contained no provision

¹ For a compilation of the documents relating to this controversy, see SEN. DOC. No. 155, 74th Cong., 3d Sess. (1938).

² 116 U. S. 483 (1886).

³ 103 U. S. 227 (1880).

⁴ *Cf. McAllister v. United States*, 141 U. S. 174 (1901).

⁵ 167 U. S. 314 (1897).

for removal. Instead the Court, obviously influenced by executive and legislative precedents in other situations which it interpreted as establishing the removal power in the President alone, construed the repeal of the Tenure of Office Act of 1867 to reestablish a prior statute of 1820 which provided that United States Attorneys should hold office at the pleasure of the President.⁶ *Shurtleff v. United States*⁷ is an even stronger example of the tendency to construe statutes as leaving the President an unrestricted power of removal. The President's dismissal without cause of a general appraiser of merchandise, appointed by and with the advice and consent of the Senate, was held valid, although the statute contained a provision authorizing the President to remove the appraisers for "inefficiency, neglect of duty, or malfeasance in office". The Court stated that the removal power was in the President unless taken away by very clear and explicit language and that the restrictive inference from the express grant of a power to remove for cause was not sufficient to limit the President's power to remove without cause.⁸

The constitutionality of limitations placed by Congress upon the President's power of removal was first involved in the famous case of *Myers v. United States*,⁹ decided in 1926. The President was held to have authority to dismiss a third-class postmaster despite a statute providing that "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law".¹⁰ The seventy-one page majority opinion written by Mr. Chief Justice Taft did not confine itself to the narrow holding that it was unconstitutional for Congress to provide for participation by the Senate in the removal of officers.¹¹ The Court went upon the broad ground that inherent in the President's power of appointment and in his duty to take care that the laws be faithfully executed was a power of removal over all appointive officers, which legislative action could not in any way qualify. But even upon the narrow ground necessary for the decision, Justices Holmes, McReynolds and Brandeis wrote strong dissenting opinions, relying on the fact that a third-class postmaster was an "inferior officer".¹² The President's removal power received its first setback in *Humphrey's Executor v. United States*,¹³ in which the President's dis-

⁶ See *id.* at 337-44.

⁷ 189 U. S. 311 (1903).

⁸ See *id.* at 315-16.

⁹ 272 U. S. 51 (1926).

¹⁰ 19 STAT. 80 (1876), 39 U. S. C. § 37 (1934).

¹¹ For a thorough analysis and criticism of the reasoning of the majority opinion see CURWIN, *THE PRESIDENT'S REMOVAL POWER* (1917).

¹² It was argued that, since Congress under U. S. CONST. Art. II, § 2 could transfer the power to appoint such officers from the President to the heads of departments or the courts of law, and after such transfer could limit the power of removal [*United States v. Perkins*, 116 U. S. 483 (1886)], the restriction imposed upon the President's power involved no undue encroachment on the executive power.

¹³ 295 U. S. 602 (1935).

THE PLIMPTON PRESS
DATE _____
DUPLICATE PROOFS
Do not contain Proofreader's Marks
PLEASE HOLD

missal of a Federal Trade Commissioner before the expiration of his term of office was held unauthorized. A statutory provision, identical with the one involved in the *Shurtleff* case, provided that the President could remove a Commissioner "for inefficiency, neglect of duty or malfeasance in office". The quasi-legislative and quasi-judicial nature of the Federal Trade Commission's duties, and the desire found expressed in its legislative background to free it from the threat of political domination, were regarded as sufficient grounds for distinguishing the *Shurtleff* case and holding that the statute limited the President's power of removal to the grounds specifically enumerated.¹⁴ So construed, the statute was held constitutional. A unanimous Court,¹⁵ including four Justices who had concurred in the majority opinion of the *Myers* case,¹⁶ felt called upon to limit the broad language of that opinion concerning the absolute power of the President to remove his appointees, at least as applied to officers whose functions were not strictly "executive" but "quasi-judicial and quasi-legislative".¹⁷

The Tennessee Valley Authority Act¹⁸ provides that the directors shall be appointed by the President, by and with the advice and consent of the Senate, but contains no provision which expressly deals with the President's general power of removal. Despite the shadow cast upon it by *Humphrey's* case, the *Shurtleff* case still stands for the proposition that the President has a power of removal unless it is shown by the legislative background of the statute, or by inferences from its provisions, that Congress intended to take it away. There are two sections which bear on this point. Section 4 provides for removal of members of the board by concurrent resolution of Congress. Section 6 requires the President to remove any member of the board who establishes political qualifications in the appointment of employees. An argument, based upon the familiar maxim *expressio unius est exclusio alterius*, could be made to the effect that Congress intended these two methods of removal to be exclusive. But an examination into the origins of Section 6 indicates an intention to impose a duty, albeit of imperfect obligation, to remove for making political appointments,¹⁹ and thereby negatives any

¹⁴ See *id.* at 612-26.

¹⁵ Mr. Justice McReynolds concurred specially on the grounds contained in his dissenting opinion in the *Myers* case.

¹⁶ Justices Van Devanter, Sutherland, Butler and Stone.

¹⁷ See 294 U. S. at 626-32.

¹⁸ 48 Stat. 58 (1931), 16 U. S. C. § 831 et seq. (1934), as amended by 40 Stat. 2071 (1918), 16 U. S. C. § 831 et seq. (Supp. 1917). For the remainder of this Note, citations will be merely to the relevant sections of the Act.

¹⁹ This provision was first introduced in the House Bill, H. R. 2081, 71st Cong., 1st Sess. (1911). It applied not only to the President but also to the members of the board with relation to the managers who, under the scheme set up by the House Bill, were to be appointed and removed by the members of the board and were to be the active directors of the TVA. The committee report on the House Bill says: "But as a further guaranty against the employment of unfit and incompetent persons it is provided that no political tests shall ever be applied by any member of the board in connection with the employment of any person nor by the manager

inference of an intention to restrict the power of removal. The provision for removal by concurrent resolution is not so easily disposed of. The purpose which motivated its inclusion in the bill is swathed in doubt.²⁰ Hence no light is cast which might aid in a decision as to whether Congress intended by this provision to assume to itself the entire general removal power or merely to reserve in itself a supplemental power. The legislative history of the Tennessee Valley Authority Act, unlike that relied upon by the Court in *Humphrey's* case, does not reveal a considered purpose on the part of Congress to free the Authority from presidential control. Rather, a contrary inference may be drawn from the numerous and important duties imposed on the President in the administration of the Act.²¹ In view of this background the *Shurtleff* case would require that any doubts created by the existence of congressional power to remove a member of the board by concurrent resolution should be resolved against limiting the President's power. And while the existence of a single thirty-five year old precedent might seem to afford a slender basis for prediction, recent events in the Court's history, marking a trend toward avoiding constitutional issues, indicate a likelihood of adherence to the doctrine of the *Shurtleff* case in order to

nor anybody acting for him. Any person violating this provision will be summarily discharged." H. R. REP. NO. 43, 73d CONG., 1ST SESS. (1933) 10.

²⁰ This provision was originally contained in the Senate Bill introduced by Senator Norris. S. 1272, 73d CONG., 1ST SESS. (1933). No reference was made to it in the committee report. SEN. REP. NO. 23, 73d CONG., 1ST SESS. (1933). No reference was made to it in the debates in either house nor in the report of the managers of the House of Representatives in the conference committee. H. R. REP. NO. 230, 73d CONG., 1ST SESS. (1933).

²¹ The President, with the advice and consent of the Senate, is authorized to appoint the members of the board, designate the Chairman and affix the original tenures of office. § 2(a), (b). The President designates the dwelling houses, owned by the government in the vicinity of Muscle Shoals, to be used by the members of the board. § 2(c). The President's approval is required for the disposal of real property deemed unnecessary for the execution of the Act. § 4(k). The President is empowered to direct other government agencies to render assistance to the TVA. § 5(i). The President is authorized to lease nitrate plant numbered 2 and Waco quarry for a term not to exceed 50 years to be used for the manufacture of fertilizer. § 5(n). The President is directed to discharge those members of the board found establishing political qualifications for employment. § 6. The President is authorized to transfer such governmental property to the TVA as he deems necessary to enable it to execute its purposes. § 7(b). The TVA is required to file a financial statement each year with the President. § 8(a). The Comptroller General is to report the result of his audit of the TVA to the President. § 9(b). The President may set the percentage of the gross receipts of the TVA to be paid to Alabama and Tennessee in lieu of taxes. § 13. The President is empowered to allocate the cost of government properties for the purposes of accounting between flood control, navigation, fertilizer, national defense and power. § 14. The President is authorized to direct the board to install additional equipment at Muscle Shoals. § 16. The President was authorized to direct the construction of Cove Creek Dam (Norris Dam). § 17. The President is authorized to investigate into the management and control of government property in the Tennessee River Basin. § 17. The President is directed to recommend legislation to Congress relative to flood control, navigation, generation of power, use of marginal lands, reforestation, and economic well-being of the people in the valley. § 23. The President was authorized to acquire title to lands owned by private persons for the TVA. § 24.

THE PLIMPTON PRESS
DATE ~
DUPLICATE PROOFS
Do not contain Proofreader's Marks
PLEASE HOLD

M H 17

1250

HARVARD LAW REVIEW

[Vol. 51]

prevent the precipitate consideration of a vexatious constitutional question.²² But even if the statute be construed to deprive the President of his inherent general removal power, his action in the instant case finds support in Section 17 of the Act. This section authorizes the President to conduct an investigation for the purpose of determining whether, in the management and control of any of the property owned by the Government in the Tennessee River Basin, any undue advantage has been given to private persons or the Government has been injured or unjustly deprived of its rights. Since most of the charges made by Dr. Morgan against his colleagues related to matters within the language of this section,²³ the President had ample authority to institute the investigation. And there is probably enough strength left in the general assumptions underlying the *Shurtleff* case so that the Court will hold that the President retains the power to remove for a cause closely connected with the execution of powers vested in him by the statute.

If, however, Section 4 is construed to deprive the President of all power of removal except that recognized by Section 6, a decision upon constitutional grounds will be necessary. It is highly probable that if Congress had set up the Tennessee Valley Authority as an independent agency, concerning which the President was given no special powers or duties, it could have established security of tenure for the members of the board as one of the incidents of such freedom from executive control. This proposition is not authoritatively determined by *Humphrey's* case: the category of quasi-judicial and quasi-legislative agencies there laid down would seem to include only bodies which declare and administer rules governing the conduct of private individuals and the litigation of private rights.²⁴ Thus, technically, even an independent Tennessee Valley Authority would come within the broad reasoning of the *Myers* case. But here, no less than in *Humphrey's* case, there would be good reasons for making further inroads upon that broad reasoning.²⁵ The growing extent of governmental activity in fields formerly recognized as the exclusive domain of private business has made the liberation of these governmental enterprises from political manipulation a matter

²² See Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936* (1938) 43 HARV. L. REV. 577, 620-37. Compare *Ashwander v. Tennessee Valley Authority*, 307 U. S. 488 (1936), and *Carter v. Carter Coal Co.*, 308 U. S. 238 (1936), with *Alabama Power Co. v. Ickes*, 58 Sup. Ct. 300 (1938), and *Electric Bond & Share Co. v. Securities & Exchange Comm.*, 58 Sup. Ct. 678 (1938).

²³ The three main charges made by Chairman Morgan against his associates were lack of honesty in handling the Berry claims against the government arising out of the flooding of marble deposits by the construction of Norris Dam, insertion of a "joker" in the contract with the Arkansas Power & Light Co., and failure to protect the public interest in negotiations with the Aluminum Company of America. See SRS. Doc. No. 155, 75th Cong., 3d Sess. (1938) 6, 21, 30.

²⁴ See 295 U. S. at 628.

²⁵ Moreover, in view of the political nature of the controversy, the close vote in the *Myers* case, and the changed personnel of the Court, the *Myers* case might well be overruled on its facts. The probability of such a result is further strengthened by the prior intellectual commitments of Mr. Justice Brandeis.

of vital concern to the social order.²⁶ The very controversies over matters of policy which have taken place within the TVA illustrate the broad discretion given it in making economic decisions of a "legislative" character.²⁷ Had Congress established a completely independent TVA, a provision placing the members of the board under civil service rules would probably have been an appropriate congressional regulation of tenure. And while a concurrent resolution would be somewhat more doubtful, it might still be held a valid exercise of the congressional power.

