

CONSTITUTIONAL ISSUES IN THE SUPREME COURT, 1935 TERM

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The term just ended has been epoch making, not only on account of the large number of important questions decided by the Court, but also because many of the Court's decisions aroused great antagonism.¹ Never has the Court itself been so sharply (and, indeed, bitterly) divided in important cases: there were eleven five-to-four decisions,² thirteen, six-to-three³; in only one of the cases involving New Deal legislation was the decision unanimous.⁴

Most of the New Deal cases which came before the Court involved further consideration of the question considered in the *NRA* case,⁵ namely, that of the relations between the states and the national government. Due to the far reaching and fundamental nature of that question, it will be well to consider together all the decisions of the term just ended which deal with that relationship. In studying these it must always be borne in mind that the cry of states' rights, when raised by individuals and not by the state affected, is usually hollow. Let one of the states actually attempt to exercise a power of regulation denied Congress on the ground that it belongs

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1. References will be given in connection with specific cases.

2. The four conservative judges were in the minority in only two cases: *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85 (1935); *Borden's Farm Products Co.*, 297 U. S. 251 (1936); in one other case three of them agreed with Justice Roberts, while Justice Van Devanter voted with the liberals in majority: *McCandless v. Furlaud*, 296 U. S. 140 (1935). In two cases Justice Roberts dissented with the liberal trio: *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936)—on the right of the stockholders to sue; *Baltimore & Ohio R. R. v. United States*, 56 Sup. Ct. 797 (1936); in another case he concurred in the result only and the liberal trio, while also concurring, disagreed expressly with the reasoning of the majority: *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38 (1936). In five cases the Chief Justice and the liberals disagreed with the other five justices: *Helvering v. St. Louis Trust Co.*, 296 U. S. 39 (1935) (and its companion, *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48 (1935)); *Bingham v. United States*, 296 U. S. 211 (1935) (special concurrences); *Carter v. Carter Coal Co.*, 56 Sup. Ct. 855 (1936); *Ashton v. Cameron County*, 56 Sup. Ct. 892 (1936); *Morehead v. New York ex rel. Tipaldo*, 56 Sup. Ct. 918 (1936). For analysis of five-to-four decisions of recent years, see Fraenkel, (1935) 2 U. S. L. WEEK 1010.

3. In all but two of these cases the dissenters were the liberal trio. The exceptions were *United States v. Safety Car Heating & Lighting Co.*, 297 U. S. 88 (1936) (Justices Roberts, Sutherland and Butler dissenting), *Whitfield v. Ohio*, 297 U. S. 431 (1935) (Justices Van Devanter, McReynolds and Stone concurring in the result only).

4. This was the *Home Loan Bank* case, *Hopkins Federal Savings & Loan Ass'n. v. Cleary*, 296 U. S. 315 (1935). The *Rice Millers* case, 297 U. S. 110 (1936), can hardly count as a unanimous decision since there had been dissent from the granting of the injunction, 296 U. S. 569 (1935).

5. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

to the states, and at once the claim is made that the due process clause of the Fourteenth Amendment prevents such exercise. In the *Minimum Wage* case⁶ the Supreme Court gave dramatic evidence on the last day of the term of this peculiarity of our constitutional system. Therefore, cases of all kinds affecting both state and federal action involving the due process clause will be considered next. After that, cases arising under the equal protection clause and other provisions affecting only the states will be taken up. The discussion will end with miscellaneous subjects affecting the national government alone.

I

THE FEDERAL SYSTEM

a. "States' Rights"

The Court has been engaged from the beginning of its history in defining the relations between the states and the federal government, veering in favor now of a broad construction of the Constitution, now of a narrow one.⁷ For our time the Court has accepted in the *Schechter* case a narrow view. It remains to be seen how that decision has since been applied to other situations, how extended beyond the implications there contained.

1. The first case decided at this term involved the right of Congress to impose a tax on persons conducting the liquor business in violation of local law.⁸ Since this tax⁹ had been imposed during the existence of the Eighteenth Amendment, it was argued, and it had been held by the circuit court of appeals,¹⁰ that it fell with the repeal of that Amendment. Without expressly passing upon that argument, the Supreme Court, in *United States v. Constantine*,¹¹ affirmed the reversal of conviction for failure to pay the tax. Speaking through Mr. Justice Roberts, the majority of the Court concluded that the imposition was a penalty, not a tax, and was therefore beyond congressional power. Justice Roberts based the first of these conclusions on the fact that the tax was levied only upon the commission of a crime and that it was very large in amount.

In support of the second conclusion he maintained that if Congress could impose penalties above those fixed by the states, possession of this power would "obliterate the distinction between the delegated powers of the federal government and those reserved to the States and their citizens. . . .

6. *Morehead v. New York ex rel. Tipaldo*, 56 Sup. Ct. 892 (1936).

7. I BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) 307-316. See 3 WARREN, *HISTORY OF THE UNITED STATES SUPREME COURT* (1926) 451-461, also 347-364, 416-424; Powell, *Commerce, Pensions and Codes* (1930) 49 HARV. L. REV. 1, 193; Note (1935) 35 COL. L. REV. 1072.

8. *The Federal Warehouse* case. *United States v. Hastings*, 206 U. S. 188 (1935), cannot be considered as the court avoided discussion of the constitutional issue.

9. 48 STAT. 731 (1934), 26 U. S. C. A. § 201 (1935).

10. *Constantine v. United States*, 75 F. (2d) 928 (C. C. A. 5th, 1935).

11. 296 U. S. 287 (1935), 84 U. OF PA. L. REV. 663 (1936), 49 HARV. L. REV. 650.

The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority".¹² Although he did not cite the *Schechter* case, he did rely on the *Child Labor* decision.¹³

Justice Cardozo wrote a dissent, with Justices Brandeis and Stone agreeing. He was unable to find justification for the conclusion of the majority that the tax was intended as a penalty and described the reading of a contrary purpose into the law as "the process of psychoanalysis . . . spread to unaccustomed fields".¹⁴ He pointed out that Congress may very well have decided that a business illegally carried on would yield larger profits than one lawfully conducted, so that "not repression, but payment commensurate with the gains is thus the animating motive".¹⁵ He further argued that the greater difficulty in collection from the illegal enterprise justified the size of the exaction, and that the very fact of illegality might be made the basis of classification since "in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful".¹⁶ Justice Cardozo in no way questioned the conclusion of the majority that if the imposition in fact were a penalty, it was then void as beyond federal power.

This case is important, not so much for itself, as because it marked a departure from earlier cases which had refused to test taxes by their motives¹⁷ and therefore foreshadows, in part, at least, the decision in the *AAA* case.

2. The attempts of the Roosevelt administration to help agriculture had been challenged in a number of ways. Processors of cotton, meat, rice, wheat, and other commodities contested the taxes levied upon them, taxes levied in order that the administration might pay bounties to producers who had conformed to various reduction plans formulated by the Secretary of Agriculture pursuant to the AAA.¹⁸ Farmers questioned the limitation of production directly provided by laws such as the Bankhead Cotton Control Act,¹⁹ and Governor Talmadge instituted a suit on behalf of the State of Georgia which also challenged this law.²⁰ By the summer of 1935 the suits which sought to enjoin collection of the processing taxes had become so numerous that Congress amended the AAA and expressly forbade these suits, providing also that no suit could be maintained to get back any taxes

12. *Id.* at 296.

13. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

14. 296 U. S. 287, 299 (1935).

15. *Id.* at 297.

16. *Id.* at 297.

17. *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934) and cases there cited.

18. 48 STAT. 31 (1933), 7 U. S. C. A. § 601 *et seq.* (Supp. 1935).

19. 48 STAT. 603, 7 U. S. C. A. § 710 *et seq.* (Supp. 1935).

20. *Georgia v. Morgenthau*, 297 U. S. 726 (1936) (bill dismissed on request of complainant after law was repealed).

actually paid unless the taxpayer could show he had not passed on the tax to the purchaser of the commodity.²¹ Nevertheless, many lower federal courts granted injunctions on the ground that the conditions imposed by the law were arbitrary and unreasonable.²²

The first of the injunction cases to reach the Supreme Court was a group involving rice. The lower courts had denied injunctive relief,²³ but the Supreme Court, without opinion, granted an injunction pending the determination of the appeal to it; Justices Brandeis, Stone and Cardozo dissented, also without opinion.²⁴ Thus, without any reason advanced, the Court overruled the precedent it had laid down in connection with the Child Labor tax. Then, although the Court had declared that tax void,²⁵ it nevertheless refused to enjoin its collection.²⁶

The fate of the processing taxes was not, however, decided in any of these injunction suits, but in a case in which the government itself sought to collect the tax from the receivers of a bankrupt concern. Originally its claim had been allowed,²⁷ but the Circuit Court of Appeals for the First Circuit decided otherwise,²⁸ upholding the contentions of the receivers that the law delegated too much power to the Secretary of Agriculture and that it infringed upon the powers of the states. In the Supreme Court the second of these positions was sustained in *United States v. Butler*.²⁹

The majority opinion, written by Mr. Justice Roberts, upheld the right of the receivers to question the tax on the ground that it formed an integral part of a regulatory plan—"to take money from the processor and bestow it upon farmers who will reduce their acreage".³⁰ It was not a tax, he said, since that word "has never been thought to connote the expropriation from one group for the benefit of another".³¹ The exaction was valid, therefore,

21. 49 STAT. 770, 7 U. S. C. A. § 623d (Supp. 1935).

22. See cases collected in Note (1935) 49 HARV. L. REV. 109. Prior to the decision by the Supreme Court injunctions were denied in *Fisher Flour Mills Co. v. Vierhus*, 78 F. (2d) 889 (C. C. A. 9th, 1935), *Escalante v. Fontenot*, 79 F. (2d) 343 (C. C. A. 5th, 1935) and *Rickert Rice Mills, Inc. v. Fontenot*, 79 F. (2d) 700 (C. C. A. 5th, 1935), but had been granted in *Regensburg & Sons v. Higgins*, 79 F. (2d) 516 (C. C. A. 2d, 1935). Moreover, the Circuit Court of Appeals for the Ninth Circuit changed its view after the 1935 amendments. *Merchants Packing Co. v. Rogan*, 79 F. (2d) 1 (1935); *Albers Bros., Inc. v. Vierhus*, 80 F. (2d) 700 (1935).

23. *Escalante v. Fontenot*, 79 F. (2d) 343 (C. C. A. 5th, 1935); *Rickert Rice Mills v. Fontenot*, 79 F. (2d) 700 (C. C. A. 5th, 1935).

24. 296 U. S. 569 (1935).

25. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

26. *Bailey v. George*, 259 U. S. 16 (1922). But in *Huston v. Iowa Soap Co.*, 364 C. H. 1936 Fed. Tax Serv. ¶ 9463 (C. C. A. 8th, 1936), the majority of the court held that the *Bailey* case was still law, suggesting that the Supreme Court must have granted the injunction in the *Rice Millers* case because of exceptional circumstances.

27. *Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552 (D. Mass. 1934).

28. *Butler v. United States*, 78 F. (2d) 1 (C. C. A. 1st, 1935).

29. 297 U. S. 1 (1936), 84 U. OF PA. L. REV. 547, 36 COL. L. REV. 667, 49 HARV. L. REV. 828. See Grant, *Commerce, Production and the Fiscal Powers of Congress*, (1936) 45 YALE L. J. 751, 991.

30. *Id.* at 58.

31. *Id.* at 60.

only if the whole regulatory scheme could be upheld. Nevertheless, the opinion next considered the contention of the government that the attack must fail, since Article I, Section 8, of the Constitution, the general welfare clause, authorized the use of the moneys raised by the tax. And this is called "the great and controlling question in the case".³² Logically, all the discussion which centered about that question was unnecessary if the first portion of the opinion was sound. The only question which should then have been considered was whether the regulation was within the power of Congress. And the Court appears to have realized this, since it is with that question that the opinion concludes. But, since the Court decided that under the general welfare clause Congress had broad power to levy taxes, one would suppose the Court would have considered the question whether the encouragement to agriculture expected from the price advance consequent upon acreage reduction was a purpose within the concept, "general welfare." And that is a subject the Court did not discuss at all. Thus the opinion of the majority suffers from a logical split in the middle which is at no time compensated for.

The Court pointed out that the government had conceded that the general welfare clause did not, of itself, give Congress the power to regulate agriculture, and that this must be so, since otherwise the federal government would be one of unlimited powers. The clause, therefore, qualified the taxing power. On the other hand, the taxing power must extend beyond the other enumerated powers granted to Congress, since otherwise the words "general welfare" would have no meaning. The Court thus adopted the position of Hamilton and Story and rejected the narrower view of Madison. Yet, having so decided, indeed for the first time, the Court turned its back on the problem presented by this discussion. It based its decision on the considerations suggested in the first part of its opinion. The tax fell because it violated the rights of the states.

This, the crucial portion of this far-reaching decision, rested upon the contention that the AAA was regulatory in character. It is prefaced by the remark that "Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton and exempt those who agree so to do."³³ The statement suggests that the regulatory force of this statute was directed toward the person who was challenging the tax, evidently in order to bring the forthcoming decision within the authority of the *Child Labor* case.³⁴ But in fact, the law in no way sought to restrict the freedom of processors; the rest of the opinion ignores them altogether. Mr. Justice Roberts goes on to argue that compulsion was laid

32. *Id.* at 62.

33. *Id.* at 70.

34. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

upon producers, not because any penalties were provided for non-compliance by them,³⁵ but because refusal to comply would involve loss of benefits. "The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. . . . This is coercion by economic pressure. The asserted power of choice is illusory."³⁶

Justice Roberts furthermore declared that the Act would have to be condemned even if wholly voluntary, since government could not purchase compliance where it could not compel it.³⁷

The fact that Congress had made many appropriations for purposes not strictly federal was glossed over by the remark: "We are not here concerned with a conditional appropriation of money"³⁸—as if to suggest that Congress might induce action by reward, but not by purchase. It remains to be seen how the Court will handle such a problem as this, if ever it is squarely faced. But perhaps Congress will not again make the mistake of tying together in one law the means and the end. For it seems clear that if the processing tax had stood by itself it would have been perfectly good as an excise. And if separate laws had provided bounties for farmers they, too, would have been immune from attack under the doctrine of *Massachusetts v. Mellon*³⁹ "because no remedy was open for testing their constitutionality in the courts."⁴⁰

The opinion of the majority closes on the note that if this law were upheld, Congress could, by similar devices, regulate all industry, and that the decision in the *Schechter* case might by such means be circumvented. "Perhaps," said Justice Roberts, "every business group which thought itself underprivileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income."⁴¹ Evidently Mr. Justice Roberts, when he made this statement, had forgotten the protective tariff, a device substantially, if not technically, the same as the one he described. And Professor Hart of Harvard has written an amusing imaginary opinion modelled on this of Mr. Justice Roberts, which invalidates the whole tariff system.⁴²

Justices Brandeis, Stone and Cardozo disagreed with these conclusions of the majority. Their spokesman was Mr. Justice Stone, who in this dissent reached the greatest heights of his career. The opinion opens by reminding the majority that "the only check upon our own exercise of power is our own sense of self-restraint", and that for the removal of unwise laws

35. Except, of course, by the Bankhead Act (see *supra* note 19) which was not then before the Court, but which the majority condemn in passing. See 297 U. S. 1, 71 (1936).

36. *Id.* at 70.

37. *Id.* at 71.

38. *Id.* at 73.

39. 262 U. S. 487 (1923).

40. 297 U. S. 1, 73 (1936).

41. *Id.* at 76.

42. Hart, *Processing Taxes and Protective Tariffs* (1936) 49 HARV. L. REV. 610.

"appeal lies not to the courts but to the ballot and to the processes of democratic government".⁴³

Justice Stone expressly states that expenditures in aid of farmers are within the general welfare clause. He brushes aside the elaborate structure of the majority: "The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government".⁴⁴ Everything else in the opinion is in refutation of some specific argument of the majority. The argument of coercion is disposed of briefly: "No such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. . . . Threat of loss, not hope of gain, is the essence of economic coercion".⁴⁵ And he referred to the Bankhead Act, not as proof of the coercive nature of the AAA, but as proof that this earlier law alone was impotent to accomplish the desired reduction of acreage. The opinion ridicules the consequences of the position of the majority. What of the Reconstruction Finance Corporation, it demands: "Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command?"⁴⁶ The greatness of the spending powers has long been recognized, Mr. Justice Stone reminds us: "The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused".⁴⁷

This decision was received as might have been expected. The financial East praised the majority.⁴⁸ In the farm area there was much difference of opinion,⁴⁹ as many communities had never liked the AAA. The administration at once called a conference of persons interested in the subject⁵⁰ and soon sponsored new legislation. Building on the suggestion of the majority that conditional payments might be upheld, by its very title, Soil Conservation Act,⁵¹ the new law indicated the method to be pursued. But whether it can actually accomplish the end desired remains uncertain.