The fact remains, however, that Congress has not set up a TVA unfettered by executive control; on the contrary, it has placed in the hands of the President large responsibilities in the supervision and direction of the entire TVA project.²⁸ Despite this fact and despite the increased relevance which it gives to the language of the *Myers* case emphasizing executive responsibility, Congress might be able to take away the President's general power of removal or even his power of removal for cause if this were done as part of the scheme which the Court deemed to be a reasonable regulation of official tenure. But, reduced to an irreducible minimum, the *Myers* case holds that a requirement of senatorial participation in the President's power to remove an inferior executive officer does not constitute such a reasonable regulation.²⁹ And Dr. Morgan's case would present an attempt to make a concurrent resolution by Congress the sole means of removal,³⁰ thereby depriving the President of any participation in the removal process. Particularly as applied to removal for a cause arising out of presidential responsibilities in the administration of the Act, this would require the Court to go not only beyond the irreducible minimum set by the majority in the *Myers* case but also beyond the considerations which motivated the dissenters. This does not seem likely.

PRIMARY JURISDICTION—EFFECT OF ADMINISTRATIVE REMEDIES ON THE JURISDICTION OF COURTS.—Keystone of the arch of administrative regulation is the "primary jurisdiction" rule. With its requirement that controversies calling for administrative discretion be determined by commissions rather than by courts, following from the formula that these questions are primarily within the jurisdiction of the administrative commission charged with that particular field of regulation, the doctrine of primary jurisdiction has pervaded the entire realm of

²⁶ But cf. *Springer v. Philippine Islands*, 277 U. S. 189 (1928). (Separation of powers, considered inherent in Organic Act of Philippine Islands, held to prevent legislature from restricting executive control of National Coal Co. and Philippine National Bank. Justices Holmes and Brandeis dissented; Justice McReynolds limited his concurrence to language of Organic Act.)

²⁷ See *Morgan, Public Ownership of Power* (Sept. 1937) 68 ATL. MONTHLY 327.

²⁸ See note 21, *supra*.

²⁹ See *CORWIN, THE PRESIDENT'S REMOVAL POWER* (1927) 65.

³⁰ This would, of course, be subject to the direction to remove for the making of political appointments contained in § 6 of the Act.

Sally File
PSF

file
FF

FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Brattle Street
May 18, 1938

Dear Zerk:

1. First and foremost, I want to tell you what deep joy Marion and I carried away in finding you so fit. I wish I could put into adequate words the sense of serenity that everything about you conveyed. With some knowledge of American History, I had the feeling that not since Lincoln has the White House had an occupant with such imperturbability of soul. It cannot be mere accident that not since Lincoln has there been a President who possessed in equal measure such a combination of the democratic faith, antiseptic humor, and largeness of view. Somehow or other, those qualities manage to convey themselves to the common understanding of ordinary folk, if they are given frequent enough opportunities through sight and speech to feel the radiations of those qualities.

2. I saw four of the Justices and not a little of both the Blacks. She is an altogether grand person, with a keen realization of the psychological aspects of the situation, and with unusual talents for mitigating difficulties and softening hard feelings. Various experiences of his life have calculated to make him a bit of an Ishmaelite--to expect every hand to be raised against him, and, therefore, at times to be unwarrantedly suspicious when nothing but friendliness is intended. Certainly

Isaiah, Stone, and Reed have the friendliest disposition toward him. I know, because I talked with all three rather intimately. I took the bull by the horn and told Stanley Reed that he must not allow Black to interpose the barrier of formality between them, and that, as a matter of fact, Black will gradually soften to influences of friendliness and affection. Marion and I had tea with the Blacks out at Alexandria, and later dined with them at the Reeds. Altogether a very good time was had, and I have high hopes for the future.

3. You asked me to remind you of a few things about which we talked:

(a) Monte Lemann is just past fifty-four, and I do not believe any informed person would gainsay Stanley Reed's opinion that "Lemann is about the best lawyer south of the Mason and Dixon line." He is just past fifty-four, has independent means (though not very rich), and I am confident that he would go on the Circuit Court of Appeals. He is that very rare thing at the contemporary American bar, a lawyer highly equipped technically, but not made narrow or unprogressive by his professional and business associations. He has, as you know, really cared about the social reforms of the New Deal, and has been not a little influential in securing the effective sympathy of his client, Zemurray, for your Administration.

It would really be a great thing to put Lemann on the C. C. A. By a few such appointments you would not only prevent

judicial obstructions but perpetuate your social outlook in the administration of law for the next twenty years. With men like Monte Lemann in the Fifth Circuit, Stuart Guthrie in the District, Francis Biddle in the Third, and Charlie Wyzanski here, you would be creating judges mindful of the basic function of law as the body of arrangements for realizing social needs. Such men have not only a progressive outlook now, but they would be open-minded to needful changes ten and fifteen years hence.

(b) You also wanted me to put on paper the suggestion of a really able committee to inquire thoroughly into technological unemployment. This would fit into your so-called monopoly studies, and could be launched so as to expose the present baffling ignorance of the critics of the New Deal on what are really fundamental economic issues. Not only the statement in which the purposes of such a committee would be explained, but also its personnel, would carry great assurance to the country and give further indication of your long-range planning. The committee ought to be a real directing body, even though the technical work would be done by technicians. The kind of people that suggest themselves--and it should be a smallish committee--are Zemurray for industry, Averill Harriman for the railroads, Sidney Hillman for the C. I. O., and some very good man for the A. F. of L., Wesley Mitchell as a professional economist, and Dr. Alice Hamilton who would be a distinguished representative of the scientific and social aspects of women in industry.

(c) Finally, you asked me to give you Julius Rosenwald's remark about money-making. I don't know whether he ever put it on paper, but I myself heard him say: "Money-making is a special knack. The fact that a man has made a lot of money doesn't mean that his opinions on any other subject are worth anything."

We had an altogether delightful time. It wasn't until we got back that Marion confessed to me, what she had already confessed to you, namely, that when the guard tried to stop her from entering the White House, she said, "Why, I am living here." That's the way you made her feel. Incidentally, she says it was perfectly wonderful the way you roared with enjoyment when she told you about it.

Ever best love to you.
Ever devotedly yours
W. F.

The President

24
file personal
PSF
FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Brattle Street
May 25, 1938

Dear Raoul:

This must have been a breath-holding weekend for you, for I suspect it was pregnant with more real cause for alarm than any period since 1914. Happily the Czechs were true to the will and wisdom symbolized by their two great statesmen, Masaryk and Benes--one of my profoundest post-War memories was a two hour talk with Masaryk at Prague--and thereby they proved anew that the way to deal with a bully is not to yield to him. It is at once mortifying and inspiring that this small nation should teach a lesson to both Great Britain and France in not feeding the bully's strength by showing weakness. But, of course, all the elements of the difficulty remain, and, I suspect, ~~that~~ the price that will inevitably be asked of the Czechs will be ultimate separation. I should be more than surprised if they yielded.

But I started to write this letter about two matters not touching world affairs.

In response to the interest you expressed when I was down, I have made further inquiries about the Boston Transcript. People who ought to know tell me it could be bought for \$100,000. It has an A. P. franchise.

Since writing you about Monte Lemann I have very good

- 2 -

reasons for believing that Claude Pepper would be agreeable to the appointment of Monte Lemann. He recognizes, as I think everyone in the south would, the rare combination of qualities of Lemann.

The tide generally seems to be running the right way. I hope you get out of Congress during the rest of the session all you want and prevent from being done what should not be done.

With our warmest regards,

Ever faith fully
R. L.

The President

Scouty Folks

PSF
Frankfurter

July 8, 1938.

Dear Felix:-

Many thanks for letting me see these letters. That list of scientists is amazing and I fear the discussions have not ended yet.

Is there some way in which the mental feelings of a large group of people can be divorced from stock market fluctuations? I might almost say physical feelings as well, because when the market goes up these people actually feel physically better, as well as mentally.

I had to have to admit it but the market of the past two weeks seems to have brought an enormous psychological change in the political situation -- and, as you have perceived, I am capitalizing on it and intend to do so on the trip across the country.

If there is no war in Europe before July sixteenth, I hope to leave San Diego on the USS MONROE, visit lower California, Clipperton Island, the Galapagos, Ocosingo Island, the Panama Canal, Old Providence Island and land at Ponce de Leon on August ninth.

Meanwhile, I hope Marion will see to it that you behave yourself and that she will bring you to Hyde Park sometime in August, after I get back.

My the way, Dr. Connor, the Archivist,
made an interesting suggestion yesterday -- that
Justice Holmes' house be loaned or given to the
American Historical Association, which, as you
know, has a national charter and is, on the whole,
a pretty decent and useful body. His idea is
that they would use it as national headquarters --
a rendezvous for their many members who visit
Washington or do research work here. What is
your slant on this?

As ever yours,

Professor Felix Frankfurter,
122 Brattle Street,
Cambridge,
Massachusetts.

(Enclosures)

192 Braden St.
FELIX FRANKFURTER
CAMBRIDGE, MASS.

July 1

Dear Miss

Dear Mr.
Adams, and also
our best wishes
for a happy summer
for you.

Most sincerely

F.F.

FELIX FRANKFURTER
CAMBRIDGE, MASS.

July 1, 1938

Mr. A. A. McKim

Dear Land -

These two Enclosures may in-
terest. Samuel Beer is one of the
brightest leaders I know, a Rhodes
scholar who made an outstanding
record at Oxford, who comes from
Hardy Republican Ohio stock &
whose grand wife (they are both
still in the thirties) is the niece
of former Governor Osborne of Michi-
gan. Dan Schacht's second
paragraph speaks for itself. In
a very ^{kind of} way I gave the
legal brethren of New York New
York that they didn't want to
hear but couldn't disown.

You certainly have been scoring
Lame-isms. The "fire-side" Confounded
the opposition, heartened your friends
and warmed the great body of your
people. And your ringing words

FELIX FRANKFURTER
CAMBRIDGE, MASS.

to the N. E. of. will be heard round
the world. They needed to be said
by the most authoritative voice
that now speaks. (In this Con-
nection, you may also care to
see the letter on disavowal of
distinguished scientists which
has just appeared in the leading
British scientific journal).

What heavy days these
have been for you, and how
severely, and with what con-
fidence and confidence, you have
borne them. The western trip
is still ahead of you - but
even that, I hope, will be
some relaxation, and then
real freedom, for a time,
from the daily grind of a
housewife and one detail of
whole ^{sale} food-holding of Sunday
hallmen. The best of luck
to you. Our fondest regards. April 28th

~~July 16~~

Law School of Harvard University,

Cambridge, Mass.

To D. S. Owen

New York

F. Dinner 2

file
personal Aug 16

Be kind

BF

Be good enough to
pass this on. Thank you.

I hope that in your
western peregrinations
you escaped the cruel
heat, and that you
caught best fish
and pleasure.

Most cordially
BT

Law School of Harvard University,
Cambridge, Mass.

To Dr. Alfred E. Cohen,
New Milford, Conn.

16 August 1938.

PSF Frankfurter

Dear Randall:

The best news that has come our way for a long time were the photographs of you in last Sunday's Times. They gave virtual proof of all that Ross McIntire said about your well-being and the extraordinary feeling of fitness that breathed through everything that came from you, since your return. There is gusto in your utterances and the serene fighting spirit - the finely-tempered samurai blade - of the real leader.

It's always dangerous to tell an author which particular product of his brain one likes, but I cannot withhold picking your latest speech the other day as one of my favorites. You packed an enormous lot into a few hundred words - formulated a basic analysis of your political philosophy as well as of its concrete expression. That speech, as well

Law School of Harvard University,
Cambridge, Mass.

as the thread of continuity that you
wove from the Northwest Territory
says your own - in your way
well - will be living utterances
fifty and a hundred years hence,
because they are of the order of
speeches that at once mark events
and give enduring insight.

I enclose some tid-bits, that, in
their various ways may interest you:

- 1: the piece from the Economist
shows real understanding of what
your fight against the Dredges,
Tydings & O'Connor really means,
and properly sees it as a function
of the Cause you lead;
- 2: the news about Arthur Kroell, from
my unclaimed friend will not be
news to you - but cumulative, fresh -
land evidence is sometimes not wholly
superfluous;
- 3: the remarks of Frank Rowland form
an edifying contrast.

In your grand letter, shortly before

Since writing to you last night I spent several hours with the Arthurs, Sulzberger and Crook. The situation is not altogether "healthy" and I am eager to discuss it with you when we meet in September. Arthur Crook was on the boat with me returning to New York. His social climbing, cynicism, conservatism and poisonous distaste for everything connected with Roosevelt and his administration can be very harmful. I expect to spend a week-end with Sulzberger very soon and hope to do what I can, but you may have a suggestion. The prospect of his becoming the "Crown Prince" of the New York Times is a horrible one.

Law School of Harvard University,
Cambridge, Mass.

left. You asked me about the suggestion of the Archivist for the use of the Holmes house by the American Historical Association. That idea has real possibilities - and I'll be very glad, of course, to canvass it with you at your convenience.

Low Hirstein said that they put John through the real jump and all liked him & his attitude very much. The details of Low H's talk with John was good - and one of these days you must have it.

Best wishes are in warmest regards.

Faithfully yours
F. H.

August 8, 1938.

Dear Felix,--As George Meredith or some other brow has said, the dog returns to his vomit, which is to say that I now have a typewriter, thanks to my youngster who ran up to town for it. (Once again, buy Standard Oil stock) So, I reply immediately to your note. I have written to Justice Brandeis, asking him if and when F.C.D. and I may call.

Enclosed is a note from Bill White which should make you feel ~~unashamed~~ unashamed of yourself. Please accept it with my compliments and lay it aside for your biographer. I have asked Bill whether he wishes to have me try to get him a speaking engagement with the Boston Chamber of Commerce. I assume that Charlie Watkins wouldn't take another chance with him--or with Jackson, R.H.

Late last night, as a gesture to the filmy eyed sleep, I took a lone stroll down toward the waterfront and the house where the stricken young Roosevelt lived for awhile during his ~~days~~ days of misery. My wife had shown me the house earlier in the day but I wanted to walk around it and get a good eyeful of it. It's a modest little place, on a corner, a short distance from the warm waters in the rear. It's as unpretentious as the man himself, and close to the other houses, as he is to other human beings. As I smoked and strolled, I couldn't help thinking of the extraordinary triumph of his mind over his body, the agony which he underwent, the temptation to bewail his lot and thumb his nose at whatever Gods may be. Doesn't it make you feel like a puny soul when you consider how little you and all of us who have free movement have accomplished in comparison with the victory of this indomitable gentleman over himself? I don't mean his political glories, but his ability to keep his mind unwarped, his heart sweet, his ideals unimpaired, his ~~ambition~~ (Damn this machine!) ambition for an active career unmodified in spite of the savage wallop he got from fate? Some day, the people will put a tablet on that unobtrusive little house where he not only bore his cross but took it to bed with him night after night. Fortunately the haters of F.D.R. have not

118

yet burned or razed or wrecked the cottage. This is one of the longest periods of modern times: how come that the Rooseveltphobes have overlooked an easy opportunity for additional desecration?

Have you had a chance to read Eugene Lyons' "Assignment in Utopia"? I suppose that we ought to turn on the suspicion light of the mind when reading the books of converts, but the facts set out in the Lyons book impressed me deeply, even without his interpretation of them. I haven't finished the book yet, but I'm three quarters through it and probably the last part, the explanation of the repentation, is not so tragic as the earlier chapters. He writes extremely well.

White and Fuess say that they found the letter of Leonard Ware in regard to Coolidge and Roosevelt valuable. How dumb I was not to realize what Fuess wrote, -- that on the night when Wilson spoke, a President was in the company of two Presidents to be.

I am returning the letter from your friend McNair of the U of L. Can't I do something for his friend Sir Frederick Marquis? I impose only one condition: Merriman must not be a part of the proceedings. As you made no reference to the McNair note in your letter to me, I ain't sure just what you would like to have me do, if anything. Anyway, I'll do it.

Schlesinger has sent me an editorial about you in the St. Louis P.D. Probably the writer has relayed you a clipping, but as he may have forgotten to, I'm enclosing the piece. Will you return it to me ultimately, please?

As to Bob Bradford: I am going to send him a check for \$25 and I'm also writing to F.C.D. requesting him to loosen up. Another candidate, L. Saltonstall, made a speech here a week ago, and the introducing gentleman, the head selectman forget Leverett's name, consulted his notes and finally introduced "Mr. Saltonstall" to the merriment of the little crowd and the amusement of Leverett, who took it in good part, stripped off his coat and made a good speech. This is a headquarters of Republicans, but the attendance was only 60 or 70. And Buxton, the poor boob, stayed late in Marion --- this was two weeks ago --- just to add one more

Overseas Correspondence

From Our Special Correspondents

United States

Relief and Politics

WASHINGTON, July 15.—Future historians of the New Deal are likely to devote much study to the dominant part played in politics by Federal relief. Roosevelt won in 1936, so his opponents complained, because he had "bought" the election with the taxpayers' money, and he is about to "buy" another election in the same way.

Since 1936 the country has suffered the steepest business decline in its history, which in normal political circumstances would be enough to win the next election for the Opposition. But the new depression has led to new Government spending, and so this political maxim has been stood upon its head. "Nobody will vote against Santa Claus," was the proverb that explained the Roosevelt victory two years ago. "You can't beat five billion dollars" is already the Republican apology for the showing expected in November.

Though the Republican line in the November campaign has not been finally clarified, it may consist of little more than a protest against the influence of relief on politics. The charge is outright corruption, not to the point of paying the voter to go to the polls on election day, but by spending large sums on relief projects in districts where the vote will be close. This creates large staffs of Government-paid employees, who are expected to express their gratitude on election day. In some regions Works Progress Administration workers are said to understand quite well that their jobs are "political," and that they have to render political services for them. The late Huey Long used to say about Louisiana that one State employee is "good for" ten votes, and the ratio holds good for the entire country.

To what extent more immediate political pressure is brought into play, and how far a needy person's party affiliations decide whether he is to receive relief, are subjects on which the evidence is scarce and not at all conclusive. In some districts the actual administration of relief has slipped into the hands of State and county professional politicians. Unquestionably, relief is politically used in such districts, but that is not to say that its administration has been debauched. If relief were really failing to reach the needy because they were not going to vote right, then plenty of evidence would be forthcoming to prove it.

The complaint that relief is being used politically applies to the planning of projects, rather than to the actual spending. When the Federal Government is pouring out funds a "good" Congressman, from the local viewpoint, is one who brings a goodly share of that money to his district. It pays a Congressman to stand in with the planners of appropriations, and it makes a questionable campaign issue for him if he has sacrificed his community to his disbelief in the New Deal and its works.

The Republican charge is not so much that relief has been dishonestly administered; they complain rather that it is a new form of political influence, and one which is so powerful that the party in office, so long as it keeps on spending, can never be ousted. In past times the party in power kept the wayward in line by withholding or extending patronage; but this was a bagatelle in comparison with million dollar relief projects and billion dollar spending programmes.

Dissensions in Both Parties

President Roosevelt's purge of disloyal Democrats has aroused great interest, and is being both exaggerated and distorted. The President holds a dual position, one which the British understand better than Americans. He is the chief executive and therefore the servant of all the people, but he is also the leader of his party. If his party shows defections, it is sound politics to try to prevent the re-nomination of the rebels. But the Republicans would deny this privilege to Mr. Roosevelt, and their comments on the purge have apparently led the President to modify his plans. The public seems to

dislike the idea of anyone being punished because he departed from the party line on the issue of the Supreme Court or the reorganisation of government.

The public is not party-minded in national affairs. This is natural, since in the past the two parties have not been clearly divided on fundamental national questions. Mr. Roosevelt would like to create a genuine New Deal party. He has expressed his desire to have the "liberals" on one side and the "conservatives" on the other. But the political executions and bitter battles which such a reformation would entail are too expensive to be risked in a campaign year. One or two conservatives may be defeated, as a warning to others. But the chief conservative Democrats will espouse the New Deal with lukewarm words for vote-catching, as they did two years ago, and will re-appear in Congress to assist Democrats but potential conspirators against the President.

It is clear that the Republicans have not recovered from their debacle of 1936. The Deal between Mr. Landon and Mr. Hoover goes on, Mr. Landon still hoping to gain party control for the liberal wing, Mr. Hoover leading the traditionalist Republicans along their familiar conservative path. But it is not a struggle which interests the public, and though Mr. Landon feels deeply enough that the Republicans cannot hope to win an election until they can vie with the Democrats in their concern for the underprivileged, he lacks the magnetism and oratory to convert Mr. Hoover's followers, or win over those of Mr. Roosevelt.

The party leadership in 1940 may go by default to Senator Vandenberg, though he lacks the stature of either Mr. Hoover or Mr. Landon. Bruce Barton, who combines advertising with popular religious writing, was invited to address the Indiana Republican convention, and struck the popular note which Mr. Landon has failed to sustain. At once Mr. Barton began to be studied as a possible candidate in 1940. He is serving his first term in Congress from a silk-stocking New York district, and was elected on his promise to try to "repeal a law each day." The combination of advertising with piety in Mr. Barton's person makes him appear an unusually characteristic American of the business type, and by no means shuts him out as a Presidential candidate.

It is worth noting that much of the effect of Mr. Roosevelt's tour across the continent was lost because of the round-the-world flight of Mr. Hughes. The President was not relegated to the inside pages, but the flyers got the larger headlines and more readers. Mr. Roosevelt, however, has aroused enthusiasm in the West, and all the polls show a slight rise of the percentage of the public who favour his leadership. The President's popularity is the chief asset of the Democratic party in the campaign, and it is difficult to see how the Republicans are going to concoct one that can begin to offset it before November.

Wall Street as a Barometer

NEW YORK, July 20.—One month has now elapsed since the memorable Monday morning when the stock market began its meteoric advance. Rarely, if ever, has so great a revaluation of the industrial equipment of a country occurred in so short a time; in two weeks, the industrial share indices rose about 30 per cent. From the low point of the year, approximately at the end of March, it is the exceptional share which has not risen at least 50 per cent.; and advances of 100 per cent. are by no means uncommon, especially among the low-priced, non-dividend-paying equities.

Not only was this remarkable change in appraisal not preceded by any visible upturn in general business; even now, a month after the stock market movement started so explosively, visible evidence of recovery is still relatively scanty. This, of course, is far from saying that no reason exists for anticipating a substantial revival. It is rather a reminder of the extreme instability of American markets and of the American economy in general.

In July, 1937, average stock market prices rose some 30 points (say 20 per cent.), apparently on the discovery that mid-summer business was holding up better than had been expected. There was hesitation for a fortnight or so, and then prices plunged downwards some 60 or 70 points between

~~Tracy file~~ To Dr. Alfred R. Cohen,
PSF Law School of Harvard University,
Frankfurter Cambridge, Mass. New Bedford, Mass.
Aug. 17/
[1935]
file
personal

Dear Rank:

This is by way of a P.S.

For I had hardly sent off
my letter when your news
arrived, and then
my hat was up high, in ce-
lebration of it. You said
it all so unacceptably
that not the bluest-colored
blue-colored boy in the State
Department could find diplo-
matic fault, and yet it was
said so simply and uncer-
tainly that not the most ordi-
nary man in the street could
miss its significance. My gratitude for it.
Ever yours
W.

TELEGRAM

18WUD14

Sally L. L.
The White House
Washington

PSF
file Frankfurter
d-v

New Milford Conn 309pm Sept 5 1938

The President

The White House

At Denton you had almost to square the circle and you certainly
did it.

Felix Frankfurter

335pmd

*File:
present*

Justice Felix Frankfurter
Friday PSF
at
[1938]

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Dear Mr. Justice:

1. First, foremost and last, I am terribly sorry that that virus should be kicked up, and I do hope that enduring relief will very soon come to you.

2. The letter to (eldest) shows, I hope, that I can follow good diplomatic advice - be kind that can make trees grow!

3. The pencilled portions are not offered as best-time stories, but they are calculated to produce sleep.

4. It will interest you to

Know that your best
Librarian of Congress to
be given a L. C. D.
by Yale at its next
Commencement.

Warrington left for
on Wednesday with a
gay and vigorous
confirmation of that a
truly civilized man is
at head of state.