As a result of this decision the various injunction suits were, of course, decided against the government. The Supreme Court, in the *Rice Millers*

43. 297 U. S. 1, 78 (1936).

44. *Id.* at 80.

45. *Id.* at 81.

46. *Id.* at 86.

47. *Id.* at 87.

48. N. Y. Times, Jan. 7, 1936, p. 12, cols. 1-8, p. 13, cols. 1-8.

49. *Id.* at p. 1, cols. 4-8, p. 11, cols. 1-8, p. 13, cols. 1-8, Jan. 8, p. 15, col. 2, Jan. 12, p. 24, col. 2.

50. *Id.*, Jan. 7, 1936, p. 1, cols. 6-7, Jan. 8, p. 1, col. 6, Jan. 12, p. 1, col. 1.

51. 49 STAT. 163, 16 U. S. C. A. § 590 (a)-(q) (Supp. 1935); Legis. (1936) 84 U. OF PA. L. REV. 878.

cases⁵² unanimously ordered returned to the processors the taxes impounded pending the decisions. This led to Mr. Wallace's intemperate remarks about "legalized steals"⁵³ and to attempts to recover for the government these "windfalls".⁵⁴ There remains open the validity of the condition imposed on the recovery of such taxes,⁵⁵ vital where the processor failed to obtain an injunction, and as to which the lower courts are in conflict.⁵⁶ There remains also the question whether certain marketing provisions of the original Act survive. At least one court⁵⁷ has decided that they are not affected by the *Butler* decision, on the ground that these provisions relate only to transactions in interstate or foreign commerce or to activities that directly affect such commerce.

3. The next outstanding case which came before the Supreme Court involved the Guffey Coal Act.⁵⁸ In *Carter v. Carter Coal Co.*⁵⁹ this was held beyond the power of Congress. The case involves not only questions of interstate commerce, but also those of due process, which will hereafter be separately discussed.⁶⁰ The majority opinion was written by Mr. Justice Sutherland. The Chief Justice dissented separately. Justices Brandeis, Stone

52. *Rickert Rice Mills, Inc. v. Fontenot*, 297 U. S. 110 (1936).

53. *N. Y. Times*, Jan. 29, 1936, p. 1, col. 3.

54. Pub. L. No. 740, 74th Cong., 2d Sess. (June 22, 1936).

55. For the 1935 amendments see *supra* note 21. These provisions were repealed by the Revenue Act of 1936 § 901, Pub. L. No. 740, 74th Cong. 2d Sess. (June 22, 1936), and replaced by somewhat similar provisions contained in § 902, 7 U. S. C. A. § 644.

56. The invalidity of the provisions of the 1935 amendments was considered sufficient ground for granting an injunction in the following cases: *Gebelein, Inc. v. Milbourne*, 12 F. Supp. 105 (D. Md. 1935); *Baltic Mills Co. v. Bitgood*, 12 F. Supp. 132 (D. Conn. 1935); *Kingan & Co. v. Smith*, 12 F. Supp. 329 (S. D. Ind. 1935); *Larrabee Flour Mills v. Nee*, 12 F. Supp. 395 (W. D. Mo. 1935); *Gold Medal Foods v. Landy*, 12 F. Supp. 406 (D. Minn. 1935); *Grosvenor-Dale Co. v. Bitgood*, 12 F. Supp. 416 (D. Conn. 1935); *Danahy Packing Co. v. McGowan*, 12 F. Supp. 457 (W. D. N. Y. 1935); *Inland Milling Co. v. Huston*, 12 F. Supp. 554 (S. D. Iowa 1935); *A. P. W. Paper Co. v. Reilly*, 12 F. Supp. 738 (N. D. N. Y. 1935). On the other hand, conditions imposed by these amendments were held not to deprive the taxpayers of an adequate remedy at law, and injunctions were denied in the following cases: *Henrietta Mills v. Hoey*, 12 F. Supp. 61 (S. D. N. Y. 1935) (rev'd subsequent to the decision of the Supreme Court); *Merkel, Inc. v. Rasquin*, 12 F. Supp. 215 (E. D. N. Y. 1935); *Louisville Provision Co. v. Glenn*, 12 F. Supp. 545 (W. D. Ky. 1935); *Frye & Co. v. Vierhus*, 12 F. Supp. 597 (W. D. Wash. 1935). These cases rested on the authority of *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934).

Subsequent to the Supreme Court decision, in actions brought to recover taxes previously paid, the lower courts have likewise been in conflict. In *Atlantic Macaroni Co. v. Corwin*, 14 F. Supp. 433 (E. D. N. Y. 1936) the provisions of the 1935 amendments were held valid and a bar to the maintenance of the suit; in *Edwin Cigar Co., Inc. v. Higgins*, 14 F. Supp. 817 (S. D. N. Y. 1936), a contrary result was reached primarily by so construing the law that recovery was made impossible if any part of the tax was passed on. This question has become academic by reason of the 1936 amendments (see *supra* note 55) because these make it plain that only so much of the tax as has been shifted, cannot be recovered. The provisions of this law have been upheld in *Lincoln Mills of Alabama v. Davis*, 15 F. Supp. 257 (N. D. Ala. 1936); see (1936) 3 U. S. L. WEEK 1237.

57. *United States v. Edwards*, 14 F. Supp. 384 (S. D. Cal. 1936) (Judge Yankwich held the Act separable and also, that there was no unlawful delegation). *Contra*: Judge Brewster in *United States v. Buttrick*, 15 F. Supp. 655 (D. Mass. 1936).

58. BITUMINOUS COAL CONSERVATION ACT, 49 STAT. 991, 15 U. S. C. A. § 801 *et seq.* (Supp. 1935); Note (1935) 45 YALE L. J. 293.

59. 56 Sup. Ct. 855 (1936).

60. See pp. 52, 53, *infra*.

and Cardozo dissented together, in an opinion written by Justice Cardozo. The majority held the Act bad, because, under the guise of imposing a tax for non-compliance with a code, it attempted to regulate hours and wages of labor, matters wholly local, over which Congress, under the *Schechter* case, had no control. They decided, without at all passing on their validity, that the section of the Act requiring separability could not save the price fixing provisions. All the dissenters disagreed with the majority on the subject of separability. They differed among themselves only as to the labor provisions, the Chief Justice agreeing with the majority, the others declaring that there was no present necessity for considering them. All the dissenters agreed that the price-fixing provisions were valid.

It is clear, therefore, that on the great question of interstate commerce there was no division of any nature among the justices, none of the opinions taking issue with the arguments of the others, except on the technical point of severance. The Chief Justice, however, expressly stated that mining was not commerce, and that, although Congress might take steps "to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it", it could not "use this protective authority as a pretext for the exercise of power to regulate activities and relations within the States which affect interstate commerce only indirectly".⁶¹ And in considering the price provisions, he took the position that the extent to which intrastate transactions could be regulated, as being intimately connected with interstate activities, would have to await future determination. But Justice Cardozo went further and accepted the contentions of the government that, in general, interstate and intrastate transactions in coal were both subject to regulation by Congress, saying: "Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other."⁶²

In holding the law to be beyond the power of Congress, the majority stressed the fact that Congress has no power to legislate for the general welfare, and that it was immaterial that the states had shown an incapacity for agreeing on suitable legislation with which to meet the need. Mr. Justice Sutherland noted the lack of uniformity in laws of marriage and divorce and referred to the creation of a Commission on Uniform State Laws to deal with such problems: "If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery."⁶³ He went to great pains to point out the limited character of the federal government and to show that, if the Constitution

61. 56 Sup. Ct. 855, 875, 876 (1936).

62. *Id.* at 880.

63. *Id.* at 865.

had been understood to permit Congress to reduce the states to little more than geographical subdivisions, "it is safe to say . . . it would never have been ratified".⁶⁴

Earlier cases dealing with the commerce clause were reviewed at length, leading to the conclusion that the labor portions of the Act, including specifically the provisions giving employees the right to bargain collectively, were beyond the powers of Congress. Thus the provisions of the Wagner Labor Relations Act,⁶⁵ insofar as they relate to transactions not in interstate commerce, have in effect been condemned. And most of the cases usually relied upon to establish the right of Congress to protect industry from interference as the result of labor disputes were expressly distinguished.⁶⁶ Justice Sutherland said:

"Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."⁶⁷

He considered the *Schechter* case as controlling and brushed aside as of no consequence the fact that there the goods had come to rest, while here they had not yet started to move. The arguments by which the labor provisions were held void for lack of due process will be discussed later.⁶⁸

64. *Id.* at 866.

65. 49 STAT. 449, 29 U. S. C. A. §§ 151-166 (Supp. 1935); Legis. (1935) 35 COL. L. REV. 1098. The lower courts have so held. *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 83 F. (2d) 998 (C. C. A. 5th, 1936), certiorari applied for; *National Labor Relations Bd. v. Friedman-Harry Marks Clothing Co., Inc.*, 85 F. (2d) 1 (C. C. A. 2d, 1936); *Fruehauf Trailer Co. v. National Labor Relations Bd.*, C. C. A. 6th (1936) 3 U. S. L. WEEK 1123.

66. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295 (1925) (there was an intent to restrain interstate commerce); *Swift & Co. v. United States*, 196 U. S. 375 (1905) (the acts constituted direct interference with the flow of commerce).

67. 56 Sup. Ct. 855, 872 (1936).

68. See *infra* pp. 52, 53. The question of separability we are ignoring, since it deals with a question of statutory, rather than constitutional, interpretation. The majority concluded that without the labor provisions the Act had no meaning, because the Codes contemplated by the law expressly required the inclusion of these provisions and because prices were so to be fixed as to permit the stabilization of wages and working conditions: "The two are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production." (*Id.* at 875.)

In reaching a contrary conclusion the Chief Justice emphasized the separability clause of the Act and the fact that the labor and price-fixing provisions were contained in entirely separate parts of the Codes. Mr. Justice Cardozo pointed out that the price-fixing provisions were to take effect at once, whereas many of the labor provisions might never be called into operation, and that much of the evil sought to be remedied could be accomplished by the price-fixing provisions alone: "Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage. To hold otherwise is to ignore the whole history of mining. All in vain have official committees

Although in its interstate commerce aspect, at least, the decision in this case was not unexpected, nevertheless it was greeted, especially in labor circles, with a storm of protest.⁶⁹ It gave new impetus to the demand for constitutional amendment which had been growing ever since the NRA decision.⁷⁰ Resentment at the decision was accentuated particularly by the realization that here was a sick industry, the better elements of which themselves favored the attempted regulation,⁷¹ that the principal states concerned likewise supported it, and that these had even filed with the Supreme Court briefs as *amici curiae*.⁷² No mention of the latter unusual circumstance is to be found in any of the opinions, unless the passing phrase of the majority, "state powers can [not] . . . be abdicated",⁷³ was intended to refer to the pleas of these states in support of the Act.

4. But the Supreme Court a week later rejected definitely the notion that a state could waive any of its rights. Congress had enacted a Municipal Bankruptcy Act⁷⁴ which gave cities and other local governing units the right to file petitions in bankruptcy, but gave no right to their creditors to force them into bankruptcy. This law provided, moreover, that any state might establish an agency for the supervision of petitions of this kind in the event of which no petition would be accepted without its consent, and no reorganization promulgated by the court without its approval.⁷⁵ Texas had created such an agency⁷⁶ and one of its water improvement districts had taken advantage of the new federal law. In *Ashton v. Cameron County, etc.*,⁷⁷ the Supreme Court declared, in another five-to-four decision, that Congress had no power to permit municipalities to become bankrupt, because that was an interference with the domestic affairs of the states. The fact that the state whose local unit was involved had consented was held unavailing. Mr. Justice McReynolds, for the majority, said: "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted".⁷⁸ Support for the conclusion was derived from the long line of cases denying to Congress the right to tax state or

inquired and reported in thousands of printed pages if this lesson has been lost." *Id.* at 884

An attempt to repass the Act without the labor provisions failed in the closing hours of the 74th Congress. See N. Y. Times, June 20, 1936, p. 1, col. 8; June 21, p. 1, col. 8.

69. N. Y. Times, May 19, 1936, p. 1, col. 7, p. 17, col. 3, p. 22, col. 1; May 20th, p. 1, col. 6; p. 20, col. 5; May 21, p. 22, col. 2.

70. *Id.*, May 20, 1936, p. 2, col. 2; May 21, p. 22, col. 2; May 23, p. 14, col. 8; May 26, p. 1, col. 2.

71. *Id.*, March 5, 1936, p. 31, col. 3.

72. *Id.*, March 11, 1936, p. 18, col. 6; March 13, p. 5, col. 2.

73. 56 Sup. Ct. 855, 866 (1936).

74. 48 STAT. 798, 11 U. S. C. A. §§ 301-3 (Supp. 1935), adding to BANKRUPTCY ACT c. LX, §§ 78-80.

75. 48 STAT. 798, 11 U. S. C. A. § 303 (k) (Supp. 1935).

76. Tex. Laws 1935, c. 107.

77. 56 Sup. Ct. 892 (1936).

78. *Id.* at 896.

municipal instrumentalities.⁷⁹ But how this principle was applicable to the law in question, a law wholly permissive in character, the majority did not attempt to point out.

Mr. Justice Cardozo for the dissenters (the Chief Justice joining the liberals) ridiculed this notion. He pointed out how the bankruptcy power of Congress had been developed through broad interpretations by the Supreme Court.⁸⁰ He intimated that his views might have been otherwise, had the law permitted involuntary proceedings. He accepted the analogy of the tax laws offered by the majority but pointed out that, where the central government consented, a state might tax one of its instrumentalities,⁸¹ and he could see no reason why the converse might not also be true.⁸² He cited as more appropriate analogies numerous interstate commerce decisions which had recognized the possibility of joint action between a state and the federal government.⁸³

This decision aroused much less comment than the ones rendered in the weeks immediately preceding and following it,⁸⁴ probably because relatively few persons knew or cared much about the law. It is, however, as clear a case of judicial legislation as has taken place in a long time. And it is particularly objectionable because there cannot be the slightest pretense that the states themselves could remedy the evil, even if they all agreed among themselves, since the Supreme Court long ago decided that the contract clause prevented any state from passing insolvency laws which affected pre-existing contracts.⁸⁵ Here is a true "no man's land" of the Constitution.

5. It is not surprising, therefore, that in a situation in which a state objected to federal interference with its local concerns the Supreme Court should unanimously have upheld the state. The Home Owners' Loan Act⁸⁶ permitted a state building and loan association to become a federal corporation by the vote of fifty-one per cent of its stockholders, regardless of the consent of the state authorities. The Banking Commission of the State of Wisconsin objected to the conversion attempted by a number of institutions originally subject to its jurisdiction. The state supreme court upheld this objection, but did so on the narrow ground that Congress had not

79. Citing *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931); see also cases involving state taxes decided at the 1936 term and discussed *infra* pp. 58 *et seq.*

80. 56 Sup. Ct. 892, 898 (1936).

81. Citing *Baltimore Nat. Bank v. State Tax Comm.*, 297 U. S. 209 (1936).

82. Suggesting as apposite *United States v. California*, 297 U. S. 175 (1936), discussed pp. 43, 44 *infra*.

83. Citing among other cases, *Whitfield v. Ohio*, 297 U. S. 431 (1936), discussed *infra* pp. 45, 46.

84. See *N. Y. Times*, May 27, 1936, p. 2, col. 5.

85. *Sturges v. Crowninshield*, 4 Wheat. 122 (U. S. 1819).

86. 48 STAT. 128 (1933), 12 U. S. C. A. § 1421 (Supp. 1935), as amended in 48 STAT. 643, 645, 646, 12 U. S. C. A. § 1464 (1934).

intended that conversion should be possible except in conformity to local law.⁸⁷ This view of the matter was rejected by an unanimous opinion of the United States Supreme Court in *Hopkins Fed. S. & L. Assoc. v. Cleary*.⁸⁸ Mr. Justice Cardozo pointed out that an amendment had omitted language which originally had so limited the right to become a federal corporation, whereas other statutes carried provisos which required state consent.⁸⁹ The constitutional problem, therefore, could not be evaded. And he declared that Congress had no power to change the character of a state corporation and to decree its assets available for purposes and under powers other than those set up by the state of original creation, and this regardless of the wishes of the stockholders. "In its capacity as quasi-sovereign", he announced, "the state repulses an assault upon the quasi-public institutions that are the product and embodiment of its statutes and its policy".⁹⁰ The apparently contrary precedent of the national banks⁹¹ was distinguished because no complaint had there been made by any state.