Ever yours

V-H

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—OCTOBER TERM, 1938.

Newark Fire Insurance Company, Ap-
pellant,

449

vs.

State Board of Tax Appeals and The
City of Newark.

Universal Insurance Company and
Universal Indemnity Insurance Com-
pany, Appellants,

456

vs.

State Board of Tax Appeals of the
State of New Jersey and the City
of Newark.

Appeals from the Court of
Errors and Appeals of
the State of New Jersey.

[May 29, 1939.]

Mr. Justice REED announced an opinion in which the CHIEF Jus-
tice, Mr. Justice BUTLER and Mr. Justice ROBERTS concurred.

The controversy in No. 449 relates to the jurisdiction of New
Jersey to tax the appellant upon the full amount of its capital
stock paid in and accumulated surplus. The case is here by appeal
under Section 237(a) of the Judicial Code.¹

Chapter 236 of the Laws of 1918² is a general act for the assess-
ment and collection of taxes. Section 202 subjects all real and
personal property within the jurisdiction of New Jersey to taxa-
tion annually at its true value. By Section 301 the tax on other
than tangible personal property is assessed on each inhabitant in
the taxing district of his residence on the first day of October in
each year. Section 305 deals with domestic corporations as resi-
dents of the district in which their chief office is located and ren-
ders their personal property taxable in the same manner as that of

¹ 28 U. S. C. § 344(a).

² N. J. Laws 1918, p. 847; also in N. J. Rev. Stats. 1937, § 54:4.

individuals, except as otherwise provided. Section 307, the most vital in the case, provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

The appellant is a stock fire insurance corporation organized under the laws of New Jersey which at the time of this assessment required it to locate its principal office and to conduct its general business in the state.⁵ It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law requires to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's "executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of \$6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago."⁶ No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums.

The Board of Assessment of the City of Newark made an assessment, as of October 1, 1934, upon the capital stock paid in and accumulated surplus of the appellant, with deductions for debts and exemptions allowed by law. The assessment was sustained, in succession, by the Essex County Board of Taxation, by the New Jersey State Board of Tax Appeals, now an appellee, by the

Supreme Court,⁴ and by the Court of Errors and Appeals, the highest court in the state.⁵ Throughout the proceedings below the appellant resisted the jurisdiction of New Jersey to tax on the ground that its intangibles had acquired a business situs and the corporation a tax domicile in New York. Throughout, the state tribunals treated the assessment as upon personal property with a business situs in the sister state. The Supreme Court characterized the exaction as a personal property tax and discussed its validity "in the light of the proofs . . . upon the inescapable premise that . . . the securities, the personalty involved, have become an integral part of [appellant's] business situs in New York" It held that the state of domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state and added that, in the absence of a New York personal property tax, multiple taxation was impossible. The Court of Errors and Appeals of New Jersey, per curiam, affirmed the judgment for the reasons expressed in the opinion of the Supreme Court.⁷

Appellant urges error in sustaining the assessment in the face of the conclusion that the tax is a property tax upon intangibles with a business situs in New York, the commercial domicile of the corporation. Such approval, it is claimed, violates the due process clause of the 14th Amendment.

The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets.⁸ The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax.

When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the

⁴ 118 N. J. L. 525.

⁵ 120 N. J. L. 185.

⁶ 118 N. J. L. at 526.

⁷ 120 N. J. L. 185.

⁸ *Fidelity Trust Co. v. Board of Equalization*, 77 N. J. L. 125, 130.

⁵ N. J. Laws 1902, c. 124, section 3, second, 408; N. J. Laws 1929, c. 6, section 3, second, p. 18, and c. 47, section 1, p. 32. By c. 164 of N. J. Laws 1937, this was amended to read that the certificate of incorporation must set forth "the place where the principal office of the said company in this State is to be located."

jurisdiction, of its creator.⁹ There it must dwell.¹⁰ The dominion of the state over its creature is complete.¹¹ In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty,¹² the presumption is that such property is taxable by the state of the corporation's origin.¹³ This power of New Jersey to tax is made effective by section 307 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type, as the franchise tax, at one time levied,¹⁴ was repealed by the Act of April 8, 1903.¹⁵

There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state.¹⁶ The carrying on of the business of the corporation in New York, it is urged, has withdrawn its intangibles completely from the tax jurisdiction of New Jersey. With the assumption of a business situs and commercial domicile in New York, that state, under the authorities cited, would have the right to tax intangibles with this relation to its sovereignty. Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been

⁹ *Lafayette Insurance Co. v. French*, 18 How. 404; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 429; *Seaboard Rice Milling Co. v. Chicago, R. I. & P. R. Co.*, 270 U. S. 363, 366; *Fairbanks Steam Shovel Co. v. Willa*, 240 U. S. 642. Cf. *International Milling Co. v. Columbian Transp. Co.*, 292 U. S. 511, 519.

¹⁰ *Bank of Augusta v. Earle*, 13 Pet. 519, 588.

¹¹ *Oklahoma Gas Co. v. Oklahoma*, 273 U. S. 257, 259; *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 537-38.

¹² *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 92; *Blodgett v. Berman*, 277 U. S. 1, 9.

¹³ *Cream of Wheat v. Grand Forks*, 253 U. S. 325, 329; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 19; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237. Cf. *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, 161.

¹⁴ Act of April 18, 1884, N. J. Laws 1884, c. 159, p. 232.

¹⁵ N. J. Laws 1903, c. 208, p. 394.

¹⁶ *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *State Board v. Comptoir National D'Escompte*, 191 U. S. 288; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool and L. & G. Co. v. Board of Assessors*, 221 U. S. 346; *Wheeling Steel Corporation v. Fox*, 298 U. S. 193; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234.

heretofore reserved.¹⁷ We do not find it necessary to answer it in this case.

Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court.¹⁸

In the *Stempel*, *Bristol*, *Comptoir National*, *Metropolitan* and *Liverpool* cases, cited in note 16, *supra*, the integration of the foreign-owned intangibles with local activities was evident from the continued course of business. The presence or absence of the evidences of the credits from the jurisdiction was immaterial.¹⁹ The non-resident individuals and corporations carried on continuously a course of lending money or granting credits within the taxing states. The taxed intangibles grew out of these transactions. They were, in fact, a part of them. In the *Wheeling Steel* case, the same type of amalgamation occurred. West Virginia sought to tax a Delaware corporation on accounts receivable and bank deposits. The opinion points out, pages 212 and 213, that these choses in action were the indebtedness for or the proceeds of sales confirmed in West Virginia, attributable "to the place where they arise in the course of the business of making contracts of sale." In *First Bank Stock Corporation v. Minnesota* another Delaware corporation was found to have established a commercial domicile for itself and given a business situs to certain of its intangibles. The intangibles in question were stocks of Montana and North Dakota state banks, purchased and held as part of the corporation's assets in its Minnesota business of holding the shares and managing, through stock ownership, the business of numerous banks, trust companies and other financial institutions of the Ninth Federal Reserve District. As this business was localized in Minnesota, the stocks of these banks were an essential factor of that business and therefore had a taxable situs in Minnesota.

¹⁷ *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237, 241. Cf. *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 213; *First Nat. Bank v. Maine*, 284 U. S. 312, 331.

¹⁸ *Beldier v. So. Car. Tax Commission*, 282 U. S. 1, 8 and cases cited.

¹⁹ *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 402.

The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement.

The tax is upon "the full amount of capital stock and surplus" less certain allowed deductions of real estate and exempt securities. The evidence gives no explanation of the amount or source of the assets making up the amount \$3,370,080.66 which balances with the capital stock and surplus less these deductions. The stipulation shows "agreed" figures, \$8,107,901.83 presumably of capital and surplus, as shown below.²⁰ Agreed deductions are \$4,737,821.17. But the assessment is \$1,069,000. From the stipulation, we learn the "general accounts" are kept in New York City and all cash except \$6,425.32 and all securities are located at the New York office or in banks outside of New Jersey. If we assume that the "general accounts" mentioned are the company's claims against agents, other insurance companies, and similar bills receivable, no progress is made towards their identification with New York business. Nothing is shown as to the volume of New York business in comparison with New Jersey or the other states. We are not told

²⁰ "(a) The following figures have been agreed upon. In the first column appears the designation of what the fund represents; opposite each designation appearing the amount of the fund in question:

1. Capital stock	\$2,000,000.00
2. Surplus (as set forth in the books of the company) ..	2,982,940.29
3. Reserve for unearned premiums	3,001,623.46
4. Reserve for taxes	71,766.65
5. Reserve for contingencies	68,915.35
6. Reserve for reinsurance	4,228.36
7. Agency balances over 90 days old	119,109.72
8. Furniture and fixtures (in Newark office)	1,500.00
Total	\$8,250,082.83"

Reserves for unearned premiums and for reinsurance are a taxable asset in New Jersey. *City of Trenton v. Standard Fire Ins. Co.*, 77 N. J. L. 757, 764-65. The Board of Tax Appeals held the agency balances an asset, and the reserve for taxes a liability which is deductible. Nothing was said about the reserve for contingencies. Addition of the items known to constitute assets—capital stock, surplus, reserve for unearned premiums, reserve for reinsurance, agency balances—equals \$8,107,901.83.

where business is accepted, moneys collected or insurance contracts made. The securities may represent local loans or investments in New Jersey or elsewhere made from funds derived from similar insurance contracts with a business situs at those points.²¹ They may be the result of insurance activities of many kinds, taking place far from New York. If we were to assume that the intangibles of a corporation may have only one taxable situs, the mere fact that general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles does not destroy the taxability of a part of these intangibles by the state of the corporation's legal domicile. The presumption of a taxable situs solely in New Jersey is not overturned.

Universal Insurance Company and Universal Indemnity Insurance Company have appeals involving the same questions. By stipulation these cases were consolidated for review below and appeal here.

These appellants are New Jersey insurance corporations, assessed by the City of Newark in the same way, under the same statute and with the same result in the state courts as the appellant in No. 449.

There are no significant distinctions between the cases. A management corporation handles these companies at a New York office, where accounts are payable. Seven per cent of the business of Universal Insurance Company originates in New Jersey. The corresponding percentage for the other company is not shown. As in No. 449, the record is silent as to the character, source and use of the securities and credits.

The judgments in both cases are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

²¹ *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395.

148

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—OCTOBER TERM, 1938.

Newark Fire Insurance Company, Ap-
pellant,
449 vs.
State Board of Tax Appeals and The
City of Newark.

Universal Insurance Company and
Universal Indemnity Insurance Com-
pany, Appellants,
456 vs.
State Board of Tax Appeals of the
State of New Jersey and the City
of Newark.

Appeal from the Court of
Errors and Appeals of
the State of New Jersey.

• [May 29, 1939.]

Mr. Justice FRANKFURTER announced the following opinion, con-
curred in by Mr. Justice STONE, Mr. Justice BLACK, and Mr. Justice
DOUGLAS.

Wise tax policy is one thing; constitutional prohibition quite
another. The task of devising means for distributing the burdens
of taxation equitably has always challenged the wisdom of the
wisest financial statesmen. Never has this been more true than
today when wealth has so largely become the capitalization of ex-
pectancies derived from a complicated network of human relations.
The adjustment of such relationships, with due regard to the pro-
motion of enterprise and to the fiscal needs of different govern-
ments with which these relations are entwined, is peculiarly a phase
of empirical legislation. It belongs to that range of the experi-
mental activities of government¹ which should not be constrained by

¹ Compare *Anderson v. Dunn*, 6 Wheat 204, 225: "The science of govern-
ment is the most abstruse of all sciences; if, indeed, that can be called a
science which has but few fixed principles, and practically consists in little
more than the exercise of a sound discretion, applied to the exigencies of the
state as they arise. It is the science of experiment."

2 *Newark Fire Ins Co. vs. State Bd. of Tax Appeals of Newark.*

rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, affirming 41 N. Dak. 330. During all the vicissitudes which the so-called "jurisdiction-to-tax" doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval.² Questions affecting the factional "situation" of intangibles, which received full consideration in *Curry v. McCauley*, decided this day, do not concern the present controversies. *Cream of Wheat Co. v. Grand Forks*, *supra*, and the cases that have followed it, afford a wholly adequate basis for affirming the judgments below.

² See *Citizens National Bank v. Durr*, 257 U. S. 99, 109; *Schwab v. Richardson*, 269 U. S. 88, 92; *Baker v. Drusedow*, 269 U. S. 137, 141; *Swiss Oil Corp. v. Shanks*, 273 U. S. 467, 418; *Hellmich v. Hellman*, 276 U. S. 233, 238; *Montgomery Ward & Co. v. Emerson*, 277 U. S. 573; *Educational Films Corp. v. Ward*, 282 U. S. 379, 391; *Nebraska ex rel. Beatrice Creamery Co. v. Marsh*, 282 U. S. 799, 800; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 237.

SUPREME COURT OF THE UNITED STATES.

No. 460.—OCTOBER TERM, 1938.

I. W. Lane, Petitioner,
vs.
Jess Wilson, John Moss and
Marion Parks.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Tenth Circuit.

[May 22, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here on *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit affirming that of the United States District Court for the Eastern District of Oklahoma, entered upon a directed verdict in favor of the defendants. The action was one for \$5,000 damages brought under Section 1979 of the Revised Statutes (8 U. S. C. § 43), by a colored citizen claiming discriminatory treatment resulting from electoral legislation of Oklahoma, in violation of the Fifteenth Amendment. *Certiorari* was granted, 306 U. S. —, because of the importance of the question and an asserted conflict with the decision in *Guinn v. United States*, 238 U. S. 347.

The constitution under which Oklahoma was admitted into the Union regulated the suffrage by Article III, whereby its "qualified electors" were to be "citizens of the State . . . who are over the age of twenty-one years" with disqualifications in the case of felons, paupers and lunatics. Soon after its admission the suffrage provisions of the Oklahoma Constitution were radically amended by the addition of a literacy test from which white voters were in effect relieved through the operation of a "grandfather clause." The clause was stricken down by this Court as violative of the prohibition against discrimination "on account of race, color or previous condition of servitude" of the Fifteenth Amendment. This outlawry occurred on June 21, 1915. In the meantime the Oklahoma general election of 1914 had been based on the offending "grandfather clause." After the invalidation of that clause a special session of the Oklahoma legislature enacted a new scheme

for registration as a prerequisite to voting. Oklahoma Laws of 1916, Act of February 26, 1916, c. 24. Section 4 of this statute (now Section 5654, Oklahoma Statutes 1931, 26 Okla. St. Ann. 74)¹ was obviously directed towards the consequences of the decision in *Guinn v. United States*, *supra*. Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. These had to apply for registration between April 30, 1916 and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those "absent from the county . . . during such period of time, or . . . prevented by sickness or unavoidable misfortune from registering . . . within such time". The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the "grandfather clause" immunity prior to *Guinn v. United States*, *supra*, and citizens who were outside it, and the not more than 12 days as the normal period of registration for the theretofore proscribed class.

¹ "It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as heretofore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state; and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote."

The petitioner, a colored citizen of Oklahoma, who was the plaintiff below and will hereafter be referred to as such, sued three county election officials for declining to register him on October 17, 1934. He was qualified for registration in 1916 but did not then get on the registration list. The evidence is in conflict whether he presented himself in that year for registration and, if so, under what circumstances registration was denied him. The fact is that plaintiff did not get on the register in 1916. Under the terms of the statute he thereby permanently lost the right to register and hence the right to vote. The central claim of plaintiff is that of the unconstitutionality of Section 5654. The defendants joined issue on this claim and further insisted that if there had been illegality in a denial of the plaintiff's right to registration, his proper recourse was to the courts of Oklahoma. The District Court took the case from the jury and its action was affirmed by the Circuit Court of Appeals. It found no proof of discrimination against negroes in the administration of Section 5654 and denied that the legislation was in conflict with the Fifteenth Amendment. 98 F. (2d) 980.

The defendants urge two bars to the plaintiff's recovery, apart from the constitutional validity of Section 5654. They say that on the plaintiff's own assumption of its invalidity, there is no Oklahoma statute under which he could register and therefore no right to registration has been denied. Secondly, they argue that the state procedure for determining claims of discrimination must be employed before invoking the federal judiciary. These contentions will be considered first, for the disposition of a constitutional question must be reserved to the last.

The first objection derives from a misapplication of *Giles v. Harris*, 189 U. S. 475. In that case a bill in equity was brought by a colored man on behalf of himself "and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated" which in effect asked the federal court "to supervise the voting in that State by officers of the court." What this Court called a "new and extraordinary situation" was found "strikingly" to reinforce "the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights". See 189 U. S. at 487.² Apart from this traditional re-

² See also, *In re Sawyer*, 124 U. S. 200; *Walton v. House of Rep.*, 205 U. S. 487; 4 POMEROY, EQUITY § 1743 et seq.; Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 651.

striction upon the exercise of equitable jurisdiction there was another difficulty in *Giles v. Harris*. The plaintiff there was in effect asking for specific performance of his right under Alabama electoral legislation. This presupposed the validity of the legislation under which he was claiming. But the whole theory of his bill was the invalidity of this legislation. Naturally enough, this Court took his claim at its face value and found no legislation on the basis of which specific performance could be decreed.³

This case is very different from *Giles v. Harris*—the difference having been explicitly foreshadowed by *Giles v. Harris* itself. In that case this Court declared "we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill." 189 U. S. at 485. That is precisely the basis of the present action, brought under the following "appropriate legislation" of Congress to enforce the Fifteenth Amendment:

"Every person who, under color of any statute, . . . of any State, subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise. Whosoever "under color of any statute" subjects another to such discrimination thereby deprives him of what the Fifteenth Amendment secures and, under Section 1979 becomes "liable to the party injured in an action at law." The theory of the plaintiff's action is that the defendants, acting under color of Section 5654, did discriminate against him because that Section inherently operates discriminatorily. If this claim is sustained his right to sue under R. S. Sec.

³"If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured." 189 U. S. at 487. Recognition of the difference between an action for damages and the equitable relief prayed for in *Giles v. Harris* was repeated at the close of the opinion. See 189 U. S. at 488. Justices Harlan, Brewer, and Brown were of the opinion that it was competent for a federal court to grant even the equitable relief asked for in *Giles v. Harris*.

⁴The Act of April 30, 1871, c. 22, 17 Stat. 13, which became Section 1979 of the Revised Statutes, and is now 5 U. S. C. § 43.

tion 1979 follows. The basis of this action is inequality of treatment though under color of law, not denial of the right to vote. Compare *Nixon v. Herndon*, 273 U. S. 536.

The other preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210. But the state procedure open for one in the plaintiff's situation (Section 5654) has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. See Section 1 of Article IV of the Oklahoma Constitution; *Oklahoma Cotton Ginners' Ass'n v. State*, 174 Okla. 243. Barring only exceptional circumstances, see e.g. *Güchris v. Interborough Rapid Transit Co.*, 279 U. S. 159, or explicit statutory requirements, e.g. 48 STAT. 775; 50 STAT. 738; 28 U. S. C. § 41(1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. *Bacon v. Rutland R. R.*, 232 U. S. 134; *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196.

We therefore cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. *Guinn v. United States*, 238 U. S. 347; *Myers v. Anderson*, 238 U. S. 368. The Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in *Guinn v. United States*, supra, the Oklahoma "grandfather clause" was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legislation of 1916 partakes too much of the infirmity of the "grandfather clause" to be able to survive.

Section 5652 of the Oklahoma statutes makes registration a prerequisite to voting.⁵ By Sections 5654 and 5659⁶ all citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were perpetually disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the *Guinn* case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional "grandfather clause" had sheltered while subjecting colored citizens to a new burden. The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in exceptional cases a supplemental period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes

⁵ "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member." Section 2, Oklahoma Laws of 1916, c. 24.

⁶ "Any person who may become a qualified elector in any precinct in this State after the tenth day of May, 1916, or after the closing of any other registration period, may register as an elector by making application to the registrar of the precinct in which he is a qualified voter, not more than twenty nor less than ten days before the day of holding any election and upon complying with all the terms and provisions of this Act, and it shall be the duty of precinct registrars to register such qualified electors in their precinct under the terms and provisions of this Act, beginning twenty days before the date of holding any election and continuing for a period of ten days. Precinct registrars shall have no authority to register electors at any time except as provided in this Act and no registration certificate issued by any precinct registrar at any other time except as herein provided shall be valid." Section 9, Oklahoma Laws of 1916, c. 24.

in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated "grandfather clause" were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked.

The judgment of the Circuit Court of Appeals must, therefore, be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER think that the court below reached the right conclusion and that its judgment should be affirmed.

Mr. Justice DOUGLAS took no part in the consideration or disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

148

SUPREME COURT OF THE UNITED STATES.

No. 810.—OCTOBER TERM, 1938.

George W. O'Malley, Individually and
as Collector of Internal Revenue,
Appellant,
vs.
Joseph W. Woodrough and Ella B.
Woodrough.

On Appeal from the Dis-
trict Court of the United
States for the District of
Nebraska.

[May 22, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here under Section 2 of the Act of August 24, 1937 (50 Stat. 751), as a direct appeal from a judgment of a district court whose "decision was against the constitutionality" of an Act of Congress. The suit below, an action at law to recover a tax on income claimed to have been illegally exacted, was disposed of upon the pleadings and turned on the single question now before us, to wit: Is the provision of Section 22 of the Revenue Act of 1932 (47 Stat. 169, 178), re-enacted by Section 22(a) of the Revenue Act of 1936 (49 Stat. 1648, 1657), constitutional insofar as it included in the "gross income", on the basis of which taxes were to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932".

That this is the sole issue will emerge from a simple statement of the facts and of the governing legislation. Joseph W. Woodrough was appointed a United States circuit judge on April 12, 1933, and qualified as such on May 1, 1933. For the calendar year of 1936 a joint income tax return of Judge Woodrough and his wife disclosed his judicial salary of \$12,500, but claimed it to be constitutionally immune from taxation. Since it was not included in "gross income" no tax was payable. Subsequently a deficiency of \$631.60 was assessed on the basis of that item, which, with interest, was paid under protest. Claim for refund having been rejected, the present suit was brought, and judgment went against the Collector. The assessment of the present tax was technically under the Act of

At 3-4
and the
subsequent
has
follows.

1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of "judges of courts of the United States, taking office after June 6, 1932" which had been similarly incorporated in the Revenue Act of 1934 (48 Stat. 680, 686-687). Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his "gross income" must be judged on the basis of the validity of Section 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes. The fact that Judge Woodrough before he became a circuit judge and prior to June 6, 1932, had been a district judge is wholly irrelevant to the matter in issue. The two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar.

By means of Section 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of *Evans v. Gore*, 253 U. S. 245. That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the "gross income" from which the net income is to be computed, although merely part of a taxing measure of general, non-discriminatory application to all earners of incomes, is contrary to Article III, § 1 of the Constitution which provides that the "Compensation" of the "Judges" "shall not be diminished during their Continuance in Office." See also the separate opinion of Mr. Justice Field in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 604 *et seq.* To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views.¹ In doing so, he merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated.² Chief Justice Taney's vigorous views were shared by At-

¹ The letter was written on February 16, 1863, and will be found in 157 U. S. 701.

² "I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it." 157 U. S. at 702.

torney General Hoar.³ Thereafter, both the Treasury Department⁴ and Congress⁵ acted upon this construction of the Constitution. However, the meaning which *Evans v. Gore* imputed to the history which explains Article III, § 1 was contrary to the way in which it was read by other English-speaking courts.⁶ The decision met wide and steadily growing disfavor from legal scholarship and professional opinion.⁷ *Evans v. Gore* itself was rejected by most of the courts before whom the matter came after that decision.⁸

Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus

³ 13 Op. A. G. 161; but see the opinion of Attorney General Palmer, 31 Op. A. G. 475.

⁴ See Mr. Justice Field, concurring, in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 606-07.

⁵ See *Wayne v. United States*, 26 Cl. Cl. 274; Act of July 28, 1892, c. 311, 27 Stat. 306.

⁶ See judgments in *Cooper v. Commissioner of Income Tax*, 4 Comm. L. R. 1304, construing Section 17 of the Queensland Constitution Act of 1867 which prohibited "any reduction or diminution of the salary of a Judge during his term of office"; also, *Judges v. Attorney-General for Saskatchewan* [1937] 3 D. L. R. 209, construing Section 98 of the British North America Act, 1867, that "The Salaries . . . of the Judges . . . shall be fixed and provided by the Parliament of Canada" in connection with the Income Tax Act, 1932, of Saskatchewan.