Summary

It thus appears that the doctrine of the *Schechter* case has been adhered to in all its implications; goods which have not yet started in motion across states lines are no more part of interstate commerce than are goods which have finally come to rest. No part of the processes of agriculture, manufacturing or mining can be regulated by act of Congress, however great the public need. The only way out suggested by the Court itself is by voluntary action among the states, or by amendment to the Constitution.⁹² Even consent by the states will be ineffective. And, whereas the municipal bankruptcy decision does not affect the problem of interstate commerce, it marks a restriction upon federal power the more serious in that the states are wholly powerless to do anything to accomplish the desired result. As we shall see hereafter, the hollowness of the cry "states' rights" becomes all the more apparent when the barrier of due process comes to be considered. To what

87. State *ex rel.* *Cleary v. Hopkins*, 217 Wis. 179, 257 N. W. 684 (1934).

88. 296 U. S. 315 (1935), 36 COL. L. REV. 671.

89. *E. g.*, NATIONAL BANKING ACT, 13 STAT. 99, 112, 113 (1864), 12 U. S. C. A. § 101 (1934); see also 42 STAT. 1469 (1923), 12 U. S. C. A. 1281 (1925).

90. 296 U. S. 315, 340 (1935).

91. *Casey v. Galli*, 94 U. S. 673 (1876).

92. As per Hughes, C. J., in *Carter v. Carter Coal Co.*, 56 Sup. Ct. 855, 876 (1936): "If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision." The Court did not refer to state compacts considered by some the basis for joint action. See Note (1936) 45 YALE L. J. 324; N. Y. Times, May 22, 1936, p. 22, col. 6; May 24, 1936, § 4, p. 7, col. 3. But see charge of Judge Clark of the District of New Jersey to a grand jury printed as an appendix to the case of United States v. Flegenheimer, 14 F. Supp. 584, 592 (D. N. J. 1935). It has also been suggested that the treaty making power might be used to extend the field of Congressional activities. See BRANT, STORM OVER THE CONSTITUTION (1936) 136, 137.

extent it will be necessary to amend the Constitution to overcome the obstacles found by the Court is still uncertain. Both major political parties seem to believe that some way may still be found to avoid amendment.⁹³ Neither has referred to a method which might offer some success—barring, of course, the unlikely reversal by the Court of its own position—namely, joint action by Congress and the states.⁹⁴ But before considering the latest word of the Court on that subject, it is desirable to dispose of a number of cases which deal with limitations on state power inherent in the federal system.

b. Limitations on the States

Most of the cases on this subject which are concerned with interstate commerce fall into two categories: regulation and taxation. One of these is of paramount importance, because it gave new meaning to the previously strongly restricted "privileges and immunities" clause of the Fourteenth Amendment. It illustrates the capacity of the Court to find in the Constitution language appropriate to every need, at least when property rights are involved. Before the adoption of the Fourteenth Amendment the contract clause was used for this purpose,⁹⁵ often in cases wholly inapposite. Then, somewhat slowly, and not without misgivings, the "due process" clause of the newly adopted Fourteenth Amendment became the keystone in the constitutional system of property protection.⁹⁶ Today, with the growing demand for a redefinition of "due process" it may be that the conservative members of the Court are preparing the path for a new way to achieve old ends.

1. The case in question, *Colgate v. Harvey*,⁹⁷ involved a Vermont law which taxed income received from interest-bearing obligations and exempted income received on account of money loaned within the state for not more than five per cent.⁹⁸ The taxpayer contended that this exemption violated the equal protection clause of the Fourteenth Amendment.⁹⁹ It was in rejecting an argument advanced against his contention that the majority of the Court brought in the "privileges and immunities" clause.

Mr. Justice Sutherland thus formulated the argument: "It is said that an exemption which may have for its aim the advancement of local interests can hardly be condemned under a Constitution which for a century has

93. See N. Y. Times, June 12, 1936, p. 1, col. 5; June 26, p. 1, col. 8.

94. See pp. 44, 45 *infra*.

95. See I BOUDIN, *op. cit. supra* note 7, at 337-374; 2 *id.* at 329-354.

96. See 2 *id.* at 355-441; Corwin, *Due Process of Law before the Civil War* (1911) 24 HARV. L. REV. 356, 460; Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform* (1936) 45 YALE L. J. 816, especially n. 50; 3 WARREN, HISTORY OF THE UNITED STATES SUPREME COURT (1926) 289-321, 463-473.

97. 296 U. S. 404 (1935), 84 U. OF PA. L. REV. 655 (1936), 36 COL. L. REV. 669, 45 YALE L. J. 926.

98. Vt. Laws 1931, No. 17, § 3.

99. This point is discussed *infra* pp. 68, 69.

known a protective tariff.”¹⁰⁰ He then made answer: “No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States.”¹⁰¹

Justice Sutherland argued that the right to invest money was derived from national citizenship, saying: “The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship.”¹⁰² The only case he cited in support of this conclusion was *Ward v. Maryland*,¹⁰³ which held void, on this ground, a tax on the privilege of trading which discriminated against citizens of other states. He pointed out that it had been settled that this clause of the Fourteenth Amendment added to the protection given by the Fourth Article of the original Constitution by binding all states, including that of the objector’s residence.¹⁰⁴ Therefore, he concluded, any tax which discriminates unreasonably between transactions within a state and those outside its borders, but within the United States, violates the constitutional guaranty. The Court thus voided the income tax on interest, but not a similar tax on dividends, because the state had taxed domestic corporations in such a way that substantially the same tax was imposed on dividends received from within the state as on those received from without.

Mr. Justice Stone, speaking also for Justices Brandeis and Cardozo, believed the law valid in its entirety. He could see no distinction between the dividends and the interest provisions, “unless the constitutional validity of the exemptions is to turn upon the ground that we approve laws enacted to avoid taxing the same economic interest twice, but disapprove those to encourage residents to invest their funds at home”.¹⁰⁵ He held the desire to stimulate local lending sufficient to justify discrimination without violating the equal protection clause. Of the immunities clause he said:

“Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment. The notion that that clause could have application to any but the privileges and immunities peculiar to citizenship of the United States, as distinguished from those of citizens of states, has long since been rejected.”¹⁰⁶

100. 206 U. S. at 426.

101. *Id.* at 426.

102. *Id.* at 430.

103. 12 Wall. 418, 430 (U. S. 1871).

104. 296 U. S. at 428, citing the *Slaughter House* case in the lower court, 15 Fed. Cas. No. 8408 (1870).

105. *Id.* at 437.

106. *Id.* at 443, citing the *Slaughter House* Cases, 16 Wall. 36 (U. S. 1873).

It is, of course, impossible to tell whether this decision will actually mark a departure in the law of taxation; it may be ignored in the future, or confined to its exact facts, as have many other Supreme Court decisions. Certain it is, however, that it will bring much litigation to the Court.

2. The taxation cases which directly involve the commerce clause can be briefly disposed of. In spite of the gradual narrowing of this field by recent important decisions,¹⁰⁷ opinions were written in seven such cases at this term. All the decisions were unanimous; all applied well settled principles, although in one these were extended to a new field, that of broadcasting. In *Fisher's Blend Station v. Tax Commission*¹⁰⁸ a Washington tax measured by the gross receipts from stations within the state was held void because the radio waves were received in other states. Mr. Justice Stone described in detail how waves are broadcast and concluded that since the station was engaged in the business of transmitting advertising programs from its station in Washington to receivers in other states, its business was interstate in character similar to that of telegraph or telephone companies. The fact that it neither owned nor operated the receiving mechanisms he held to be irrelevant. The Court refused to decide whether the state might tax the electric waves generated within the state by the broadcasting, pointing out that it had attempted to tax, instead, the advertising receipts, which involved transmission as well as generation.

Three of the other cases involved franchise taxes imposed on corporations; in each the tax was upheld, either because measured only by the local business¹⁰⁹ or the local assets¹¹⁰ or because, although including income from interstate commerce, it was based on net, not gross, income.¹¹¹

In *Clyde Mallory Lines v. Alabama*,¹¹² harbor fees were upheld when levied to cover the cost of policing the harbor. The fact that they were related to the tonnage of the vessels did not bring them within the prohibition against tonnage duties found in Article I, section 10, clause 3; the fact that the vessel did not ask for the service did not make the exaction a burden on interstate commerce, any more than did highway fees charged on interstate

107. See Fraenkel, *Constitutional Issues in the Supreme Court 1934 Term* (1936) 84 U. OF PA. L. REV. 345, 363; *The Supreme Court and the Taxing Power of the States, 1933 Term* (1934) 4 BROOKLYN L. REV. 123, 132; *The Supreme Court and the Taxing Power of the States* (1934) 28 ILL. L. REV. 612, 627.

108. 297 U. S. 650 (1936), 84 U. OF PA. L. REV. 251, 1024; Legis. (1936) 49 HARV. L. REV. 473; Note (1936) 45 YALE L. J. 495.

109. *Matson Nav. Co. v. State Board of Equalization*, 297 U. S. 441 (1936). For discussion of the due process features of this case see *infra* note 217.

110. *Atlantic L. Co. v. Comm'r. of Corp. and Tax.*, 56 Sup. Ct. 887 (1936).

111. *Pacific Tel. & Tel. Co. v. Tax Comm.*, 297 U. S. 403 (1936). The Court rejected the contention of the taxpayers that the tax was necessarily void if it was impossible for the company to withdraw from its local business without at the same time discontinuing its interstate business. Mr. Justice Brandeis found that discontinuance of the local business would have entailed a greater loss than was sustained by carrying it on; consequently it was impossible to hold that the tax constituted a direct burden on interstate commerce. For discussion of the due process features of this case see *infra* note 217.

112. 296 U. S. 261 (1935).

automobiles.¹¹³ But fees charged to such automobiles, not as compensation for highway use, but as an excise based on consumption of gasoline, were declared void in a case later decided, *Bingaman v. Golden Eagle Western Lines*.¹¹⁴ The Court, in that case, merely followed interpretations of the state statute made by the state's highest court. It declared void also the exaction of a license fee, since the company did no intrastate business whatever.¹¹⁵ But in *Morf v. Bingaman*¹¹⁶ fees required for each car transported for sale and also for a license to engage in such business were upheld because imposed not on the use of the highways on a mileage basis, but for the privilege of using them.

Thus the Court adhered to well-established principles, refusing to void taxes unless they actually constituted an interference with interstate commerce, but broadening the conception of such commerce to keep up with modern conditions.

3. In similar fashion, in the cases dealing with regulatory statutes, no controversial decisions developed. Five decisions were rendered, all unanimous, four dealing with state laws, one with the effect of a federal statute on state owned business. The complete power of the federal government over interstate commerce was recognized in all these decisions. Thus, in *United States v. California*,¹¹⁷ the Court held that a railroad owned and operated by the state was subject to federal regulation because it was a link in interstate operations; Justice Stone could see no reason for exempting the owner merely because it was a state, and this, whether the state was acting in a governmental or in a private capacity.¹¹⁸ Following established precedent, the Court held an order of the Interstate Commerce Commission supreme over orders of any state commission, even with regard to intrastate rates, when these were so low as to be discriminatory.¹¹⁹

But state regulations were upheld, even though they affected interstate commerce, when they were aimed at manufacture or use within the state, and were not discriminatory: as in conditions restricting the manufacture

113. The Court cited, among other cases, *Clark v. Poor*, 274 U. S. 554 (1927).

114. 297 U. S. 626 (1936).

115. Citing International Textbook Co. v. Figg, 217 U. S. 91 (1910).

116. 56 Sup. Ct. 679 (1936). For discussion of the equal protection features of this case see *infra* notes 275, 276. A similar California law was, before the Supreme Court decision was announced, declared void by a three-judge court, one judge dissenting, in *Morf v. Ingels*, 14 F. Supp. 922 (S. D. Cal. 1936). The basis of the decision was that there was discrimination between cars imported into the state and cars already there. There appears to be no substantial difference between the laws of the two states, since both exempted from the tax cars with domestic license plates. The Supreme Court, however, stated that the New Mexico law applied to cars in intrastate, as well as in interstate shipment, without any discussion of the effect of the exemption. In the *Ingels* case the majority held that the law was in effect a tariff, subject to the same condemnation as the New York Milk Law condemned in *Baldwin v. Seelig*, 294 U. S. 511 (1935). Judge Yankwich, in dissent, could see no basis for the contention that there was any discrimination.

117. 297 U. S. 175 (1936).

118. *Id.* at 185.

119. *Pennsylvania R. R. v. Illinois Brick Co.*, 297 U. S. 447 (1936).

of fish, even though these were intended for shipment outside the state or had been caught outside;¹²⁰ and regarding standards for containers of raspberries even though these were made outside the state.¹²¹ So a requirement that sellers of farm produce on consignment be licensed was upheld, since the effect on interstate commerce was but indirect and incidental.¹²² In the last two cases the contention that Congress had already preempted the field of regulation was overruled, partly because the federal law did not include all the provisions of the state law; in the second case also because the federal law expressly preserved existing state laws. A similar contention was overruled in a case involving telephone rates on the ground that, although Congress had authorized action to be taken by the Federal Communications Commission, nothing had yet been done by it.¹²³

Summary

It will be seen, therefore, that in those fields in which the power of the federal government has been definitely acknowledged the Court will uphold it against all attack, and that state enactments will not be upset if they affect primarily local use or manufacture. But the Court has extended the area of individual exemption from taxation by an interpretation of the immunities clause which rests on very uncertain foundations. It cannot be gainsaid that the Court is much more prone to adopt a broad construction of the Constitution when this results in protection to property than when it results in widening the scope of federal activity. It remains to be seen how sympathetic the Court has been to attempts on the part of Congress and state governments to cooperate, each in the sphere of activity traditionally assigned it.

c. A Possible Solution

The device of joint state and federal action is not new, but it has been seldom employed. It appears to have been used first in 1890, in aid of dry states. Congress then provided that intoxicating liquor should become subject to local law upon arrival in any state, whether in the original package or not;¹²⁴ this law was later supplemented by one making it a federal crime to transport liquor into a state which forbade its manufacture or sale.¹²⁵ Both laws were upheld by the Supreme Court.¹²⁶ The same device has

120. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (1936); for discussion of the equal protection features of this case see *infra* note 271; for the due process, *infra* note 171.

121. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935); for discussion of the equal protection features of this case see *infra* note 270; for the due process, *infra* note 170.

122. *Hartford Acc. & Indem. Co. v. Illinois*, 298 U. S. 155 (1936).

123. *Northwestern Bell Tel. Co. v. Nebraska State R. Comm.*, 297 U. S. 471 (1936); for the due process features of this case see *infra* note 169.

124. WILSON ACT, 26 STAT. 313 (1890), 27 U. S. C. A. § 121 (1935).

125. WEBB-KENYON ACT, 37 STAT. 699 (1913), 27 U. S. C. A. § 122 (1935).

126. *In re Rahrer*, 140 U. S. 545 (1891); *Rhodes v. Iowa*, 170 U. S. 412 (1898); *United States v. Hill*, 248 U. S. 420 (1919).

been upheld as applied to other subjects, such as stolen automobiles.¹²⁷ In 1929 Congress enacted the Hawes-Cooper Act¹²⁸ which adopted the principle of the first of the liquor laws to convict-made goods; in 1935 Congress made the shipment of convict-made goods into a state in violation of its laws a federal crime.¹²⁹ And similar legislation was adopted with regard to the shipment from a state of "hot" oil, namely, oil produced in excess of quantities permitted by local law.¹³⁰ The first of these convict labor laws was upheld by the Supreme Court in *Whitfield v. Ohio*.¹³¹ The other laws have also been upheld by the lower courts;¹³² and one of these cases will soon be considered by the Supreme Court.

The reasoning of Mr. Justice Sutherland in the *Whitfield* case leaves little room for doubt that the Court will sustain as valid any act of Congress passed in aid of valid state laws.¹³³ He nevertheless pointed out in that opinion that in tax cases the unbroken-package doctrine had been practically rejected by the Court itself.¹³⁴ In connection with the interstate commerce aspects of the case it should be noted further that the Court refused to decide whether a state could punish a sale which expressly involved interstate transportation. Since the first count on which defendant had been convicted was based on a sale made wholly within the state and since he had not been punished separately on the second count, it was unnecessary to consider the validity of the latter. Evidently, it would be an interstate transaction such as was described in this second count that would come within the criminal provisions of the second federal statute, which, of course, was not involved in this case.

It is still too early to tell whether this device will accomplish all that some of its supporters have claimed for it.¹³⁵ Presumably it could be used

127. *Brooks v. United States*, 267 U. S. 432 (1925). Many statutes and cases are collected in *United States v. Edwards*, 14 F. Supp. 384, 389, 390 (S. D. Cal. 1936).

128. 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (1935).

129. 49 STAT. 494, 49 U. S. C. A. §§ 61-64 (Supp. 1935).

130. THE CONNALLY ACT, 49 STAT. 30, 15 U. S. C. A. § 715 (Supp. 1935).

131. 297 U. S. 431 (1936).