⁷ See Clark, *Further Limitations Upon Federal Income Taxation*, 30 YALE L. J. 75; Corwin, *Constitutional Law in 1919-1920*, 15 AM. POL. SCI. REV. 635, 641-644; Fellman, *Diminution of Judicial Salaries*, 24 IOWA L. REV. 89; Lowndes, *Taxing Income of Federal Judiciary*, 19 VA. L. REV. 153; Powell, *Constitutional Law in 1919-1920*, 19 MICH. L. REV. 117-118; Powell, *The Sixteenth Amendment and Income from State Securities*, NATIONAL INCOME TAX MAGAZINE (July 1923) 5-6; 20 CH. L. REV. 794; 45 HARV. L. REV. 318; 20 ILL. L. REV. 376; 45 L. Q. REV. 291; 7 VA. L. REV. 69; 3 U. OF CHI. L. REV. 141.

⁸ The cases, pro and con, are collected in the recent dissenting opinion by Chief Judge Bond of the Court of Appeals of Maryland in *Gordy v. Dennis*, 5 A. (2d) 69, 82. Particular attention should be called to the decision of the Supreme Court of South Africa, *Krause v. Commissioner for Inland Revenue*, [1929] SO. AFR. B. (A. D.) 236, construing Section 100 of the South Africa Act, which had taken over the identical clause from Article III, Section 1, of our Constitution.

charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1.⁹ To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by Section 3 of the Public Salary Tax Act of 1939, amended Section 22(a) so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932."¹⁰ That Section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, 268 U. S. 501, the latter cannot survive.

Judgment reversed.

Mr. Justice McREYNOLDS did not hear the argument in this cause and took no part in its consideration or decision.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁹ The provisions regarding security of salary came from the Act of Settlement of 1700, 12 & 13 Will. III, c. 2, Sec. III, and the Act of 1760, 1 Geo. III, c. 23. See Holdsworth, *The Constitutional Position of the Judges*, 48 L. Q. Rev. 25; 2 HOLDSWORTH, *THE HISTORY OF ENGLISH LAW*, 559-64; § 44, 234, 514.

¹⁰ Public No. 22, 76th Cong., 1st Sess., c. 59. Section 209 of the same statute, however, provides that "In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

SUPREME COURT OF THE UNITED STATES.

No. 510.—OCTOBER TERM, 1938.

George W. O'Malley, Individually and
as Collector of Internal Revenue,
Appellant,

vs.

Joseph W. Woodrough and Ella B.
Woodrough.

On Appeal from the Dis-
trict Court of the United
States for the District of
Nebraska.

[May 22, 1939.]

Mr. Justice BUTLER, dissenting.

Concretely, the question is whether, by exacting from United States circuit judge Joseph W. Woodrough and his wife \$631.60 in the form of income tax on his salary of \$12,500 for 1936, the government diminished the compensation for his services theretofore fixed by Congress. That item excluded, they had no taxable income. The judge's monthly pay was \$1041.66. The tax took at the monthly rate of \$52.63.

The material details may be given briefly.

April 12, 1933, Judge Woodrough was appointed judge of the United States circuit court of appeals for the eighth circuit. He qualified May 1, 1933. Congress had by the Act of December 13, 1926,¹ enacted that "To each of the circuit judges the sum of \$12,500 per year" shall be paid as compensation. Since May 1, 1933, appellee has received the specified pay. The Revenue Act of June 6, 1932, applicable only to taxable years beginning after December 31, 1931, contained a provision declaring that in the case of judges taking office after that date "the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such . . . judges are hereby amended accordingly."² The Revenue Act of 1934,³ applicable only to taxable years beginning after December 31, 1933, and that of 1936,⁴ applicable only to taxable years beginning after December 31, 1935, contain the same language as that just quoted from the Act of 1932.

Judge Woodrough and his wife made a joint income tax return for 1936; it disclosed his salary but claimed it was not subject to the tax. The commissioner held the item taxable and made a de-

¹ c. 6, 44 Stat. 919.

² § 22(a), c. 209, 47 Stat. 169.

³ § 22(a), c. 277, 48 Stat. 680.

⁴ § 22(a), c. 690, 49 Stat. 1643.

iciency assessment of \$631.60. Plaintiffs paid under protest and filed claim for refund; it was denied. Claiming the tax that they were so compelled to pay diminished the judge's compensation and that therefore § 22(a) of the Act of 1936 violates § 1, Art. III, of the Constitution, plaintiffs sued to recover the amount of the tax. The collector moved to dismiss. The court held the Act unconstitutional, overruled the motion and, defendant having elected not to plead further, gave plaintiffs judgment as prayed. Defendant appealed.⁵

Article III, § 1, declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

It safeguards the independence of the judiciary. The abuse against which it was intended to be a barrier is included in the list of reasons for our Declaration of Independence. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.—He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Alexander Hamilton, explaining the reasons for and the purpose of § 1 of Art. III, said:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment . . .

"This simple view of the matter . . . proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks . . .

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no

⁵ Act of August 24, 1937, § 2, c. 754, 50 Stat. 752.

bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing . . ." (The Federalist, No. 78.)

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a *power over a man's subsistence amounts to a power over his will* . . . The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges, but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges." (The Federalist, No. 79.)

Mr. Justice Story declared that "Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery . . ." 2 Story, § 1628. Chancellor Kent said: "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions." 1 Kent Com. 294.

The first judicial construction of the clause was by the circuit court of the District of Columbia in 1803 in the case of *United States v. More*.⁶ The court was composed of Chief Justice Marshall, Chief Judge Kilby, and Circuit Judge Cranch. The opinion was written by Judge Cranch. The court sustained a demurrer to an indictment charging that More, a justice of the peace, under color of his office, exacted an illegal fee, 12 cents, for giving judg-

⁶ The opinion is set forth in a footnote at p. 160 *et seq.*, 3 Cranch.

ment upon a warrant for a small debt. The issue was whether an Act of Congress abolishing fees of justices of the peace in the District of Columbia could affect those who accepted their commissions while the fees were legally annexed to the office. The court said: "The 3d article of the constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, which shall not be diminished during their continuance in office. The act of congress of 27th of February, 1801, which constitutes the office of justices of the peace . . . ascertains the compensation which they shall have for their services in holding their courts . . . This compensation is given in the form of fees, payable when the services are rendered . . . That his [the justice's] compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. . . . If his compensation has once been fixed by law, a subsequent law for diminishing that compensation (a fortiori for abolishing it) cannot affect that justice of the peace during his continuance in office; . . ."

The first attempt to tax compensation of federal judges was during the Civil War. Section 86 of the Act of July 1, 1862,¹ levied "on all salaries of officers, or payments to persons in the . . . service of the United States . . . when exceeding the rate of six hundred dollars per annum, a duty of three per centum on the excess above the said six hundred dollars", and directed disbursing officers to deduct and withhold the duty. These general provisions were construed by the revenue officers to comprehend the compensation of the President and the judges of the United States. By letter of February 16, 1863, Mr. Chief Justice Taney protested to the Secretary of the Treasury. In the course of his letter,² he said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even

¹ c. 112, 12 Stat. 472.

² Printed in 157 U. S. at p. 701.

the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments. . . ."

"Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it."

The letter of the Chief Justice was not answered and, at his request, the Court, May 10, 1863, ordered the letter entered on its records. In 1869, the Secretary of the Treasury requested the opinion of Attorney General Ebenezer Rockwood Hoar as to the constitutionality of the Act construed to extend to judges' salaries. He rendered an opinion in substantial accord with the views expressed in Chief Justice Taney's protest. 13 Op. A. G. 161. Accordingly, the tax on the compensation of the President and of judges was discontinued and the amounts theretofore collected from them were refunded—some through administrative channels; others through action of the court of claims and ensuing appropriations by Congress. See *Wayne v. United States*, 26 C. Cl. 274, 290; 27 Stat. 306.

In 1889, Mr. Justice Miller, a member of the Court since 1862, said:³

³ Miller on the Constitution of the United States, p. 247.

"The Constitution of the United States has placed several limitations upon the general power [of taxation], and . . . some of them are implied. One of its provisions is that neither the President of the United States (Art. II, sec. 1, par. 6), nor a judge of the Supreme or inferior courts (Art. III, sec. 1), shall have his salary diminished during the period for which he shall have been elected, or during his continuance in office. It is very clear that when Congress, during the late [Civil] war, levied an income tax, and placed it as well upon the salaries of the President and the judges of the courts as those of other people, that it was a diminution of them to just that extent."

Although the Income Tax Act of 1894 said nothing about the compensation of the judges, Mr. Justice Field construed § 33¹⁰ to tax that compensation and assigned that ground among others for joining in the decision that the Act was unconstitutional. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 604-606. Mr. Justice Field, who was confirmed the day this Court ordered Chief Justice Taney's letter entered on its records, had taken his place upon this bench at the beginning of the following term. His opinion recited the facts of that incident and quoted extensively from the letter, which was printed as an appendix to the volume of the reports containing the opinions in the *Pollock* case. 157 U. S. 701. The Justice ended his discussion of the matter by stating his belief, based on information, that the opinion of Attorney General Hoar had been followed ever since without question by the Treasury. And, upon reargument of the cause, Attorney General Olney said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt."

The Revenue Acts of 1913¹¹ and 1916¹², being the first two after adoption of the Sixteenth Amendment, expressly excluded from gross income the compensation of judges then in office. But after this country engaged in the World War, the Revenue Act of 1918, approved February 24, 1919, defined gross income to include "in the case of the President . . . [and] the judges of the Supreme and inferior courts . . . the compensation received as such."¹³ The

¹⁰ Section 33, 28 Stat. 557, in terms was much like § 86 of the Act of 1862; it levied "on all salaries of officers or payments . . . to persons in the service of the United States, . . . when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars" and made it the duty of disbursing officers to deduct and withhold the tax.

¹¹ § 2B, 38 Stat. 168.

¹² § 4, 39 Stat. 759.

¹³ § 213(a), 40 Stat. 1062.

reports of the congressional committees having the measure in charge indicate that the Congress was in doubt as to the constitutional validity of that provision and intended to have the question decided by the courts.¹⁴ The question was raised and presented for decision in *Evans v. Gore*, 253 U. S. 245. The Collector included the salary for 1918 of Judge Evans, appointed before enactment of the taxing statute, in gross income. Had it been excluded, he would have had no taxable income. He paid the tax and brought suit to recover the amount so exacted. The United States district court for the western district of Kentucky held him not entitled to recover. But, after argument by eminent counsel including the Solicitor General, this Court held that the clause declaring that compensation of judges "shall not be diminished during their continuance in office" prevents diminution by taxation and that it has been so construed in the actual practice of the government.

For the purpose of disclosing the reasons for and true meaning of the clause forbidding diminution of compensation of judges, the opinion of the Court, written by Mr. Justice Van Devanter, brought forward statements of Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Chief Justice Taney, Justice Field, Attorneys General Hoar and Olney and others.

Speaking for the Court, he said:

"With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office.' Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?"

" . . . The primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading

¹⁴ H. Rept. No. 767, 65th Cong., 2d sess., p. 29; Sen. Rept. No. 617, 65th Cong., 2d sess., p. 6; 56 Cong. Rec., p. 10376.

principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

"Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished . . ."

"The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. . . ."

"When we consider . . . what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forebear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. [Citing.] Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on se-

curing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all."

Mr. Justice Holmes wrote a dissenting opinion, in which Mr. Justice Brandeis joined. With that expression his opposition to the decision ended. Two years later, in *Gillespie v. Oklahoma*, 257 U. S. 501, writing for the Court, invalidating a state tax upon net income of a lessee from sales of his share of oil and gas received under leases of restricted Indian land, he said (p. 505): "In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source, the tax is *pro tanto* void; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; a rule lately illustrated by *Evans v. Gore* . . ." And in that case he relied on the truth, as put by Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy." He quoted (p. 505) with approval from *Indian Oil Co. v. Oklahoma*, 240 U. S. 522, the statement of the opinion (p. 530) that "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them."

Miles v. Graham (1925), 268 U. S. 501, held invalid § 213(a), Revenue Act of 1918, (condemned in *Evans v. Gore*) when applied to compensation of Judge Graham, appointed after its enactment. Mr. Justice Holmes joined in the decision. Mr. Justice Brandeis merely noted dissent.

In the course of the opinion, we said:

"Does the circumstance that defendant in error's appointment came after the taxing Act require a different view concerning his right to exemption? The answer depends upon the import of the word 'compensation' in the constitutional provision.

¹⁵ *Gillespie v. Oklahoma* is one of the decisions subjected to condemnatory comment in the concurring opinion in *Graves v. New York ex rel. O'Keefe*, No. 478, October Term, 1938. It is there said: "A succession of decisions [*Gillespie v. Oklahoma* is the first cited] thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."

At another place in that concurrence, the writer stated: "The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old

"The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

" . . . The compensation fixed by law when defendant in error assumed his official duties was \$7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of *Evans v. Gore*.

"The taxing Act became a law [February 24, 1919] prior to the statute prescribing salaries for judges of the Court of Claims [approved February 25, 1919] but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of 'gross income', 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income', and to tax this as other salaries. This is forbidden by the Constitution.

tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. . . . The arguments upon which *McCulloch v. Maryland*, 4 Wheat. 316, rested . . . have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' . . . The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (dissent)."

But, in the *Gillespie* case, Mr. Justice Holmes, speaking for the Court, had definitely applied the doctrine that the power to tax does involve the power to destroy.

In the *Panhandle* case neither the Court, nor indeed another justice dissenting, was impressed by "The power to tax is not the power to destroy while this Court sits." The statement is vague and may be read to imply a power that this Court never possessed. If taken to mean that we are empowered to regulate or to limit the exertion by Congress of its power of taxation, it justly may be regarded as hyperbole; if taken to mean that this Court has power to prevent imposition by Congress of taxes laid to discourage, to destroy, or to protect, then it is in the teeth of the law. See, e.g., *Venzle Bank v. Penno*, 8 Wall. 533, 548; *McCray v. United States*, 195 U. S. 27, 53 et seq.; *Magnano Co. v. Hamilton*, 292 U. S. 40, 44 et seq.; *Cincinnati Soap Co. v. United States*, 301 U. S. 308.

"The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law."

In *O'Donoghue v. United States* (1933), 289 U. S. 516, we construed the Act of June 30, 1932¹⁸ reducing the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." We there held that the supreme court and court of appeals of the District of Columbia were constitutional courts and therefore that the judges of those courts were excepted from the salary reduction. We cited the authorities, adopted the reasoning, and reaffirmed the conclusions on which rest the Court's judgments in *Evans v. Gore* and *Miles v. Graham*. And see *Booth v. United States*, 291 U. S. 339.

Evidently the Court intends to destroy the decision in *Evans v. Gore*. Without suggesting that there is any distinction between that case and *Miles v. Graham*, it declares that the latter "cannot survive." But the decision of today fails to deal with, much less to detract from the reasoning of those cases. The opinion would imply that the letter of Chief Justice Taney to the Secretary of the Treasury, and the separate opinion of Mr. Justice Field in the *Pollock* case were treated as having weight as judicial decisions. But nowhere has that ever been suggested. However, all who are familiar with our judicial history know that entitled to great respect are the reasoned conclusions of these eminent American jurists as to the true intent and meaning of the Constitution of the United States. And similarly worthy of attention are the opinions of the Attorneys General and other public officials following the reasoning of Chief Justice Taney.

Now the Court cites, as if entitled to prevail against those well-sustained opinions and the deliberate judgments of this Court, opposing views—if indeed upon examination they reasonably may be so deemed—of English speaking judges in foreign countries.

It refers, footnote 6, to the decision of the Privy Council in *Judges v. Attorney-General of Saskatchewan* (1937), 2 D. L. R. 209, construing income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legis-

¹⁸ §§ 106, 107, 47 Stat. 401, 402.

148

lative enactments and subject to authoritative interpretation or change by the local or British Parliament. They shed no light upon the issue in this case.

The opinion claims no support from any state court decision. The one it cites, footnote 8, that of the Maryland Court of Appeals in *Gordy v. Dennis*, 5 A. 2d 69, held that under a clause in the Constitution of Maryland like that in Art. III, § 1, the compensation of state judges may not be taxed.

The opinion also cites, footnote 7, selected gainaying writings of professors,—some are lawyers and some are not—but without specification of or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students.

The suggestion that, as citizens, judges are not immune from taxation begs the question here presented. The Constitution itself puts judges in a separate class, declaring that at stated times they shall receive for their services compensation which "shall not be diminished." And so their salaries are distinguished from income of others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved.

Admittedly the Court now repudiates its earlier decisions upon the point here in issue. The provision defining tenure and providing for undiminishable compensation was adopted with unusual accord. There has been unanimity of opinion that, because in comparison with the legislative and executive the judicial department is weak, its independence is essential to our system of government. These safeguards go far to insure that independence. And, from the beginning, statesmen and jurists have agreed that the clause forbids diminution of judges' compensation by any form of legislation. The clause in question is plain: no exception is expressed; none may be implied. Its unqualified command should be given effect.

For one convinced that the judgment now given is wrong, it is impossible to acquiesce or merely to note dissent. And so this opinion is written to indicate the grounds of opposition and to evidence regret that another landmark has been removed.

I am of opinion that the judgment of the district court should be affirmed.

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

1301-S

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

(02)

R. B. WHITE
PRESIDENT

NEWCOMB CARLTON
CHAIRMAN OF THE BOARD

J. C. WILLEVER
FIRST VICE-PRESIDENT

SYMBOLS

DL	Day Letter
NM	Night Message
NL	Night Letter
LC	Deferred Cable
NLT	Cable Night Letter
	Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination.

Received at 234 Main St., Poughkeepsie, N. Y. PHONE 2392

NS198 11=TDB CAMBRIDGE MASS 4 636P

HON FRANKLIN D ROOSEVELT=

HYDEPARK NY=

file
OCT 4 PM 7 09
RSF
Frankfurter

MANY THANKS WE SHALL BE DELIGHTED TO RUN UP SATURDAY AFTERNOON=

FELIX FRANKFURTER.

36111
Place

NO ADDITIONAL CHARGE IS MADE FOR REQUESTING A REPLY BY WESTERN UNION

Return Ticket

~~Early Files~~ Frankfurter PSF
Law School of Harvard University,
Cambridge, Mass.

Cambridge, Nov. 16
[1938]

Dear Miss Le Hand,

May I entrust

this note to you? Its

contents are so startling &

would like to have it get

into the wrong hands. May

I thank you, and warm regards

Marion Frankfurter

126.

file
personal

d-✓

192, Brattle St.
Cambridge, Nov. 15
[1938]

126

Dear Mr. President,

It gives me
great pleasure to announce
that I voted for Mr. Cawley.
I won't say the choice
was easy, but I'm

Don't tell me that he
did. He too says the
Gallot is secret!

We tell and you are
here.

Therion Frankfurter

idea and unmarked
Being both, & take
great pains to tell all
my friends. The
idea of sanctity is so
strong they need a
stroke or two.

Felix - the coward -

Hamet Springs

FELIX FRANKFURTER
CAMBRIDGE, MASS.

file personal
July 21
BF
Frankfurter

192 Brattle Street
November 17, 1938

Dear Mr. President:

At Hyde Park you asked me to look into the work of Circuit Judge Stephens of California, Circuit Judge Healy of Idaho, and of a judge in Montana whose name at the moment had escaped you.

Having examined the reported opinions of Judge Stephens and Judge Healy, as well as the decisions in which they participated without writing, I now enclose two memoranda, I hope sufficiently brief, giving the results of this survey.

But I am sorry to say that I am not able to spot your Montana judge, for I can hardly believe that you had either Judge Baldwin or Judge Pray in mind. If, however, it should be either, I can send you a memorandum very quickly, for I have examined the opinions of both.

Faithfully yours,

Felix Frankfurter

The President

CAMBRIDGE, MASS. 02142
JULY 1964
LETTER NUMBER 1000000000

CIRCUIT JUDGE WILLIAM HEALY

Judge Healy has been on the court less than a year and a half, and neither his reported opinions, nor the cases in which he participated but did not write, afford an adequate judgment upon the bent of Judge Healy's mind or his constitutional outlook upon politico-economic issues. So far as his voting record indicates trends, it is one of liberality. The style of his opinions is lucid, less weighed down with dreary quotations and legal jargon than is the way of so many judges. But he has no radium-like quality; there is no real distinction of utterance and no manifestation of learning in the service of wisdom.

1. Constitutional Cases.

He has written in only two cases which come within this general field. Paramino Lumber Co. v. Marshall, 95 F (2d) 203, was a rather simple case, easily governed by the Supreme Court's decision in Myers v. Bethlehem Shipbuilding Co. The other, Cerritos Gun Club v. Hall, 96 F (2d) 620, arose under the Migratory Bird Treaty Act in which Judge Healy dealt with some procedural problems.

2. Administrative Agencies.

Judge Healy has written and participated in a number of cases in which he has shown hospitality towards the administrative process both of the Securities and Exchange Commission and of the National Labor Relations Board. But these cases were not challenging because in the S. E. C. cases (Wodley v. United States, 97 F (2d) 259, and Consolidated Mines v. S. E. C., 97 F (2d) 704,) Judge Healy followed the lead of the Circuit Court of Appeals for the Second Circuit, while in the Labor Board case (N. L. R. B. v. Oregon Worsted Co., 96 F (2d) 195,) he had the benefit of Stone's opinion in the Greyhound case.

5. Taxation.

Nor have the tax cases that have thus far come before Judge Healy furnished the proper litmus paper for a test of his mind on more fundamental legal issues affecting taxation. Commissioner v. Gerstle, 95 F (2d) 587; Mead v. Welch, 95 F (2d) 617; Bagnell v. Commissioner, 96 F (2d) 956; and Strauss v. Commissioner 97 F (2d) 549, are either conventional decisions or opinions which, however lucid, do not touch the nerve center of constitutional controversies in the domain of taxation.

CIRCUIT JUDGE ALBERT L. STEPHENS

While all of Judge Stephens' reported opinions have been canvassed, it is assumed that the qualities of his mind and his outlook upon politico-legal questions are to be gleaned from his opinions in public law controversies. This memorandum, therefore, restricts itself to these, and, is not concerned with ordinary private law litigation.

1. Constitutional Law.

It is fair to say that during his short tenure Judge Stephens has not been adequately tested in the domain of Constitutional Law. He seems to have written no opinions dealing with powers of government, excepting Gum Club v. Hall, 96 F (2nd) 620, arising under the Migratory Bird Treaty Act, and Femmer v. Juneau, 97 F (2nd) 649, dealing with a city's implied power to lease a wharf. Both these opinions reached sound enough conclusions. In the light of the authorities they were not difficult to reach, and give no indications as to his general constitutional outlook nor his ability to meet more complicated constitutional problems.

2. Administrative Agencies.

a. National Labor Relations Board

He has written no majority but only two concurring opinions. In N. L. R. B. v. Carlisle Lumber Co., 94 F. (2nd) 158, he added some commonsensical observations to Judge Haney's majority opinion, which incidentally indicates that he has probably a liberal attitude toward the rights of workers. In N. L. R. B. v. Star Publishing Co., 97 F (2nd) 465, he again appended concurring remarks to Judge Haney's majority opinion sustaining the Board in its order against the Seattle

Star. That paper found itself involved in a controversy between the Newspaper Guild and the A. F. of L., and Stephens' concurrence was a statement that he deemed it just to the Star to say that it endeavored to live up to the purposes of the Wagner Act, and that its violation was due to the dilemma presented to the newspaper by internal labor strife.

b. Immigration

In two cases Judge Stephens upheld the rulings of the Department of Labor, although in one case real hardship was entailed: Ex parte Nunez, 93 F (2nd) 41; Sing v. Director, 96 F (2nd) 969.

3. Taxation.

His opinions dealing with taxation show no marked trend. Several were on the record inevitable decisions for the Government. Others were rulings against the Government. In Commissioner v. Lyons, 97 F (2nd) 70, is a decision against the Government based on the interpretation of a lease. In U. S. v. Southwestern Cement Co., 97 F (2nd) 413, Judge Stephens dissented from a decision in favor of the Government which turned on the interpretation of a resolution declaring a continuing dividend. Here Judge Stephens construed the resolution rather stiffly against the Government's contention.