132. *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 84 F. (2d) 168 (C. C. A. 6th, 1936), certiorari granted, Oct. 12, 1936—this was a suit to compel defendant to accept convict-made goods for shipment; the lower court [12 F. Supp. 37 (W. D. Ky. 1935)] had upheld the act only insofar as it required branding, and had held that both Congress and the states were without power to bar convict-made goods properly branded; on appeal this view was rejected in conformity to the Supreme Court decision in the *Whitfield* case and the law upheld in its entirety. *Griswold v. President of the United States*, 82 F. (2d) 922 (C. C. A. 5th, 1936) (action to restrain shipment of "hot oil", judgment for the Government).

133. 297 U. S. 431, 439 (1936).

134. *Sonneborn v. Cureton*, 262 U. S. 506 (1923).

135. See Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 193, 231-234; *Would the Supreme Court Block a Planned Economy?* (August, 1935) 12 FORTUNE 48, 135; Chambliss, *Constitutional Code Control* (1936) 30 ILL. L. REV. 829. See also Note (1936) 49 HARV. L. REV. 466. Mr. Chambliss also advocates similar results by use of the power granted by Art. I, § 10, cl. 2, which permits states to lay imposts on exports or imports with the consent of Congress and for the use of the national Treasury. He believes that this method might be used to bring recalcitrant states into line and secure uniformity of social conditions and that the effect of a decision such as *Baldwin v. Seelig*, 294 U. S. 511 (1935), might be overcome in this manner.

to prevent the shipment into progressive states of goods manufactured by child labor in backward states, unless the Court, while conceding the right of a state to forbid the sale of such goods made within its borders as a regulation of its own residents, be impelled to deny such state a similar right indirectly to regulate the conduct of the children of other states. But these are considerations relating to due process.

II. THE BARRIER OF DUE PROCESS

All novel statutes, all extensions of administrative activity, as well as most important occasions of the use of administrative power, are met by the contention that the due process clause has been violated. The history of the interpretation of that clause by the Supreme Court has been told and retold.¹³⁶ The decisions rendered are irreconcilable and unpredictable. One may remark a tendency to uphold as emergency legislation¹³⁷ what would be condemned if designed to be permanent.¹³⁸ Beyond that, no clear principle can be derived from the decisions. And in consequence we have a rule of men, rather than of law; a rule exercised so frequently in behalf of property interests, that from time to time the cry is raised that this power must be curbed.¹³⁹ The recall of judicial decisions by the people or by Congress, redefinitions of due process, the requirement of a concurrence of two-thirds of the judges, the demand that the power to declare acts of Congress unconstitutional be taken away from the Court—these are among the suggested cures. And we are now in one of the recurring periods in which such views receive serious consideration. In large measure this recurrent pressure toward in some way lessening the power of the Court has been occasioned by due process decisions rendered during the 1935 term. Most of the due process cases can be considered under the heads of regulation and taxation. Yet it must be borne in mind that this clause is responsible also for many of the liberal decisions of the Court, especially for those which deal with civil rights, such as the *Scottsboro*¹⁴⁰ and *Mooney*¹⁴¹ decisions.

136. See *supra* note 96.

137. Such as the rent laws of the post-war period: *Bloch v. Hirsch*, 256 U. S. 135 (1921); *Marcus Brown Co. v. Feldman*, 256 U. S. 170 (1921), as well as various laws born of the depression: *Nebbia v. New York*, 291 U. S. 502 (1934); *Home B. & L. Ass'n. v. Blaisdell*, 290 U. S. 398 (1934) (all these were five-to-four decisions).

138. See intimations in *Minimum Wage* case, 56 Sup. Ct. 918, 920, 925 (1936).

139. Among the more recent discussions of the subject see Beard, *Rendezvous with the Supreme Court* (Sept. 2, 1936) 88 NEW REPUBLIC 92; Corwin, *Curbing the Court* (March 9, 1936) 2 VITAL SPEECHES 373; Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform* (1936) 45 YALE L. J. 816. See also 119 LITERARY DIGEST 15 (June 8, 1935); 121 LITERARY DIGEST 9 (June 6, 1936); bibliographies will be found in 185 ANNALS 45 (May, 1936) and 10 REF. SHELF No. 6, p. 31 (Oct. 1935). See also 14 CONG. DIG. 289 (Dec. 1935). Discussion of the subject is also to be found in (1936) 3 U. S. L. WEEK 418, 1174, 1213.

140. *Powell v. Alabama*, 287 U. S. 45 (1932).

141. *Mooney v. Holohan*, 294 U. S. 103 (1935); see Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 365.

a. Regulation

At this term the Court departed from familiar principles in a number of cases, once to uphold a state law, more often to warn against what the majority of its members deemed arbitrary action on the part of state or federal authorities. However, in most of the cases the Court unanimously rejected the contentions raised, and upheld the challenged law or administrative action.

1. It was in the *Convict Labor* case, *Whitfield v. Ohio*¹⁴² that the Court for the first time announced a principle which may be far reaching in importance and may lead to an effective ban on child labor. It will be remembered that in the *Child Labor* case¹⁴³ the Court had denied to Congress any power of regulation over the interstate shipment of goods made by such labor, on the ground that there was nothing inherently harmful in such goods, in this fashion distinguishing the *Lottery* case¹⁴⁴ and other similar decisions upholding independent federal power.¹⁴⁵ But in the *Convict Labor* case Mr. Justice Sutherland, without citing the *Child Labor* case,¹⁴⁶ justified both the state and federal laws on the ground that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison."¹⁴⁷ He called attention also to acts of Congress and of other states which agreed in the view that such competition was an evil. Here, perhaps for the first time, we find the notion of economic harm as distinguished from inherent wrongfulness accepted by the Court in principle, although not yet in words. What will be the answer of the Court if many states prohibit the manufacture or sale of goods made by child labor because they believe the competition of child labor with adult labor is evil for the reason that children cannot command an adequate wage, and if Congress prohibits the shipment of such goods into a state in violation of its laws? Will the Court expand the concept suggested in the *Convict Labor* case or will it confine that case to its own peculiar facts? The answer depends, probably, on the personnel of the Court when the time comes. Probably Justices Van Devanter and McReynolds withheld approval from the opinion lest it lend itself to such interpretation; did Justice Stone concur only in the result, because he would have preferred a more explicit statement of this principle? Only the future can answer these interesting questions.

142. 297 U. S. 431 (1936).

143. *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

144. *Champion v. Ames*, No. 2, 188 U. S. 321 (1903).

145. See laws and cases collected in *United States v. Edwards*, 14 F. Supp. 384, 389, 390 (S. D. Cal. 1936).

146. In *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 84 F. (2d) 168 (C. C. A. 6th, 1936), Judge Moorman expressly distinguished the *Child Labor* case, pointing out that here was no attempt by Congress to foist its policy on the states.

147. 297 U. S. 431, 439 (1936).

2. Arbitrary action, suspected by the majority, found absent by the minority, occasioned most of the discussion in the case of *Jones v. Securities and Exchange Comm.*¹⁴⁸ The problem involved was the right of the Commission to require Jones to submit to examination concerning an application for registration of securities which the Commission believed contained false statements, although Jones had withdrawn his application without having attempted to sell the securities. The statute¹⁴⁹ was silent on the right to withdraw, but the Commission had adopted a rule requiring its consent to any withdrawal. Mr. Justice Sutherland, for the majority, argued that the registration statement, once withdrawn, had no life sufficient to enable the Commission to inquire about it, that the request to withdraw it was analogous to an attempt to discontinue an action, and that no rule could validly be adopted by the Commission to prevent withdrawal. Having in mind, perhaps, the public furor aroused by the seizure of certain telegrams by the Black Committee of the Senate,¹⁵⁰ Justice Sutherland denounced the action of the Commission as an arbitrary invasion of personal rights.

And the majority rejected the contention of the Commission that it might question Jones under provisions of the statute¹⁵¹ which gave it general power of investigation. Such power, said Justice Sutherland, must be related to some purpose; otherwise it is as intolerable as the abuses of the Star Chamber.¹⁵²

But Mr. Justice Cardozo, with whom Justices Brandeis and Stone agreed, thought these alarms unwarranted. He believed the rule of the Commission to be justified, lest applicants might otherwise continue filing and withdrawing, and said that this might "encourage falsehood and evasion" and "invite the cunning and unscrupulous to gamble with detection".¹⁵³ The minority could find no constitutional ground upon which to rest the contention of Mr. Jones, which had been accepted by the majority.¹⁵⁴

3. In two other cases, the same three justices rejected views which the other six, in their desire to prevent what they feared might be arbitrary acts, had accepted. It is significant that the acts in these cases affected property, not personal, rights. Both these cases involved the fixing of rates, by the Secretary of Agriculture in the one case, by the Interstate Commerce Commission in the other. In both the Court upheld the challenged orders; the disagreement of the minority was, therefore, with the reasoning, not

148. 56 Sup. Ct. 654 (1936), 84 U. OF PA. L. REV. 658, 1019.

149. SECURITIES ACT OF 1933, 48 STAT. 74, 15 U. S. C. A. § 77a-ff, amended by 48 STAT. 881, 15 U. S. C. A. § 78 (Supp. 1935).

150. See *Strawn v. Western Union Tel. Co.*, Sup. Ct. D. C. (1936) 3 U. S. L. WEEK 646 (oral opinion); *Hearst v. Black*, Sup. Ct. D. C. (1936) 3 U. S. L. WEEK 770 (oral opinion), 84 U. OF PA. L. REV. 904, 36 COL. L. REV. 841, 45 YALE L. J. 1503.

151. SECURITIES ACT, cited *supra* note 149, § 19 b.

152. See 56 Sup. Ct. 654, 663 (1936).

153. *Id.* at 665.

154. *Ibid.*

with the conclusion of the majority. The precise points involved differed somewhat in the two cases.

In *St. Joseph Stock Yards Co. v. United States*,¹⁵⁵ an order of the Secretary of Agriculture fixing stock yard rates was challenged as confiscatory and lacking support in the evidence. The district court had refused to review the findings of the Secretary, believing that it was not within the scope of judicial review so to do, when there was substantial evidence to sustain the finding.¹⁵⁶ With this reasoning the Chief Justice disagreed. He argued that this rule applied only when no constitutional issue such as confiscation was involved. When such an issue existed, nothing done by the legislature directly could prevent review by the courts, and similarly when the legislature acts through an administrative agency.¹⁵⁷

Mr. Chief Justice Hughes recognized, however, that there was a strong presumption in favor of the validity of the findings of an experienced administrative body. He examined the evidence and the contentions of the parties, and found the action of the Secretary of Agriculture justified and the proof on the part of appellant lacking in convincing quality.

Mr. Justice Brandeis believed that the district court had been right in refusing to review the evidence, saying:

“The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.”¹⁵⁸

While he conceded that certain earlier decisions appeared to support the view of the majority,¹⁵⁹ he contended that it was only when personal liberty was being infringed upon that such should be the rule, and this only because of the importance of that liberty. He referred to many cases in which the Court had refused to review findings of fact although constitutional issues were involved, cases such as those involving the value of property taken in condemnation proceedings¹⁶⁰ or the amount of income found by the Board of Tax Appeals.¹⁶¹

155. 56 Sup. Ct. 720 (1936). See Caldwell, *A Federal Administrative Court* (1936) 84 U. OF PA. L. REV. 966, 976.

156. 11 F. Supp. 322 (W. D. Mo. 1935).

157. 56 Sup. Ct. at 726.

158. *Id.* at 735.

159. Citing *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287 (1920); *Manufacturers R. R. v. United States*, 246 U. S. 457, 488-490 (1918).

160. Citing *Crane v. Hahlo*, 258 U. S. 142, 148 (1922).

161. Citing *Helvering v. Rankin*, 295 U. S. 123, 131 (1935).

He concluded that in the circumstances of this case Congress had the right to make the findings of the Secretary of Agriculture final and that the Court should respect that direction. He answered each of the arguments of the majority, noting particularly that there was a vast difference between direct legislative action and action by an administrative body in that before the latter each person affected had full opportunity to be heard and to make a record which could be reviewed in order to ascertain whether the facts found supported the conclusion and whether there was any evidence to support the findings and that this was enough to satisfy the constitutional guaranty.¹⁶²

In concluding, Justice Brandeis warned of the bad effect the decision of the majority would have upon administrative bodies and courts:

"Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?"¹⁶³

He reiterated briefly his view, expressed many years ago in the *Southwestern Telephone* case,¹⁶⁴ that the difficulties in the whole business of rate fixing were due to the persistence of the Court in adhering to the reproduction cost basis of valuation; that therefore it was all the more incumbent on the Court not further to complicate the process, lest "a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review".¹⁶⁵

This opinion is characteristic in its scholarship and its broad social vision of the great judge who wrote it. Justices Stone and Cardozo regretfully recognized that, although the opinion stated the law as it ought to be, precedent had accumulated against it. They believed, however, that if the question were to be re-examined, as had been done by the majority, it should be decided otherwise than the majority had decided it. Justice Roberts concurred in the result without any comment on either opinion.

The other rate case, *Baltimore & Ohio R. R. v. United States*,¹⁶⁶ involved an order of the Interstate Commerce Commission for division of rates among various carriers of Florida citrus fruit. Again the issue was one of confiscation.¹⁶⁷ The majority, speaking this time through Mr. Jus-

162. See 56 Sup. Ct. 720, 741 (1936).

163. 56 Sup. Ct. at 744.

164. See 262 U. S. 276, 289, 302, 303 n. 16 (1923). See also authorities collected by Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 369-70.

165. 56 Sup. Ct. at 744.

166. 56 Sup. Ct. at 797.

167. The issue of statutory construction also involved is not within the scope of this article.

tice Butler, reaffirmed the doctrine of the *Stock Yards* case, and ruled that the district court was right in permitting the carrier to give evidence on the subject of confiscation when the Commission had refused it such opportunity on application for rehearing. That issue had not originally been raised; it arose only as to particular roads because of the nature of the division. The evidence of confiscation was then examined by the Court and, since it lacked "useful certainty", was rejected.

Justice Brandeis, while concurring, was of the opinion that no issue of confiscation was properly in the case at all. If the through rate was adequate, as was evidently conceded, then the carriers should have anticipated that the Commission might make a division which, as to some of them, would be confiscatory, and they should have raised the issue before it. Their remedy now was to apply to the Commission for a new order as to the future. Justice Brandeis further expressed the opinion that in a rate division proceeding, confiscation was not really an issue at all. The rate which the Constitution required to be compensatory was the through rate. There might be many reasons, such as inefficiency in operation, which might justify the Commission in allotting a non-compensatory share to one of the carriers. He pointed out further that the issue of confiscation had first been raised on a second application for rehearing and urged that the Commission had not abused its discretion in refusing to entertain this application. Justice Brandeis did not discuss what evidence should have been considered by the trial court upon any issue of confiscation. This time Justice Roberts joined with Justices Stone and Cardozo in agreement with Justice Brandeis.

In these two cases the Court has gone a long way towards increasing the difficulties of rate regulation; the slight balance in favor of the majority view may happily not always be maintained.

4. Five other cases involving regulation can briefly be disposed of. The decisions in all were unanimous.

As in the *Jones* case and the rate cases, two of these dealt with the more ancient conception of due process, the right to be heard. The contention of a consumer of gas that he was entitled to be heard before the city could settle a rate dispute with the utility, was overruled: the consumer had no such vested right in the refund he might get, as to be able to claim he had been deprived of his property.¹⁶⁸ The Court concluded also that the requirement of notice and opportunity to be heard had been complied with when, at some stage of rate proceedings, it appeared that rates for the current year were going to be revised, and the Commission had received all the evidence the utility desired to produce.¹⁶⁹

168. *Wright v. Central Kentucky Natural Gas Co.*, 297 U. S. 537 (1936).

169. *Northwestern Bell Tel. Co. v. Nebraska State R. R. Comm.*, 297 U. S. 471 (1936).

The other three cases bring into play the more modern notion, pursuant to which the Court inquires into the validity of measures adopted by the legislature to carry out its general policy. The Court held it proper to fix, not only the contents, but also the dimensions and form of berry baskets¹⁷⁰ since shape may assure observance of quantity regulations and may assist the purchaser in estimating quantity and may better preserve the fruit. A California statute was upheld against the challenge that it deprived fish manufacturers of their freedom of contract because it denied them their right to contract for the purchase of sardines taken from the high seas.¹⁷¹ Mr. Justice Sutherland pointed out that this statute was not directed against the right to contract, but toward conservation of the fish supply. The right to contract as guaranteed by the Constitution was not affected by a statute which "may operate indirectly as a deterrent. . . . A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective".¹⁷²

In one case, however, *Treigle v. Acme Homestead Ass'n*¹⁷³ the Court struck down the challenged statute. This affected the withdrawal rights of members of building and loan associations. The contention of the state that the act could be upheld as an emergency measure to conserve the assets of such companies was rejected by Mr. Justice Roberts, since it affected not the assets of the associations, but merely the rights of members as among themselves. The stockholders had vested rights which were subject to regulation only if "exercised for an end which is in fact public and the means adopted [are] reasonably adapted to the accomplishment of that end and not arbitrary or oppressive".¹⁷⁴ Since the statute deprived withdrawing members of their property rights under their contracts for the benefit of those who remained, it failed to meet the required test. And for substantially the same reasons the law was held to violate the contract clause.

5. In two other cases of far reaching importance the Court likewise held void the statutes involved. The first of these cases, the *Guffey Coal* decision,¹⁷⁵ has already been discussed from its interstate aspect. Not content with denying the power of Congress to deal at all with the subject of the relationship between employers and employees in the business of coal mining, the majority of the Court ruled that, in a number of respects, the regulations attempted violated the due process clause of the Fifth Amend-

170. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935); 49 HARV. L. REV. 827 (1936). For discussion of the equal protection clause see *infra* note 270.

171. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (1936). For discussion of the equal protection clause see *infra* note 271.

172. *Id.* at 427.

173. 297 U. S. 189 (1936).

174. *Id.* at 197.

175. *Carter v. Carter Coal Co.*, 56 Sup. Ct. 855 (1936).

ment. In this respect the Chief Justice agreed with the majority, while the other dissenting justices deemed it unnecessary to discuss that subject at all.

For the majority Mr. Justice Sutherland tied up the discussion of the due process clause with the discussion of delegation.¹⁷⁶ He emphasized the fact that a minority of producers and miners would be bound as to hours of labor and minimum wages and declared that "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."¹⁷⁷

It is important to bear in mind, however, that there is nothing in this opinion nor in the brief discussion of this subject by the Chief Justice,¹⁷⁸ which limits the power of Congress directly to regulate hours and wages or other aspects of the employer-employee relationship in a case properly involving interstate commerce. The Wagner Labor Relations Act has, therefore, not been pre-judged in this respect. And at least one circuit court has sustained that law against attack on this score.¹⁷⁹ Application has been made to review that decision so that the Supreme Court may decide the basic issue at the present term.

6. One of the subjects dealt with in the Guffey Act was that of minimum wages. While nothing was said as to the power of Congress to regulate wages in this manner in the *Guffey* decision, the Court, of course, had many years ago denied such power in the *Adkins* case.¹⁸⁰ Nevertheless, many states had enacted laws attempting in one way or another to establish minimum wages. In an effort to avoid the ban of the *Adkins* decision,¹⁸¹ the legislature of New York had provided not merely for a living wage for women, but also for a wage commensurate with service rendered.¹⁸² This difference caused a minority of the Court of Appeals of New York to believe that the *Adkins* case did not dispose of the problem.¹⁸³

But in *Morehead v. New York, ex rel. Tipaldo*,¹⁸⁴ a bare majority of the Supreme Court agreed with the majority of the state court. Mr. Jus-

176. See *infra* pp. 72, 73.

177. 56 Sup. Ct. at 873.

178. *Id.* at 877.

179. National Labor Relations Board v. Associated Press, 85 F. (2d) 56 (C. C. A. 2d, 1936). *Accord*: Washington, Va. & Md. Coach Co. v. National Labor Relations Bd., C. C. A. 4th (1936) 4 U. S. L. WEEK 134.

180. *Adkins v. Children's Hospital*, 261 U. S. 525 (1923) (Justices Taft, Holmes and Sanford dissented; Justice Brandeis did not participate). Earlier a statute on the same subject had been sustained, without opinion, by an evenly divided Court, Justice Brandeis not participating, *Stettler v. O'Hara*, 243 U. S. 629 (1917).

181. The majority opinion in the *Adkins* case had stressed the lack of relation to the fair value of the wages, terming any excess ". . . a compulsory exaction from the employer for the support of a partially indigent person. . . ." *Adkins v. Children's Hospital*, 261 U. S. 525, 557.

182. N. Y. Laws 1933 c. 584 § 19 (7); N. Y. LAB. LAW § 551 (7).

183. *People ex rel. Tipaldo v. Morehead*, 270 N. Y. 233, 239, 200 N. E. 799, 801 (1936). Judge Lehman wrote the dissent which was concurred in by Judges Crouch and Loughran. Chief Judge Crane wrote briefly for the majority, holding the differences between the two laws to be matters of detail, not of principle. Judges Hubbs, O'Brien and Finch agree.

184. 56 Sup. Ct. 918 (1936), 45 YALE L. J. 1490; Hale, *Minimum Wages and the Constitution* (1936) 36 COL. L. REV. 629.

tice Butler stated ¹⁸⁵ that no application had been made in the petition for certiorari for a reconsideration of the constitutional question decided in the *Adkins* case, but only for review on the ground that this case was distinguishable from that one; therefore, he said, the Court would not concern itself with the soundness of the *Adkins* decision. This view, which appears to have narrowed the issue, was challenged by Justice Stone in his dissent; he pointed out that the petition for certiorari had expressly requested a reconsideration of the *Adkins* case and said further: "unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked".¹⁸⁶

Justices Brandeis and Cardozo agreed on this point; not so, however, the Chief Justice, who based his separate dissent principally on the ground of the difference between the two statutes.

The opinion of the majority proceeds in part upon an interpretation of the New York law attributed to the Court of Appeals that included cost of living as part of the standard in fixing the minimum wage required by the statute. Justice Butler said:

"There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment."¹⁸⁷

That being so, the addition of another element, namely, reasonable value, could not save the New York law from the condemnation imposed upon the earlier act of Congress.

Nevertheless, the opinion of the majority discusses at some length the broader question and concludes that the *Adkins* case had denied any power of regulation of the wages of adult women. Justice Butler intimated that one of the reasons why the law was arbitrary was because it left men free to bargain and accept pay smaller than that allowed to women, pay that "would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to work".¹⁸⁸ But

185. 56 Sup. Ct. at 920.

186. *Id.* at 934.

187. *Id.* at 922.

188. *Id.* at 926.

it is hardly to be supposed that the Court, as now constituted, would uphold a minimum wage law which affected both men and women. The Court, moreover, emphasized the fact that this law had not been enacted to meet any emergency.¹⁸⁹ Yet it is difficult to say whether similar emergency legislation would be upheld under the doctrine of the *Nebbia* case.¹⁹⁰

The Chief Justice dissented on the ground that the New York law differed substantially from that considered in the *Adkins* case. He said: "And I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by over-reaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority."¹⁹¹ He referred to the procedure required by the statute as proof that there was nothing arbitrary about it. He disagreed with the conclusion of the majority that the state court had actually construed the state statute; it had done no more than recite its provisions. The difficulty on this point seems to have been due to the fact that the statute prohibits "an oppressive and unreasonable wage"¹⁹² and defines this to be both less than the fair and reasonable value of the services and less than sufficient to meet the minimum needed for health. The majority in the Court of Appeals described the definition as creating two standards¹⁹³; the majority in the Supreme Court accepted this as a construction which bound this case to the *Adkins* decision. The Chief Justice, with whom Justices Brandeis, Stone and Cardozo agreed, said this was not so and there can be little doubt that on this score the minority is correct. In effect the state law imposed only one standard so far as the employer was concerned, namely, reasonable value, since if the wage he paid met this standard he could not be required to pay more. In such case the employee was simply not getting the so-called "living" wage. This element really entered into the determination of the minimum wage only when that was found to be lower than the reasonable value of the services; in which case also the employer could not complain.

Finding, therefore, that there was a substantial difference between the two statutes, the Chief Justice felt free to deal with the subject on its merits. He stressed the factual background which induced the legislature to enact this statute, the relatively weak bargaining power of women, the tendency of wages to be lowered by unscrupulous employers with resultant harm to the purchasing power of the workers and the stability of industry as a whole. He pointed to the fact that where wages were insufficient they had to be supplemented by relief, thus increasing the burden of taxation. It was in

189. *Id.* at 920, 925.

190. *Nebbia v. New York*, 291 U. S. 502 (1934) (milk price fixing case).

191. 56 Sup. Ct. at 926-27.

192. See *supra* note 182.

193. 270 N. Y. 233, 238: "The Act of Congress had one standard, the living wage; this State act has added another, reasonable value."

the light of these facts, he said, that the contention of interference with freedom of contract must be considered.¹⁹⁴

The Chief Justice also indicated that women are entitled to special protection and always have been.¹⁹⁵ He could see no distinction between laws regulating their hours of labor, which had been repeatedly upheld¹⁹⁶ and the law now before the Court. He concluded by remarking that the state should have the power to require employers who pay less than a fair wage to make good what would otherwise be made good out of the public purse.¹⁹⁷

The other dissenting justices, while they agreed with everything the Chief Justice had said, went further. Their spokesman, Justice Stone, said he cared little about the distinction between a fair and a living wage, pointing out that employers would probably not pay the minimum wage at all if the services were worth less, since they were under no compulsion to employ women at any wage. Discussing the extent to which freedom of contract might be regulated, he concluded that this freedom was always subordinate to the public interest:

“There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.”¹⁹⁸

He referred to a long line of cases which, starting with *Munn v. Illinois*,¹⁹⁹ had sustained various kinds of regulatory statutes. He found it impossible to believe that wage regulation was not a matter of public concern, especially when, as here, the forced acceptance of inadequate wages “tends to produce ill health, immorality and deterioration of the race”.²⁰⁰ He noted that seventeen states and twenty-one foreign countries had enacted similar legislation.

Justice Stone concluded that the power to regulate wages existed, and that the Court could not decide how that power was to be exercised. Quoting from the *Nebbia* decision that “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare”,²⁰¹ he urged that the *Adkins* case had in effect been overruled by that decision. Justice

194. 56 Sup. Ct. at 930.

195. *Id.* at 931.

196. Citing *Muller v. Oregon*, 208 U. S. 412 (1908); *Riley v. Massachusetts*, 232 U. S. 671 (1914); *Radice v. New York* 264 U. S. 292 (1924).

197. 56 Sup. Ct. at 932.

198. *Id.* at 932.

199. 94 U. S. 113 (1877). The cases are collected in 56 Sup. Ct. at 933.

200. 56 Sup. Ct. at 933.

201. 291 U. S. 502, 537 (1934).

Stone thought that the Court had learned from experience, since the decision of the *Adkins* case, that a wage is not always the result of free bargaining: "It may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors";²⁰² that an inadequate wage affects not the employee alone: "It may affect profoundly the entire economic structure of society. . . . Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation".²⁰³

A storm greeted the announcement of this decision,²⁰⁴ for which, probably, the conservative justices were not prepared. The demand for constitutional amendment has received great impetus, the prestige of the Court a serious blow. There is no doubt that the people of the country, without partisan distinction of any kind²⁰⁵ are determined that legislation of this sort shall be permitted to the states and that they will find a way to accomplish this result. It is not yet beyond the range of the possible that the Court will itself bow to the clamor this decision has aroused. While the Court has denied the application to re-hear this case, the principles decided in the *Adkins* case may be reconsidered on the appeal from a Washington decision which upheld the constitutionality of that state's minimum wage law.²⁰⁶ It may well be that Mr. Justice Roberts, who sided with the liberal majority in the *Nebbia* case, will change his vote with the broader issue thus presented.

Summary

But whatever the final result in this particular minimum wage case, the decision shows how necessary it is that the whole question of due process be in some manner reconsidered. The remedy suggested in many quarters,²⁰⁷ that the Court be denied power to declare legislative acts unconstitutional, either accomplishes too much or too little. If it affects only acts of Congress then, of course, the Court would remain free to render decisions such as this and many others which have been deplored. On the other hand, it is difficult to conceive of the continuation of a federal government unless power be lodged somewhere to declare state law void for infringement of the national Constitution. While in the Convention of 1787 it was suggested that Congress might have a veto power over such laws, that notion was

202. 56 Sup. Ct. at 933.

203. See *id.* at 933.

204. See N. Y. Times, June 2, 1936, p. 1, col. 7.

205. Every political party made some reference to this subject, either in platform or other significant declaration.

206. *Parrish v. West Coast Hotel Company*, 55 P. (2d) 1083, 1088 (Wash. 1936). Probable jurisdiction was noted Oct. 12, 1936. The state court emphasized the public health aspects of the situation and summarily dismissed the *Adkins* case as not controlling because it involved an act of Congress, not a state law.

207. See for instance, Cohen, Boudin, and Fraenkel, *What to Do With the Supreme Court* (1935) 141 NATION 39.

rejected as impracticable.²⁰⁸ If it was impracticable then, with only thirteen states and a much smaller volume of legislation in each state, how much more impracticable would such a proposal be now! It is probable, therefore, that the Supreme Court will continue to wield the power it has so frequently exercised. Another suggestion, namely, that no law be declared unconstitutional if more than some specified number of judges dissent,²⁰⁹ may produce the desired result; it is, however, not a very happy solution. Nor would giving Congress the right to reverse decisions of the Supreme Court be a suitable way to revive state laws. Sooner or later the necessity must be faced and the concept of due process itself redefined. The task will not be easy; language will have to be found so plain and explicit that not the most skillful judges can twist it to continue their prejudices. It may well be that this is a problem, like the important problem of the relations between the states and the national government, which can be solved only by the calling of a new Constitutional Convention. We are approaching the one hundred and fiftieth anniversary of the calling of the last one, surely a long period for a great people to have consented to be governed by one instrument. The time seems ripe for an attempt at a reformulation of some of its clauses in the light of the experience gained and of the present needs.

b. Taxation

After the varied and far-reaching cases which deal with due process in the field of regulation, it proves to be somewhat of an anti-climax to turn to the cases which discuss the subject in the field of taxation. While, in a number of decisions, the Court was here sharply divided, no such important conclusions were at this term reached as at almost all the other recent preceding terms.²¹⁰ With one exception the current decisions repeated well-settled principles or cleared up minor points left uncertain by some of the more important cases of the immediate past.

1. The important exception is *Great Northern Ry. v. Weeks*,²¹¹ another of the many six-to-three decisions, with Justices Brandeis, Stone and Cardozo dissenting. The majority, through Mr. Justice Butler, set aside the valuation of the railroad's property on the sole ground that it was excessive, a decision which the minority declared was against all precedent. There was no claim by the railroad of discrimination. Essentially the claim was, that since there had been no change in the assess-

208. This proposal although originally agreed to without consent and subsequently defeated was several times re-considered. See 5 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1787), 127, 139, 171, 174, 215, 251, 468 and 469; compare introduction to his notes by Madison at 121.

209. This is also an old proposal originally suggested in 1826 and has twice been adopted by one of the houses of Congress. See 2 WARREN, THE SUPREME COURT IN U. S. HISTORY (1922) 124-127, 143; 3 *id.* at 171, 188-193.

210. See FRAENKEL, *supra* note 107, 84 U. OF PA. L. REV. at 357; 4 BROOKLYN L. REV. at 132; 28 ILL. L. REV. at 627.

211. 297 U. S. 135 (1936), Note 45 YALE L. J. 1306, 84 U. OF PA. L. REV. 784.

ment from 1932 to 1933, and only a six per cent reduction from 1929, notwithstanding the fact that there had been sharp declines in property values during that period, the result for 1933 was so arbitrary as to violate due process.

The majority recognized that mere over-valuation was not enough to warrant federal interference, and that "there must be something [which] in legal effect is the equivalent of intention or fraudulent purpose to over-value the property and so to set at naught fundamental principles that safeguard the taxpayer's rights and property".²¹² Nevertheless Mr. Justice Butler insisted that since values by 1933 had reached a low level which could no longer be regarded as temporary, the failure of the assessment board to take this into consideration was indicative of arbitrariness, and resulted in a grossly excessive valuation.

Mr. Justice Stone, for the minority, criticized this result both on principle and because of practical considerations.²¹³ To the writer's mind this is a case which is likely to give the Court much trouble in the future unless ultimately the views of the minority prevail.²¹⁴

2. Another case dealing with state taxation, *Wheeling Steel Corp. v. Fox*,²¹⁵ resolved in the affirmative the question expressly left open in the line of cases culminating with *First National Bank v. Maine*,²¹⁶ whether intangibles might acquire in a state other than that of their owner's domicile such a situs by reason of their being there used in business as to justify that state in taxing them. The case involved property taxation, not death duties.

3. Four other cases involving state taxes dealt with corporations engaged in interstate commerce and involved the fairness of the method employed by the state while seeking to tax property or income within its own jurisdiction. In each instance the Court unanimously upheld laws which based the tax on income derived from business done within the state;²¹⁷ or on property there located.²¹⁸

212. *Id.* at 139.

213. *Id.* at 155.

214. See (1936) 30 ILL. L. REV. 1070.

215. 56 Sup. Ct. 773 (1936).

216. 284 U. S. 312, 331 (1932).