4. Federal Jurisdiction.

In two cases, Bowen v. Johnson, 97 F (2nd) 860, and Royalty Service Corp. v. Los Angeles, 98 F (2nd) 551, Judge Stephens wrote lucid opinions confining the jurisdiction of the federal courts to appropriate limits. In both cases prior Supreme Court decisions easily paved the way for his opinions.

5. General Observations as to style and sympathies.

On the whole the opinions of Judge Stephens are well conceived

and lucidly expressed, but devoid of distinction. Nor do they give evidence of learning.

The materials are insufficient for decisive judgment as to his sympathies. The Carlisle Lumber opinion manifests recognition of the place of the worker in the law, while the Star Publishing opinion not unnaturally sympathizes with an employer caught between two unions. His dissent in the Southwestern Portland Cement Co. case strains a point in favor of the taxpayer, while his opinion for the majority in Fireman's Fund Co. v. Kennedy, 87 F (2nd) 842, refused to avail itself of the legal reasoning advanced by Judge Haney's dissent, leading to recovery for an injured party under a liability insurance policy.

~~Early File~~ Felix Frankfurter PSF

FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Brattle Street
21 Nov. 1938

Dear Frank -

Let me break in on
your holiday just long enough
to thank you for the courageous
resourcefulness with which you
are making the Chamberlain
Government do its duty ⁱⁿ and
utilizing Palestine as the ob-
vious first line of relief for
the victims of the latest and
largest Nazi barbarities. So
much of recent British policy
reminds me of Mr. Kuzar
Ward's eagerness, in his pa-
triotic devotion, to offer up
his wife's relations on the
altar of patriotism. Palestine
is here and now - that and
Trans-Jordan - as an obligation
of action by Et. Britain, in-
stead of utterly pious words.
And you have driven home
your whole effort with Doering
Street blantly fully, with your

FELIX FRANKFURTER
CAMBRIDGE, MASS.

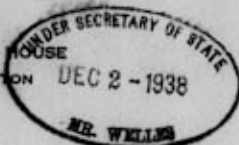
statement of hope at Warren
Springs. I admired it un-
necessarily - merely as a piece
of art.

Your Lonely Traveling
Day remembrance was the best
possible way of vindicating
and re-vivifying our
traditional democratic
faith. I've been reading
Hazard - and the speeches
of Chamberlain and Simon
and even of Halifax are
sickening. How Gladstone
and Bryce and Stagg and
Balfour must "wince" in
the other world! Thank God,
say I, with millions upon
millions of Americans, for
the way in which you keep
the flame of civilization
alight and burning brightly.
Ever faithfully yours
F. F.

These Enclosures may interest you.

RECEIVED
1938
22

REPRODUCED BY
THE WHITE HOUSE
WASHINGTON



CONFIDENTIAL

Warm Springs, Ga.,
December 1, 1938.

MEMORANDUM FOR

THE UNDERSECRETARY OF STATE

*file
personal*

Will you read the
enclosed and speak to me about
it on my return?

F. D. R.

24
file
personal

FELIX FRANKFURTER
CAMBRIDGE, MASS.

Handy file

192 Brattle Street

6 December 1938

BF Frankfurter

Dear Frank:

Did you really mean to include me among the Council of scholars whom you have summoned to consider your proposal for establishing a fit home and organization, at Hyde Park, for your unparalleled archival materials? In any event, your kind invitation says you want me and so I shall be there on Saturday. If you think that I ought to be presumed on any phase of this business, beyond what your lucid memorandum sets forth and our talks in the park have given me, so as to be helpful at the meeting, please send me words, perhaps through

2.

FELIX FRANKFURTER
CAMBRIDGE, MASS.

Tommy, who can give it to me orally.

I could not listen in to your Chapel Hill speech - I had a seminar at the time - but it reads like the utterance of a man in solidly high spirits who has, with good humor and a knowing mind, just begun to fight. There is no doubt about - we, the U.S.A., are the sure hope of all that has been most precious in Western civilization. And how infinitely fortunate civilization is that you are where you are.

Yours devotedly
FF.

~~Dear Mr.~~ J. Frankfurter

PSF

FELIX FRANKFURTER
CAMBRIDGE, MASS.

192 Braute Street

12 December 1938

Mr. Frank-

Wanted that a fine affair on Saturday! It seemed true that it was ^{even} edifying a gathering as I experienced. The talk was good, because free, at lunch, and your place was persuasive because it was patriotically patriotic and imaginative. Such minor suggestions, complementary to your proposals, merely confirmed and strengthened what you planned. I did appreciate your letting me join that interesting if not wholly scholarly group. Frank Walker & I saved it from being completely a cadence.

Have you the enclosed stamp, sent me by a friend, who says that

over

Hitler did not like his face
and so recalled this issue.

It was grand seeing you
so fit and I had a good
time - Even to I heard
that Marion sent you a
dirty dig against me.

Our affectionate regards
to you.

Ever devotedly
V.T.

~~Study File~~

Frankfurter PSE

92 Broad St.

FELIX FRANKFURTER
CAMBRIDGE, MASS

27 DEC 38

1938

Dear Randall

When I left the
other day, after your
archival luncheon,
you said that you
would like to see me
in two or three weeks
to talk about lower
court appointments.
That is just a word
today that I am at
your disposal at
any time - and

shall be free from any
Engagements here
until January 9th.

I had a most in-
timate talk with
Lothian, just from
London, who is now
as hot against
Hitler as any Jut,
and said that Cham-
berlain was known
his "appeasement" policy
is a complete flop
as to Hitler but that
he - Chamberlain -

hoping to wear Mussolini from
Hitler! Old Joe Chamberlain
would look. Have been as
naive as all that.

I hope that you are having
some jayous days. At least
on one thing Marion and I
head with one voice - we
wish you our warmest good
wishes. Graciously yours
W.

*file
personal
d-✓*

A LETTER TO HITLER

By

HOWARD MUMFORD JONES

*with the devoted
good wishes of
Mae and her daughter*

Reprinted from

The Boston Evening Transcript, December 3, 1938

Feeling that this letter is worthy of wider circulation, a small group of citizens of Boston and Cambridge have provided the funds necessary to reprint it.

A LETTER TO HITLER

SIR:

As I sit at my desk meditating on a Christmas book article for the Boston Evening Transcript, I find that, like King Charles's head in "David Copperfield," you constantly intrude into whatever I am about to write. The American Christmas season is an offspring in large measure of the German Christmas — that jolly and comfortable celebration which you, more than anyone else in the world, have ruined; and your hostility towards the doctrine of the Prince of Peace will not down. It is a period when we like to think of the birth of a Jewish baby in Bethlehem of Judaea; but the unspeakable obscenities which have characterized the German treatment of that proud and unhappy race are the product of your book and are carried out at the instigation, explicit or implicit, of your ministers.

The capital of the Christian world is Rome; but nowadays Rome mainly suggests the policy of your

ally, whose warriors have horribly mangled men, women and children in Ethiopia and Spain, and who is now blindly following you in excluding from his nation those who, like Jesus of Nazareth, are of Jewish blood.

At this season of the year it is customary in our country to give toys to the children. In the past many of these toys have come from Czechoslovakia and many of them have come from Japan. You have destroyed the first of these countries and your party has instigated in what is left of it the same bigoted persecutions which have characterized your regime in Germany. The second of these countries is your ally and is prosecuting a war against the Chinese distinguished by the callous indifference to suffering which seems to be the policy of Fascist nations.

The Christmas period is also a period in which men turn naturally to the Christian church. The most distinguished Protestant minister in Germany is, so far as I can learn, either in a concentration camp or otherwise obscurely imprisoned for saying that God has some rights, even in Germany; and a Catholic cardinal in your city of Vienna was recently mobbed without rebuke by a body of your followers.

That the German people have suffered many unmerited injuries in the last quarter of a century is

freely allowed by all thoughtful men. In correcting these injuries, however, you, more than any other single person in the world, are responsible for unleashing a torrent of hate, of bigotry, of persecution, of violence, of fear. I do not know what Christmas will be like in Germany. In my own country it will not be a happy time because you and your party have injured all those concepts of brotherhood, of gentleness, of tolerance, of respect for the personalities of others which we in this country like to think that Christmas represents.

It has been customary on this paper, I am informed, to draw up lists of books which can be recommended to readers who desire to give suitable presents to their friends. My associates, better informed than I am about current fiction and contemporary poetry, in other columns of the Transcript will make their recommendations of novels and books of verse. My task is to draw up a list of general books suitable for this purpose. The reason I find the task difficult is that your shadow falls over the pages of these works, devoted as they mainly are to the analysis of a world of violence and bloodshed which must apparently continue its mad course until you are one with Attila and Napoleon.

Possibly this will flatter you, if you happen to know that it is true. You can say that like Charle-

magne or Julius Caesar or Alexander you changed the course of world history. Men for a thousand years to come will be studying your character, probing your policies, and endeavoring to learn why, from dark, unfathomable caverns in your own nature, you let loose upon the world the instruments of your power. It is not surprising therefore that men have already begun this quest; that, outside the field of science (and yet not altogether excluding that field), I find few volumes published this year, dealing with current events, in which you and your policies do not figure. Even the philosophers have had to re-examine their premises since you came into being. But somehow I cannot feel that these books are appropriate at Christmas.

There is, however, an old book which I gather you have not read; or, if you have read it, I am quite certain you have not understood what it says. Indeed, it would be difficult for you to appreciate either its beauty or its wisdom, for the sufficient reason that it is a product of the genius of the Jewish race. This book is called the Bible, and it was beautifully translated into German by a distinguished predecessor of yours among the great men of Germany, one Martin Luther. I have read parts of that translation, and I find it has something of the literary dignity which distinguishes our version of the

same book, the so-called King James Bible. It is a book, or rather collection of books, divided into two parts — the Old Testament and the New.

Should you read it, or read it again, I am certain you will find in the older portions of this book many passages which will confirm you in your dislike of the Jewish race. The most ancient parts reflect the life of relatively primitive times. The savagery there portrayed is curiously like the savagery portrayed in the Nibelungenlied; and some of us are inclined to think that in either case it is savagery that is, or ought to be, out of date.

The later portions of this volume, called the New Testament, tell of course a different story. As I open this portion of the volume, my eye falls upon several familiar passages. One, for example, is this:

Then Herod, when he saw that he was mocked of the wise men, was exceedingly wroth, and sent forth and slew all the children that were in Bethlehem, and in all the coasts thereof, from two years old and under, according to the time which he had diligently inquired of the wise men.

Then was fulfilled that which was spoken by Jeremy the prophet, saying,

In Rama was there a voice heard, lamentation, and weeping, and great mourning, Rachel weeping for her children, and would not be comforted, because they are not.

I find, however, that Herod was unsuccessful in destroying the Prince of Peace:

But when Herod was dead, behold, an angel of the Lord appeareth in a dream to Joseph in Egypt,

Saying, Arise and take the young child and his mother, and go into the land of Israel: for they are dead which sought the young child's life.

The young child grew into manhood. He proved to be a powerful and fascinating orator like yourself. One of his orations has been preserved in full. I quote a portion of it:

Our Father which art in heaven, Hallowed be thy name.

Thy kingdom come. Thy will be done in earth, as it is in heaven.

Give us this day our daily bread.

And forgive us our debts, as we forgive our debtors.

And lead us not into temptation, but deliver us from evil.

Like you the young man was chancellor of a kingdom. It was a kingdom, he thought, which had been invaded by a powerful prince, one Beelzebub. Regarding methods of repelling the invasion, he had a policy somewhat different from your own, which he thus enunciated:

And if Satan cast out Satan, he is divided against himself; how shall then his kingdom stand?

This seems to mean that when violence is used to repress violence, only violence results.

We do not feel, here in the United States, any immense moral superiority to you or anybody else. We have, God knows, our own unhappy record of violence to mourn over. But the young man whom I have quoted was likewise of the opinion that they that take the sword shall also perish by the sword, and we are trying not to perish in this way. Our Christmas season is not as cheerful as it might be, largely because of the history of Europe in 1938. And we are wondering, some of us, whether you are going to make the Christmas season of 1939 equally tragic.

Very truly but not (thank God) yours,

HOWARD MUMFORD JONES