217. *Matson Nav. Co. v. State Bd. of Equalization*, 297 U. S. 441 (1936); *Pacific Tel. & Tel. Co. v. Tax Comm.*, 297 U. S. 403 (1936)—for discussion of the interstate commerce aspect of these two cases see *supra* notes 109, 111. *Norfolk & W. R. R. v. North Carolina*, 297 U. S. 682 (1936). The first case involved net income, but there was no dispute as to the calculation; the second gross income; the third, also net income, but there was dispute as to deductions. The dispute as to deductions centered around a formula used for the apportionment of expenses and revenue. The argument of the railroad company was rejected despite a showing that its actual expenses were greater than those allowed by the formula because the state had shown that gross revenue was also greater than fixed by the same formula. The contention of the railroad that it was impossible to apportion revenue except on a mileage basis was rejected as not sustained by the evidence; the Court reserved for the future the question how such a formula might be affected if that contention were proved sound.

218. *Great Northern Ry. v. Weeks*, 297 U. S. 135 (1936) cited *supra* note 211 (the Court upheld the allocation).

4. The problem of retroactivity was involved in a number of estate tax cases decided early in the term. In *Helvering v. City Bank Farmers Trust Co.* ²¹⁹ and in *Helvering v. Helmholz* ²²⁰ the government attempted to tax, as part of the estate of a decedent, property which he had transferred by a trust which reserved to him the power to amend or revoke, even though the consent of some other person was necessary to accomplish the change. In the first of these cases the trust was created subsequent to the enactment of the law; in the second it had already been in existence. This was made the basis of distinction in the decisions. In the first case the Court upheld the tax; in the second it was held void.²²¹ In this respect the decisions in both cases were unanimous ²²²; they merely followed precedent.

There was, however, division of opinion as to the validity of the tax in the first case. The circuit court of appeals ²²³ had thought the statute should be construed so as to apply only when the person joining in the change was not a beneficiary, since otherwise it would tax as taking effect at death a transfer actually made previously. Justices Van Devanter, McReynolds, Sutherland and Butler without opinion stated that this decision should be affirmed. The other Justices, speaking through Mr. Justice Roberts, concluded that taxation of such an interest was permissible in order to prevent evasion. Justice Roberts commented upon the possibility that a beneficiary who was a member of the family might readily join with the settlor in terminating the trust, hoping perhaps to receive other benefits. But the opinion does not expressly limit the decision to cases in which the beneficiary is in fact a close relative.

5. Income tax cases involving constitutional issues were few in number. Two of them dealt with the right of Congress to tax as income property which had a contingent existence prior to March 1, 1913, the effective date of the first law enacted after the Income Tax Amendment. In both cases the Court upheld the power. In *United States v. Safety Car Heating & Lighting Co.*,²²⁴ the question arose in connection with money received in settlement of a contingent claim for patent infringement, suit having been started before March 1, 1913. In *Helvering v. San Joaquin Fruit &*

²¹⁹. 296 U. S. 85 (1935), Note (1936) 84 U. OF PA. L. REV. 400, 36 COL. L. REV. 333, 49 HARV. L. REV. 491.

²²⁰. 296 U. S. 93 (1935).

²²¹. To the same effect is *White v. Poor*, 296 U. S. 98 (1935).

²²². In *Helvering v. Helmholz*, 296 U. S. 93 (1935), cited *supra* note 220, Justices Brandeis, Stone and Cardozo concurred only on this ground; they evidently rejected the view of the majority that the trust did not come within the law because it gave the right to revoke to the same persons who had such right under state law. In the *Poor* case, cited *supra* note 221, the same judges evidently disapproved a ruling of the majority, that a trust did not come within the law because the settlor derived his right from his appointment as a trustee by the other trustees in accordance with provisions of the trust—surely an unfortunate decision, since it opened wide the door to evasion.

²²³. Commissioner of Int. Rev. v. City Bk. Farmers' Tr. Co., 74 F. (2d) 242 (C. C. A. 2d, 1934), on the authority of *Reinecke v. Northern Trust Co.*, 278 U. S. 339 (1929).

²²⁴. 297 U. S. 88 (1936).

Investment Co.,²²⁵ it arose in connection with an option to purchase contained in a lease executed prior to the controlling date. In the first of these cases Justices Sutherland, Butler and Roberts dissented, the second decision was unanimous.

Justice Cardozo, for the majority in the first case, held that, since liability had been contested by the infringer, no part of the later settlement could be deemed income accrued prior to March 1, 1913, and that it all could constitutionally be taxed: "Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition".²²⁶ And he concluded that the taxpayer was not entitled to a reduction either because of any estimated value of the claim as of March, 1913, or because the infringer had made profits prior to that time. The minority, without discussing the question of power, were of the opinion that the claim had an ascertainable value as of March, 1913, which had been found by the trial court²²⁷ and accepted on appeal,²²⁸ and that this had been properly allowed as an offset.

In the second case the circuit court of appeals²²⁹ had treated the real estate purchased after March, 1913, by exercise of the option previously granted, as acquired when the option was granted in order to avoid doubts concerning the power of Congress to tax it otherwise. Mr. Justice Roberts, for the unanimous Court, saw no need of such fictitious process, because he could see no constitutional issue in the case at all. The gain which had accrued to the real estate prior to 1913 did not accrue to property owned by the purchaser—what he then owned was an option, and this had not increased in value.

This concludes the important^{229a} tax cases involving due process, with a single exception, which, because of the unusual nature of the objection to the tax, will be considered separately. As a matter of fact, it really belongs with that small group of cases involving civil rights which perhaps justifies the retention by the Supreme Court of the power of judicial review.

c. Civil Rights

It is in the realm of civil liberties that the conception of due process plays its most useful part. Under this head the Supreme Court has ren-

^{225.} 297 U. S. 481 (1936).

^{226.} United States v. Safety Car Heating & Lighting Co., 297 U. S. 88, 99 (1936), cited *supra* note 224.

^{227.} Safety Car Heating & Lighting Co. v. United States, 5 F. Supp. 276 (D. N. J. 1933).

^{228.} United States v. Safety Car Heating & Lighting Co., 76 F. (2d) 133 (C. C. A. 3d, 1935).

^{229.} San Joaquin Fruit & Investment Co. v. Commissioner of Int. Rev., 77 F. (2d) 723 (C. C. A. 9th, 1935), cited in Supreme Court *supra* note 225.

^{229a.} There were two additional tax cases: Georgia Ry. & Elect. Co. v. Decatur, 297 U. S. 620 (1936) (a street railway company may be assessed for street paving even though it acquires no benefit from such paving); Ingraham v. Hanson, 297 U. S. 378 (1936) (tax laws may be amended so as to permit the sale of the property against which bonds were issued separately instead of as before in connection with other past due taxes).

dered many notable decisions, to which may be added two of the present term.

1. The first of these, *Grosjean v. American Press Co.*,²³⁰ declared void a Louisiana tax on newspaper advertising, on the ground that it violated freedom of the press as guaranteed by the due process clause of the Fourteenth Amendment. Mr. Justice Sutherland, for a unanimous Court, said that it was now settled that the fundamental rights safeguarded by the first eight amendments to the federal Constitution were protected by the Fourteenth Amendment against infringement by the states,²³¹ and that it had already been decided that freedom of speech and of the press were rights so protected.²³² The only question, therefore, was whether this law interfered with such freedom. After a long historical review of the circumstances which impelled the adoption of the freedom of the press provision contained in the First Amendment, Justice Sutherland concluded that taxes directed to the curbing of the circulation of newspapers were among the evils aimed at.²³³

That the Louisiana tax was of the kind prohibited followed because its amount was determined, not by the volume of the advertisements on which it was presumably laid, but by the extent of the circulation and because it applied only to papers with a large circulation. Justice Sutherland was careful to point out that newspapers, like other enterprises, were liable to taxation and said this law was bad "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves".²³⁴

2. In the other case, *Brown v. Mississippi*,²³⁵ a unanimous Court reversed the convictions for murder of three Negroes, on the ground the convictions rested solely on confessions extorted by brutality and violence. The Chief Justice, in an opinion bristling with indignation, recited the undisputed facts as to the manner in which the confessions had been obtained, quoting in large measure from the dissenting opinion of Judge Griffith of the Mississippi Supreme Court.²³⁶ He overruled the contention of the state that this was a case of compulsory self-incrimination, which, many years ago, in *Twining v. New Jersey*,²³⁷ the Supreme Court had ruled was not a

230. 297 U. S. 233 (1936).

231. Citing the first *Scottsboro* case, *Powell v. Alabama*, 287 U. S. 45, 65, 68 (1932).

232. Citing *Gitlow v. New York*, 268 U. S. 652 (1925); *Near v. Minnesota*, 283 U. S. 697 (1931).

233. 297 U. S. 233, at 247 (1936).

234. *Id.* at 250.

235. 297 U. S. 278 (1936), 36 COL. L. REV. 832.

236. *Brown v. State*, 173 Miss. 542, 161 So. 465, 470, 471 (1935).

237. 211 U. S. 78 (1908); cf. *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

right covered by the due process clause. The difference, said the Chief Justice, lay in the circumstance that in the earlier case the compulsion had been imposed by legal process, here by illegal torture. While reaffirming earlier cases which held that the state might abolish indictments²³⁸ and even trial by jury,²³⁹ Chief Justice Hughes declared that the fundamental principles of liberty and justice must be preserved: "Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand"²⁴⁰.

Slowly the Supreme Court is increasing its control over state criminal trials.²⁴¹ To the mob violence, the depriving prisoners of counsel, the knowing use of perjured testimony characteristic of the cases the Chief Justice referred to²⁴² as grounds for reversal, there must now be added also the use of confessions obtained by torture—at least when there is no other competent evidence. The Court has not yet reversed because of prejudice on the part of the trial judge; indeed, individual justices refused to intercede in the *Sacco-Vanzetti* case, where such prejudice was claimed.²⁴³ But the Court has reversed because of the judge's financial interest in the fines.²⁴⁴ And, although it has reversed a federal conviction because of prejudicial conduct on the part of the prosecuting attorney,²⁴⁵ it has not yet gone so far as to reverse a state conviction on that ground.

It remains to be seen to what extent the Court will extend general conceptions of what constitutes a fair trial, such as it has applied in federal cases,²⁴⁶ to criminal cases arising in the states. The problem, of course, is different, since to reverse the state conviction the Court must be willing to conclude that the trial has been actually only a sham, a travesty on justice; yet the trend seems toward holding that what is justice for the national government should be justice for the states also.

III. MISCELLANEOUS RESTRICTIONS ON THE STATES

a. The Contract Clause

Of the various restrictions contained in the original Constitution, the Court has been most concerned with the clause which forbids a state from impairing the obligation of contracts. For many years prior to the adoption

238. *Hurtado v. California*, 110 U. S. 516 (1884).

239. *Walker v. Sauvinet*, 92 U. S. 90 (1876).

240. 207 U. S. 278, at 285 (1936).

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

242. 207 U. S. 278, at 286 (1936).

243. FRAENKEL, THE SACCO-VANZETTI CASE (1931) 178-182.

244. *Tumey v. Ohio*, 273 U. S. 510 (1927).

245. *Berger v. United States*, 295 U. S. 78 (1935).

246. See *Aldridge v. United States*, 283 U. S. 308 (1931); *Quercia v. United States*, 289 U. S. 466 (1933).

of the Fourteenth Amendment, this provision was a bulwark for property rights, as indeed it was intended it should be. Many of these early decisions were criticized as unnaturally straining the clause beyond the intention of the framers.²⁴⁷ With the due process clause now ready to hand the Court has in recent years rendered few decisions of importance which deal with the contract clause. And while the subject was discussed in seven opinions rendered at the 1935 term, no significant issues were determined. In each instance, also, the decision was unanimous. In five of the seven cases the challenged legislation was upheld; only the two in which it was declared unconstitutional need be mentioned here.^{247a}

We have already considered one of these two cases, *Treigle v. Acme Homestead Ass'n*,²⁴⁸ from the point of view of due process²⁴⁹; here the Court declared the law void under both heads, for the same reason: it was not a regulation of the corporation, but an attempt to change the rights of members among themselves.

The other case, *International Steel & Iron Co. v. National Surety Co.*,²⁵⁰ presented a complicated question on which the state courts had disagreed. The defendant surety company had executed a bond in connection with a public improvement, under a statute which required the withholding of a certain percentage of the contract price from the general contractor for the purpose of satisfying claims of subcontractors. Thereupon the statute was amended to permit the payment of this withheld money upon the contractor furnishing a new bond. After plaintiff's claim against the contractor came into existence, the method authorized by the new statute was followed. Plaintiff then brought suit against the sureties on both bonds. Before judgment had been entered in its favor the surety on the second bond had become insolvent. The National Surety Company, the surety on the first bond, contended that it had been discharged by the procedure adopted under the new law. The trial court held that it was liable to the extent that the new surety was unable to respond; the first appellate court reached the conclusion that the new law was not intended to apply to existing bonds and that everything done pursuant to it had no validity, but

247. See *supra* note 95.

247a. The other five cases are: *Ingraham v. Hanson*, 297 U. S. 378 (1936), (change in the law as to the manner in which land could be sold for taxes held not substantial); *Wright v. Central Kentucky Natural Gas Company*, 297 U. S. 537 (1936), (a consumer had no right to complain of the manner in which a rate controversy was settled by the municipality); *Violet Trapping Company v. Grace*, 297 U. S. 119 (1936) (changes in the method of redeeming tax leases were upheld because of the broad language contained in the original lease); *Phillips Petroleum Company v. Jenkins*, 297 U. S. 629 (1936), (reserved right to amend a charter properly exercised so as to deprive a corporation of the right to plead the fellow servant rule as a defense); *Scheneback v. McCrary*, 298 U. S. 36 (1936), (the taxpayer had no interest in funds lost by reason of a bank's insolvency so as to complain about a law which released the county treasurer from liability therefor).

248. 297 U. S. 189 (1936).

249. See *supra* note 173.

250. 297 U. S. 657 (1936).

nevertheless that it had the effect of discharging the original surety completely. The Supreme Court of Tennessee affirmed, though it held that the law applied and the action under it had been lawful. Until then no federal question had been presented. But plaintiff urged, on reargument in the state supreme court, that its contract rights had been impaired by the new legislation.

This, of course, was the only point the United States Supreme Court was called upon to consider. Mr. Justice Roberts reached the conclusion that the new law did impair a contract right of plaintiff. His right was based on the contract between the surety and all subcontractors, a contract created under the terms of the original law. The effect of the new law, as construed by the highest court of the state, was to annul that contract altogether. That was beyond the power of the state; it was immaterial that the new law also created a new contract, since plaintiff had not consented to that new contract. The fact that plaintiff had joined the surety on the second bond as defendant in its law suit could not deprive it of its constitutional rights on any theory of estoppel, especially as the state court had not passed upon any such issue. The National Surety Company, the original surety, therefore, remained liable in full.

b. Full Faith and Credit

There has at times been controversy over what state activities are covered by the protection of the clause of the Federal Constitution²⁵¹ which provides that each state shall give "full, faith and credit" to the acts of other states, and at the 1934 term two interesting decisions were rendered on this subject.²⁵² During the term just ended there were two opinions also.

One, a *per curiam* memorandum, dealt with the validity of a judgment fixing the liability of a non-resident stockholder under Minnesota law.²⁵³ This had been successfully attacked in the state of the stockholder's residence, for minor defects in procedure. The Supreme Court reversed, holding that the defects were not jurisdictional and, if serious, should have been corrected by the stockholder by an appeal in the original proceeding in Minnesota.

In the other case, *Milwaukee County v. White*,²⁵⁴ the Court was divided, Justices Butler and McReynolds dissenting without opinion. The case involved the delicate subject of enforcement of a judgment for taxes outside the state in which the obligation had been incurred and the judgment rendered. The circumstance that in the particular case suit on the judgment for taxes had been instituted in a federal court did not change the nature

251. Art. IV, § 1.

252. See Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 378-9.

253. Chandler v. Peketz, 297 U. S. 609 (1936).

254. 296 U. S. 268 (1935), Notes (1936) 84 U. OF PA. L. REV. 526, 49 HARV. L. REV. 490.

of the problem, since such court was, by Act of Congress, required to give to state judgments the same faith and credit to which they would have been entitled in the states.²⁵⁵ Mr. Justice Stone, after adverting to the view often expressed, that revenue laws are not within the protection of the Constitution, concluded that it was not necessary now to decide that question: the narrower issue actually presented was whether a judgment for such taxes could be refused credit. Whatever embarrassment there might be in directly enforcing revenue laws outside the state which enacted them because of the supposed scrutiny of policy involved, no such difficulty arises when the claim for taxes has already been reduced to judgment. The issues which then remain to be litigated, such as jurisdiction or fraud, are no different in the case of a judgment for taxes than in the case of any other judgment. The doubtful grounds of policy cannot withstand the command of the Constitution. Precedent for this conclusion was ample.²⁵⁶ The Court, however, expressly left open the question whether the same result would be reached in a case dealing with a judgment based upon a penal obligation, thus avoiding a complete repudiation of the doctrine announced many years ago in *Wisconsin v. Pelican Ins. Co.*²⁵⁷

c. *The Taxation of Federal Instrumentalities*

This subject, though not mentioned in the Constitution itself, naturally grew up out of the dual sovereignties created by the Constitution. It has been the occasion for many perplexing and often contradictory opinions.²⁵⁸ At the current term it was considered in six cases. In four the decision was unanimous^{258a}; in two, Justices Brandeis and Cardozo dissented, Justice Stone agreeing with them in one of the cases, and not sitting in the other.

1. The first of these cases, *Schuylkill Trust Co. v. Pennsylvania*,²⁵⁹ dealt with the right of a state to tax shares in trust companies which included among their assets securities of the United States Government. The state contended that the tax was only upon the shares of the corporation;

255. 1 STAT. 122 (1790), 28 U. S. C. A. § 687 (1934).

256. The Court cited, among other cases, *Fauntleroy v. Lum*, 210 U. S. 230 (1908), where the judgment was based on a gambling debt, which was unenforceable under the laws of the state in which suit had been brought upon the judgment; nevertheless, the Supreme Court held that full faith and credit must be given.

257. 127 U. S. 265 (1888). That case was, however, more concerned with the question of the original jurisdiction of the Supreme Court than with the effect of the full faith and credit clause.

258. See Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 384; 4 BROOKLYN L. REV. at 127; 28 ILL. L. REV. at 623.

258a. *Leahy v. State Treasurer*, 297 U. S. 420 (1936), (income derived from exempt property held taxable because the income had become the property of the individual Indian); *Oklahoma ex rel. Oklahoma Tax Commission v. Barnsdell*, 296 U. S. 521 (1936), (tax on oil produced by Indian lands voided); *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209 (1936), (taxation of bank stock held by Reconstruction Finance Corporation upheld because of Congressional consent); *Posadas v. National City Bank*, 296 U. S. 497 (1936), (the Philippines held not entitled to tax branches of national banks).

259. 296 U. S. 113 (1935); Notes (1936) 84 U. OF PA. L. REV. 758, 49 HARV. L. REV. 480.

the taxpayer, that it was upon the assets and therefore in part upon assets wholly exempt from state taxation. The majority of the Court, by Mr. Justice Roberts, concluded that the tax was bad without precisely determining its nature, on the ground that certain assets specially taxed were deducted in fixing the value of the shares: this resulted in a discriminatory increase of their value, due to ownership of exempt securities. The rather obscure opinion of the majority indicates that taxes will be condemned, although devised so as to avoid double taxation of non-exempt property, if, as a result, exempt property enters into the calculation.

The minority, speaking by Mr. Justice Cardozo, insisted that since the tax was laid upon the shares, it was immaterial that deductions were permitted, the purpose of the deductions being lawful and non-discriminatory: "Never before has it been held that out of deference or favor toward the securities of government a state is disabled from framing its system of taxation along lines of equity and justice".²⁶⁰ Justice Cardozo pointed out that vast classes of property other than the government securities were included in the valuation; therefore there was no basis for inferring an intention to discriminate. The true criterion, he believed, had been laid down in earlier cases dealing with national banks; in these, partial exemptions had been upheld.²⁶¹ The minority, nevertheless, agreed that the inclusion of shares of national banks held by the trust company was improper, since the trust company itself had already been taxed by reason of owning them.²⁶²

2. In *Graves v. Texas Co.*²⁶³ this question arose due to the attempt of Alabama to tax a distributor of gasoline on gasoline sold to the United States Government. While recognizing that the *Panhandle* decision²⁶⁴ prohibited a sales tax on products used by the government, the state authorities contended that the tax under consideration was on the storage, not on the sale. Mr. Justice Butler, for the majority, brushed this contention aside as a pretext, calling attention to the fact that the tax was really on the sale, since without withdrawal there was no tax. But he went further and declared that, even had the tax been upon the storing alone, it would have violated constitutional principles; since storing was an essential element in the purchase by the government, the tax necessarily would increase the price paid by the government.

The minority disputed both contentions. They said, by Mr. Justice Cardozo, that the statute expressly taxed storing: "What the lawmakers have put into a statute, a court may not take out of it".²⁶⁵ And Justice

260. *Id.* at 128.

261. As, for instance, in *Mercantile Nat. Bank v. New York*, 121 U. S. 138 (1887).

262. On the authority of *Bank of California v. Richardson*, 248 U. S. 476 (1919).

263. 56 Sup. Ct. 818 (1936).

264. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218 (1928).

265. 56 Sup. Ct. at 823.

Cardozo protested against the extension of the *Panhandle* case, which, he recalled, had been a five-to-four decision. He objected to the logic of the majority, according to which any stage of transportation or production became exempt from taxation so long as ultimate consumption was by the government. And in view of the fact that sales were made to the government under contracts at specified prices, there was no assurance that the tax could be passed on to the government.

d. Equal Protection

The adoption of the Fourteenth Amendment, of course, greatly increased the scope of federal review of state legislation. The due process clause we have already considered, and, also, the privileges and immunities clause. The equal protection clause has in recent years produced many strange judicial decisions and many sharp divisions among the Justices, particularly in tax cases.²⁶⁶ There were eleven opinions at the 1935 term, all but three being unanimous.

1. At the 1935 term, four tax cases involving equal protection were decided. The only important^{266a} decision, *Colgate v. Harvey*, has been discussed above²⁶⁷ in connection with the relations between the federal government and the states; here the new use to which the privileges of federal citizenship were put caused three of the justices to dissent. There was agreement among them all that the equal protection clause as applied to dividends had not been violated. For the majority Mr. Justice Sutherland pointed out that taxes would be upheld, despite differences, "if the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality . . ."²⁶⁸ In this instance, the distinction was based on the desire to avoid double taxation. But the majority reached a different conclusion as to the interest provisions of the law: the exemption of interest loaned within the state was declared to be arbitrary, especially as it was not conditioned upon the money having been invested in the state. As no public purpose could be discerned to justify the distinction (except, perhaps, the forbidden purpose of favoring local interests, as already considered) the classification was condemned as arbitrary, quite as arbitrary as if the criterion had been, not the place where the loan had been made, but its incidence on a particular day of the week.

²⁶⁶. See Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 360, 4 BROOKLYN L. REV. at 127, 28 ILL. L. REV. at 624.

^{266a}. The other cases: *Matson Navigation Co. v. State Bd. of Equalization*, 297 U. S. 441, (corporations doing both intrastate and interstate business not discriminated against even though corporations doing no intrastate business were exempt); *Wheeling Steel Corp. v. Fox*, 56 Sup. Ct. 773 (1936) (a contention that discrimination resulted from a failure to tax natural persons was rejected as not supported by the statute or state decisions); *Georgia Ry. & Electric Co. v. Decatur*, 297 U. S. 620 (1936) (street railways held to be in a separate class so that they could be assessed for street pavings regardless of benefits).

²⁶⁷. 296 U. S. 404 (1935), *supra* pp. 41-43.

²⁶⁸. *Id.* at 422.

To this ruling Mr. Justice Stone answered that the state had the right to determine that a public purpose was served by having loans made within the state at favorable rates of interest, even though not all the money so loaned might remain in the state, especially as the law had been enacted after committees had determined that the existing tax system was driving capital from the state. He pointed to a long line of cases in which the Court had refused to declare laws invalid where a possible basis for the challenged classification might have existed. He warned the Court that it should not sit as a superlegislature and laid down the applicable principle as follows:

“All taxes must of necessity be levied by general rules capable of practical administration. In drawing the line between the taxed and the untaxed the equal protection clause does not command the impossible or the impractical. Unless the line which the state draws is so wide of the mark as palpably to have no reasonable relation to the legitimate end, it is not for the judicial power to reject it and say that another must be substituted.”²⁶⁹

2. In the field of regulation, two of the six decisions, those relating to the New York Milk Law, were by a divided Court; the other four were unanimous. Two of the unanimous decisions have already been considered in connection with interstate commerce and due process, the berry container case²⁷⁰ and the fish case.²⁷¹ In the first, the taxpayer claimed that the regulation created a monopoly: this claim was rejected as unsupported by the facts, but even if so supported, the contention would not justify the application of the equal protection clause. In the second case a classification was attacked which distinguished between canners and reducers of fish: but there were justifiable factual grounds for such differentiation, hence no violation of the Constitution.

In one case²⁷² the state of Arkansas sought to deprive corporate employers of the right to plead the fellow servant rule as a defense. This law the Court upheld, on the narrow ground that the legislature must have complied with provisions of the state constitution which permitted amendment of corporate charters only in the public interest. Mr. Justice Butler said that there was nothing in the record to indicate that justice required the abrogation of the defense in the case of individual as well as corporate defendants. He was careful to state that the Court was not deciding the effect of the equal protection clause upon such a law in the absence both of the right to amend corporate charters and of the conditions imposed by the state constitution. This is one of that growing number of cases in which the Court has refused to condemn laws as violative of equal protection in the

269. *Id.* at 442.

270. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935).

271. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (1936).

272. *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629 (1936).

absence of evidence requiring that result.²⁷³ However, every now and then the Court indulges in the privilege of suggesting, in the absence of such evidence, that there could be no reasonable basis for the classification despite the contrary view of a number of its own members.²⁷⁴

A nice question was avoided in *Morf v. Bingaman*,²⁷⁵ a case involving New Mexico's auto-caravan law. By this law a license fee was imposed on all cars transported for sale although it was designed to affect cars transported in groups, or caravans. The attack on the law was based on the fact that it failed to make the classification apply only to caravans, a classification which concededly would have been within the power of the state. The Court, through Mr. Justice Stone, held that since plaintiff's business was conducted in caravans he could not raise the point which some owner transporting cars singly might raise: whether the state can differentiate between cars driven for sale and those driven for other purposes, when that is the only ground of the distinction. The Court will probably be confronted with the solution of this problem at the coming term, since the same owner has sued to restrain the enforcement of a similar California law as applied to the movement of a single car.²⁷⁶

That leaves only the two milk cases to be considered. In *Borden's Farm Products Co. v. Ten Eyck*,²⁷⁷ the Court approved a provision of the New York law which authorized a differential of one cent a quart in favor of dealers who did not have well advertised trade names; in *Mayflower Farms v. Ten Eyck*²⁷⁸ the Court condemned a provision of the same law which denied the benefit of this differential to dealers who embarked in business after the law went into effect.

In the first of these cases, Mr. Justice Roberts, for the majority, called attention to the earlier decision of the Court²⁷⁹ which had sent the case to trial in order to have established the local conditions which surrounded the industry and which might throw light upon the need for the legislation. The facts found at the trial precluded any contention that the law was needed

273. As in *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U. S. 580 (1935), and the *Mayflower* case, 56 Sup. Ct. 457 (1936), cited *infra* note 278.

274. As in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935) (Justices Brandeis, Stone and Cardozo dissenting).

275. 56 Sup. Ct. 756 (1936).

276. In *Morf v. Ingels*, 14 F. Supp. 922 (S. D. Cal. 1936), a three-judge court granted an injunction, one judge dissenting, less than two weeks before the *Bingaman* decision was rendered by the Supreme Court. The majority stressed the fact that the law did not properly define caravans, because it included cars driven singly, and that the amount collected was greatly in excess of any possible policing costs. The law was declared void also as in effect a tariff on cars imported into the state under *Baldwin v. Seelig*, 294 U. S. 511 (1935) (for discussion of this aspect of the case see *supra* note 116). Judge Yankwich in dissent disposed of each of these arguments forcefully and at length, and listed many instances of classifications which had been approved. *Morf v. Ingels*, *supra*, at 931. Neither the majority nor the minority considered the point made by Justice Stone in the *Bingaman* case.

277. 296 U. S. 251 (1936), 84 U. OF PA. L. REV. 786.

278. 296 U. S. 266 (1936), 84 U. OF PA. L. REV. 786.

279. 293 U. S. 194 (1934); see *Fraenkel*, *supra* note 107, 84 U. OF PA. L. REV. 352.

in order to prevent monopoly; nor, said Mr. Justice Roberts, was there any difference in the service rendered the consumer. In effect this last conclusion of the Supreme Court rejected the argument of Judge Learned Hand, who wrote for the statutory court which denied the injunction²⁸⁰ that the classification was proper as one of grades, if plaintiff's reputation was founded on better quality, and if it was not, then the legislature had the right to redress the advantage obtained by unfair competition. Nevertheless, the Supreme Court, by a five-to-four vote, found basis for the classification in the fact that, before the enactment of the law, it had been customary for dealers without advertised brands to charge one cent less per quart than did dealers such as Borden's. Having in mind the limited life of the experiment in price-fixing contemplated by this law, Mr. Justice Roberts could find no reason why the state might not preserve the existing relationship. Here was "compliance with, rather than a disregard of, the constitutional guarantee".²⁸¹ The contention of the plaintiff, that the law had imposed a burden upon it, was dismissed for lack of proof that such had been its effect.

Mr. Justice McReynolds dissented; Justices Van Devanter, Sutherland and Butler agreed with him. They could see no merit in the argument of the majority; the law merely deprived one who had built up a good will of the benefits, so that "another may trade successfully. Thus the statute destroys equality of opportunity".²⁸² They pointed out that before the law the dealer with a well advertised brand could adjust its prices to meet the circumstances; now the dealer was powerless: "it must stand helpless while adversaries take possession of the field. It may suffer utter ruin solely because of good reputation, honestly acquired".²⁸³

What was given to the independent dealer by the *Borden* decision was probably taken away by the *Mayflower* case. Again Mr. Justice Roberts wrote for the majority, while this time it was the liberal trio which dissented. He could find in the record no reason for the distinction which denied plaintiff the right to the one cent differential, simply because plaintiff had not been in business at the time the law was enacted. He rejected the argument that this provision was designed to protect dealers having advertised brands from the increased competition which might come from new businesses permitted to sell at the lower price; this, he maintained, in effect amounted to closing the milk business to those engaged in it when the law was passed. Finding no basis in the record, "we have no right to conjure up possible situations which might justify the discrimination".²⁸⁴ Whether

280. 11 F. Supp. 599 (S. D. N. Y. 1935).

281. 296 U. S. at 263.

282. *Id.* at 265.

283. *Id.* at 266.

284. 296 U. S. 266 at 274.

the decision would destroy the differential clause in its entirety the Court refused to decide, preferring to leave that problem to the state courts.²⁸⁵

For the minority Mr. Justice Cardozo declared this decision irreconcilable with that in the *Borden* case. He believed that hardships were inevitable whether newcomers were allowed the benefit of the differential or were denied it and that the legislature, and not the court, had to determine which course was the wiser. He found justification for the choice of date in the fact that those previously engaged in the business had their capital already invested, whereas those who had gone into it later were entitled to a lesser degree of protection. In the presence of so many interests clamoring for legislative favor, there could be no quarrel with any particular solution. Mr. Justice Cardozo said in conclusion:

"I have not seen the judicial scales so delicately poised and so accurately graduated as to balance and record the subtleties of all these rival equities, and make them ponderable and legible beyond a reasonable doubt."²⁸⁶

3. In the field of criminal law the equal protection clause has often been invoked to prevent discrimination.²⁸⁷ A vain attempt was made at the term just ended to invoke the clause in aid of a convict for murder of his guard, on the theory that the law deprived convicts of the right to plead self-defense. The Court dismissed his appeal for want of a substantial federal question,²⁸⁸ primarily because in fact the defendant had been permitted to prove his contention that he had acted in self-defense, and because the judge had charged the jury that if it believed that contention it must acquit.

IV. MISCELLANEOUS POWERS OF THE FEDERAL GOVERNMENT

With the exception of a few cases which deal with questions of practice, all the rest may conveniently be grouped around two topics: the vexed issue of delegation of powers and the increasingly important one of the acquisition and use of property.

a. Delegation

1. Ever since the first successful attack upon an Act of Congress in the *Panama Oil* case,²⁸⁹ delegation of powers has become a fruitful basis for litigation. In the *AAA* case, for instance, an attack was made on this

285. These courts have not yet taken any action.

286. 296 U. S. at 278.

287. Generally in aid of Negroes who complained of laws which denied to members of their race the right to serve on juries, as in *Neal v. Delaware*, 103 U. S. 370 (1880); notably in the second *Scottsboro* case, in reversal of conviction on the ground that administrative officers had in fact discriminated against Negroes, although the law was above reproach: *Norris v. Alabama*, 294 U. S. 587 (1935).

288. *Hart v. Virginia*, 298 U. S. 34 (1936).

289. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935). See Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, (1936) 36 COL. L. REV. 871.

ground²⁹⁰ and was answered by the minority,²⁹¹ although discussed not at all by the majority. In the *Cowvict Labor* case,²⁹² it was unsuccessfully contended that Congress had unlawfully delegated power to the states; the Court pointed out that Congress had merely removed an impediment which, it might be argued, resided in its power over interstate commerce.

2. In the *Guffey* case,²⁹³ on the other hand, the majority of the Court denounced the provisions of the code which gave to the industry the right to fix hours and wages of labor, as delegation "in its most obnoxious form".²⁹⁴ The Chief Justice agreed, since there were no standards or limitations fixed in the law. The liberal dissenters ignored this phase of the case, it being according to their view unnecessary to consider the labor provisions at all. But in considering the price fixing clauses, which the majority in their turn also ignored, Mr. Justice Cardozo found no improper delegation, because the prices fixed were by the law required to be just and equitable, and had to take account of costs of production and competitive situations already existent. He could see no reason why it should be harder to fix prices for coal than rates for transportation or rent for dwellings.

It seems reasonably certain that the entire Court will accept the views here announced, should the price fixing provisions again come before it—and the due process clause not be invoked to destroy them.

b. Government Property

1. In *Becker Steel Co. v. Cummings*²⁹⁵ Mr. Justice Stone proclaimed that no seizure of property, even during war, complied with constitutional requirements, unless Congress afford an adequate method for questioning the legality of the seizure. The Court divided on the right of the particular claimant to maintain the suit.²⁹⁶

2. That the right to question the government's acquisition and use of property was not limited to the person from whom it was taken was made clear in the *T. V. A. case, Ashwander v. Tennessee Valley Authority*.²⁹⁷ There, suit was brought when minority preferred stockholders of Alabama

290. See *Butler v. United States*, 297 U. S. 1, 62 (1936).

291. *Id.* at 79.

292. *Whitfield v. Ohio*, 297 U. S. 431 (1936).

293. *Carter v. Carter Coal Co.*, 56 Sup. Ct. 855 (1936).

294. *Id.* at 873.

295. 296 U. S. 74 (1935).

296. Justices Roberts and Sutherland were of the opinion that the suit was, in effect, one to set aside a satisfaction of the first judgment, on the ground that it had been obtained by duress and that Congress had not authorized the bringing of a suit of this kind against the United States. They agreed with the majority in their difference with the lower courts: these had dismissed the case, on the ground that the statute permitted suit only while the property was still within the control of the Treasury. Such a construction would violate constitutional principles. The judges differed, however, on the question whether the statute of limitations was jurisdictional, the majority ruling that it was not necessary at that time to pass on the question, the minority, that it was a jurisdictional matter.

297. 297 U. S. 288 (1936).

Power Company claimed that the contracts voluntarily entered into between the company and the government were beyond the constitutional power of the government. There was no claim that compulsion had been exerted in any way upon the officers of the company or the company itself. The Court split, five-to-four, on the right of the stockholders to maintain the suit under such circumstances.²⁹⁸ It divided eight-to-one on the merits of the constitutional issue.

The Chief Justice wrote for the majority. He limited the issue to the constitutional authority for the construction of the Wilson Dam and the disposition of electric energy there generated in accordance with specific contracts with the company. The judicial power, he said, did not extend to the solution of abstract questions. Therefore the Court would not inquire into the motives and desires of the T. V. A., except insofar as they had ripened into action. On the contrary, Mr. Justice McReynolds thought it proper to examine into these motives and desires, in order to show that the action complained of was aimed at the accomplishment of purposes beyond Congressional power, namely the development of the business of generating electric power under the guise of developing navigation.

Both majority and minority agreed that the government might dispose of electricity developed in connection with the improvement of navigable waters, but Justice McReynolds qualified his agreement by requiring that the power be "honestly" developed and that the means employed be "reasonably appropriate in the circumstances".²⁹⁹ He accepted the findings of Judge Grubb, who tried the case,³⁰⁰ that the T. V. A. sought, by threat of destructive competition, to compel power companies to reduce their rates, and that the contracts were entered into by the company because it believed this course to be the lesser of two evils. To the venerable former Attorney General these facts savored too much of aggression.

The other eight justices, however, failed to see the matter in the same light. They ignored altogether these arguments based on the threat of competition. The Chief Justice developed an argument of simple and inescapable logic: the Wilson Dam was erected under the war power, to enable the government to develop nitrate plants; moreover, the Tennessee River was navigable, and, although not yet adequately improved, the Court was not at liberty to deny to Congress the right to complete the improvement of it. Therefore, it followed that electric energy was being lawfully generated; it could not be supposed that it was to be wasted. And the government had consequently the right to sell it. The argument that such sale must be restricted to purchasers who would come to the dam was re-

298. This phase of the *T. V. A.* case is discussed *infra* pp. 75-77.

299. 297 U. S. at 357.

300. 8 F. Supp. 893 (N. D. Ala. 1934); 9 F. Supp. 800 (N. D. Ala. 1935); 9 F. Supp. 965 (N. D. Ala. 1935).

jected.³⁰¹ The Court upheld, therefore, the purchase of transmission lines for the distribution of the current to purchasers at a distance. Yet Chief Justice Hughes took care to point out that no opinion was being expressed concerning the right of the government to acquire or operate local distribution systems, nor concerning the status of any other dam, nor concerning the right of the government to use the current for manufacturing. And he warned that governmental power, even within the approved limits, must not invade powers reserved to the states or to the people.

On this very narrow base the great experiment in the Tennessee Valley may lawfully continue. At what point in its development its many activities will be checked by the Court cannot be foreseen. It is reasonably clear, however, that at some point the majority of the Court as now constituted will cry a halt. And suits designed to accomplish that end are now pending.³⁰²

V. QUESTIONS OF PRACTICE^{302a}

In the *T. V. A.* case the Court approved a method of raising constitutional issues which is certain to burden the Court in the future. As has been noted, the question was raised not by any one complaining of the exertion of unlawful power, nor even by a stockholder in a company against which such power was being used. The right of a stockholder to sue in this latter class of cases is sanctioned by long usage. Such suits were first allowed when the directors refused to challenge taxes claimed by the stockholder to be unconstitutional³⁰³; the right was extended to afford protection against challenged regulation.³⁰⁴ Only once before had such a suit been permitted when the action of the company was wholly voluntary, in the case of *Smith v. Kansas City Title & T. Co.*³⁰⁵ There a stockholder claimed that since the Act of Congress which authorized Federal Land Bank bonds was unconstitutional, investment in these bonds was beyond the power of the corporation, limited as it was to investment in "legal securities." In the *T. V. A.* case the majority were of the opinion that these earlier decisions should be followed.

301. See 297 U. S. 288, 339.

302. An attempt to start this process in the same litigation by the device of amending the complaint after the decision of the Supreme Court failed. 14 F. Supp. 11 (N. D. Ala. 1936). Many other cases are pending. See (1936) 3 U. S. L. WEEK 1253.

302a. In four cases the Court unanimously reaffirmed familiar principles: *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U. S. 447 (1936) (questions not raised in the State Court will not be reviewed); *Northwestern Bell Telephone Co. v. Nebraska State Ry. Comm.*, 297 U. S. 471 (1936) (the Court will consider only questions actually discussed in the opinion of the State Court where the record does not show what federal questions were presented); *Premier-Pabst Sales Co. v. Grosscup*, 56 Sup. Ct. 593 (1936) (a person not qualified to obtain a license cannot attack a law which discriminated between persons who sold imported beer and those who sold beer made in the state); *Corporation Comm. v. Cary*, 296 U. S. 452 (1935) (an action for an injunction was appropriate where state decisions left in doubt the availability of a legal remedy).

303. *Dodge v. Woolsey*, 18 How. 331 (U. S. 1856).

304. *Smyth v. Ames*, 169 U. S. 466 (1898).

305. 255 U. S. 180 (1921).

The minority, composed of Justices Brandeis, Stone, Roberts and Cardozo, speaking by the first named, thought that, to the extent to which they were analogous, these cases should be disapproved. Justice Brandeis said of the *Smith* case that the parties had not questioned the jurisdiction, and he noted that Justices McReynolds and Holmes had dissented on that ground.³⁰⁶ Particularly where constitutional issues were involved had the Court laid down rules for its own governance, rules which Justice Brandeis outlined under seven heads.³⁰⁷ The Chief Justice replied that the Court should not deprive stockholders of the right to challenge illegal transactions "because of reluctance to decide constitutional questions".³⁰⁸ The assumption underlying this argument of the majority, however, that the acts of the directors were illegal, had no support in the facts. Acquiescence in governmental activities free from coercive character can hardly be characterized as illegal merely because the government may have exceeded its constitutional powers. On this point the Chief Justice's conclusion is more in line with the views of Justice McReynolds on the threat of competition involved in the *T. V. A.* than with his own views on that subject.

Justice Brandeis could see no basis for permitting stockholders to interfere with the management of a company in the absence of any claim of fraud or ultra vires; nor should the fact that the contract was with the government enlarge their rights. He pointed out also that plaintiffs as preferred stockholders should have no standing, unless they could show damage to their interest, and that this they had failed to do; in effect they were like bondholders. The majority answered that the preferred stockholders should be allowed to sue, since otherwise no one would be able to do so, the sole common stockholder having itself been a party to the challenged contracts. Apparently the majority were satisfied that possible loss to the company had been shown, if not to the interest of plaintiffs, because it was uncertain what remedy might be available on the contract, should it be determined that the *T. V. A.* had no power to make it: the *T. V. A.* might be unable to respond in damages, and the government unwilling to make good. Justice Brandeis further contended that the company was estopped to question the validity of the contracts because it had accepted benefits under them, and that plaintiffs themselves had lost rights by delay. The majority answered that the acts relied on to create estoppel had occurred before the contracts in suit had been made and that the delay had caused no harm. Finally, Justice Brandeis indicated that in cases of this kind relief should never be granted unless the illegality was clear; this argument the majority ignored, probably because relief was being denied anyway.

306. The point considered was only whether an issue arose under the Constitution; the right of the stockholders to sue was not debated and no notice was taken of the fact that no compulsion had been laid upon the company.

307. See 297 U. S. at 346.

308. *Id.* at 321.

First fruits of this decision were seen in the *Guffey Coal* cases.³⁰⁹ In one of these, minority stockholders sued to prevent the directors from joining the code, although their action had been approved by a majority of the stockholders; in another, a stockholder sued to compel the company to join. The majority of the Court approved the bringing of the suits on the authority of the *T. V. A.* decision. It may be noted, however, that the cases were not similar, since there was present in the *Guffey* cases that element of governmental compulsion which had long been the ground for permitting such stockholders' actions.

CONCLUSION

Despite the wide range of these varied decisions and the sweeping character of the limitations on governmental power which result from some of them, extensive fields remain uncharted. Uncertainty exists, not only on account of attempts bound to be made to nullify the effect of decisions such as that in the *AAA* case, but also because many decisions, reached by a bare majority, may prove not permanent when there comes the inevitable change in the personnel of the Court.³¹⁰ And as fast as old laws are struck down new ones take their place.

New problems are crowding for the Court's consideration at the coming term. Among the statutes which it will have to pass on are an unemployment insurance law,³¹¹ fair trade practice laws,³¹² another mortgage moratorium law,³¹³ the new Frazier-Lemke Act,³¹⁴ the National Labor Relations Act,³¹⁵ the Utilities Holding Company Act,³¹⁶ and that portion of

309. *Carter v. Carter Coal Co.*, 56 Sup. Ct. 855 (1936), and other cases. It should be observed, however, that this issue would have reached the Court anyway, since some of the companies had directly challenged the law.

310. Instances in which the Court has reversed its position have been collected by Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406-410, notes 1-4 (1932). Of course, not all of these decisions were due to changes in the personnel of the Court.

311. To review, *W. H. H. Chamberlin, Inc. v. Andrews*, 271 N. Y. 1 (1936), which upheld the law; on May 25, 1936, the Supreme Court ordered argument. See *Legis.* (1935) 35 *COL. L. REV.* 1262.

312. To review, *Factor v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), which upheld the law; on June 1, 1936 probable jurisdiction was noted. *Seagram Distillers Corp. v. Old Dearborn Dist. Co.*, 363 Ill. 610, 2 N. E. (2d) 317 (1936). Probable jurisdiction was noted Oct. 12, 1936. See *Legis.* (1936) 49 *HARV. L. REV.* 811; Note (1936) 45 *YALE L. J.* 672.

313. To review, *Loporto v. Druiss Co.*, 241 App. Div. 419, 273 N. Y. Supp. 11, (1934) *aff'd*, 268 N. Y. 699, 198 N. E. 565 (1936), which upheld the law; on April 6, 1936, probable jurisdiction was noted.

314. The court on Oct. 12, 1936 refused to review, *Phoenix Joint Stock Land Bank v. Hotsenpiller*, D. C. Ct. App., (1936) 3 U. S. L. WEEK 1104.

315. To review, *National Labor Relations Bd. v. Jones & Laughlin*, 83 F. (2d) 998 (C. C. A. 5th, 1936) in which the jurisdiction of the Board was denied on the ground that the employer was not engaged in interstate commerce, compare *National Labor Relations Bd. v. Friedman-Harry Marks Clothing Company*, 85 F. (2d) 1, (C. C. A. 2d, 1936); *National Labor Relations Bd. v. Associated Press*, 85 F. (2d) 56 (C. C. A. 2d, 1936) in which the jurisdiction of the Board and the constitutionality of the law were upheld, compare *Washington, Va. & Md. Coach Co. v. National Labor Relations Bd.*, C. C. A. 4th (1936) 4 U. S. L. WEEK 134.

316. To review, *Landis v. North American Co.*, C. C. A. 8th (1936) 3 U. S. L. WEEK 1171. Certiorari granted Oct. 12, 1936.

the National Industrial Recovery Act which permitted Congress to lend money for local purposes.³¹⁷

Indubitably the delay which always results while such laws are being tested in the courts is harmful to public and private interests alike. It is hardly probable that the evil will be remedied by any amendment to the Constitution in the near future, whether such amendment change the power of judicial review or so extend governmental power as to take away from the courts the solution of most of these trying problems. Relief by legislation should, therefore, be attempted. Congress has power to put an end to the long delay between the commencement of a law suit which raises constitutional issues and its final decision by the Supreme Court. Congress could deprive all lower federal courts of jurisdiction to determine issues such as this and could require their immediate presentation to the Supreme Court.³¹⁸

While such a change would increase the work of the Supreme Court, at least in the beginning, its effects should be highly salutary. No useful purpose is served by the multiplicity of conflicting lower court decisions on constitutional issues; they impose a burden on the judges and counsel and add to the expense and delay of the litigation. With rare exceptions not one of these decisions by the lower courts has any ultimate significance. If, after such change, the burden on the Supreme Court were too great, due to the greater speed with which cases would then reach it, why could not that Court be relieved of the duty of passing on patent, bankruptcy and admiralty cases, not to mention the many other problems of statutory interpretation now cast upon it in connection with the revenue laws, criminal laws and the multitude of other subjects not constitutional in character?

317. To review, *Greenwood County v. Duke Power Co.*, 81 F. (2d) 986 (C. C. A. 4th, 1936), in which the power of the government was upheld. Certiorari was granted on May 18, 1936.

318. An attempted formulation of this proposal may be of interest:

1. No Court of the United States, except the Supreme Court, shall have jurisdiction to determine any issue involving the constitutionality of any statute or ordinance of the United States, or of any state, territory, insular possession or political sub-division thereof.

2. If an issue involving the constitutionality of any statute or ordinance of the United States, or of any state, territory, insular possession or political sub-division thereof is raised in any action or proceeding now pending in any court of the United States or hereafter removed to or instituted in any court of the United States, other than the Supreme Court, and a decision upon such issue would finally determine the action or proceeding, then the court shall summarily proceed to the trial of any issue of fact raised by any of the parties which may be necessary to the determination of such constitutional issue and shall thereupon certify the constitutional issue to the Supreme Court, together with its decision on the facts. If a decision upon such constitutional issue would not finally determine the action or proceeding, then such issue shall be reserved by the court, and shall, after a final hearing of the action or proceeding on the merits, be certified to the Supreme Court.

3. The Supreme Court shall have appellate jurisdiction to answer any question so certified, and it shall have the right to review the decision on the facts reported to it by the court of original jurisdiction. If the answer to such question is not determinative of the entire litigation the action or proceeding shall be remanded to the court in which it originated for further proceedings with regard to any non-constitutional issues necessary for a complete determination of the litigation.

Some suggestions tending in that direction were advanced last year by the author of the present article³¹⁹; to him at least they seem even more pertinent now. Let the justices of the Supreme Court be freed of routine burdens and enabled to give all their energies to the prompt consideration of vital constitutional issues. Until this is done, no one can justly expect the present system to produce the best of which it is capable.

319. See Fraenkel, *supra* note 107, 84 U. OF PA. L. REV. at 388.