August, 1942

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

VOL. 91 AUGUST, 1942 NUMBER 1

CIVIL LIBERTIES DECISIONS OF THE SUPREME COURT, 1941 TERM

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The Term just ended, the first since President Roosevelt's appointees have constituted more than a bare majority of the Court, was remarkable, both for the extent of the division within the Court and for the unusually large number of civil liberties cases considered. There were more 5 to 4 decisions [1] than during any Term in which the conservative and liberal blocs contended for mastery while Chief Justice Hughes and Justice Roberts held the balance of power.[2] This Term, however, no such consistent pattern characterized the Court as during the former period—although Justices Black, Douglas and Murphy voted generally together and became frequent dissenters.[3] The division of the present Court showed itself clearly in the twenty-six civil liberties cases. For it was unanimous in only fourteen—and even in three of these there were differences in the reasons assigned. The Court divided 5 to 4 in four cases; [4] 4 to 4 in two cases; [5] and in

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1. There were altogether 18 such cases (including one 4-3 case and one in which the difference was in the grounds of decision); and there were 22 cases in which the Court divided 6-3 or 5-3. There were also 2 cases in which the Court divided 4-4 and one 3-3 case.

2. Thus at the crucial 1936 Term there were 13 cases in which the Court divided 5-4 or 4-3 and two in which it divided 4-4. At the 1935 Term there had been eleven 5-4 cases.

3. These three justices dissented, either alone or with others in 13 cases; they concurred specially in 4 others.

4. And, in addition, differed 5-4 in reasoning in the *Edwards* case. Edwards v. California, 314 U. S. 160 (1941).

5. Since no opinions were written in these cases they have not been discussed in the text. Weber v. United States, 62 Sup. Ct. 911 (1942), *affirming*, 119 F. (2d) 932 (C. C. A. 9th, 1941), upheld the denial of citizenship to an applicant for relief.

four cases three Justices dissented.[6] In the appendix at the end of this article we list the division in each of the twenty-four cases in which opinions were written.

It is difficult to find any really consistent grouping among the Justices, however, or any consistent pattern in the decisions of any particular judge. Not even Justices Black and Douglas, who agreed with each other in all of these cases, were always on the civil liberties side, even when some of their confreres were. Nor did they always agree with Justice Murphy. For, while these three judges differed from the majority, either in dissent or in special concurrence, in seven cases, there were three in which Justice Murphy disagreed with the other two. Justices Black and Douglas dissented together six times. Justice Murphy agreed with them five times, and with the Chief Justice and Justice Frankfurter twice. The two new Justices, Jackson and Byrnes, showed all possible variations of agreement, dissent and special concurrence in three cases carried over from the previous Term,[7] but voted with the majority in all of the other cases in this field. Chief Justice Stone and Justice Frankfurter, except for the last case of the Term, were always on the same side. Justices Roberts and Byrnes agreed throughout and dissented only once. Justice Reed dissented twice, each time in a 5 to 4 decision. And Justice Jackson never dissented at all—though he wrote two separate concurring opinions.

Thus it is impossible to trace any definite pattern among the judges of this newly constituted Court, although it may be significant that Justices Black and Douglas never agreed with Justices Roberts, Frankfurter or Byrnes, except when the Court was unanimous. Of the Court as a whole it may be said that the decisions of this Term show a trend away from that support of civil liberties which marked the period of Hughes' Chief Justiceship. For the Court upheld the claim of infringed liberties in only eleven of the twenty-six cases, with dissents in only two of the eleven cases. However, in the other fifteen cases in which claims of civil liberties were rejected there were dissents in ten.

The subjects considered cover a wide range: peonage, jury questions, fair trials, wiretapping, the right to counsel, leaflet distribution, contempt of court, the right to travel from state to state, sterilization, employers' rights of free speech and various aspects of picketing. We

Schenectady Union Pub. Co. v. Sweeney, 62 Sup. Ct. 1031 (1942), *affirming*, 122 F. (2d) 288 (C. C. A. 2d, 1941), refused to consider a plea that a complaint charging as libelous a statement that a Congressman was anti-semitic violated the guaranty of freedom of speech. Justice Jackson participated in neither case.

6. And in Bakery and Pastry Drivers etc. v. Wohl, 62 Sup. Ct. 816 (1942), Justices Black, Douglas and Murphy wrote a separate concurring opinion.

7. *The Lisenba, Edwards and Bridges* cases, cited notes 9, 49 and 59 *infra*. In the *Lisenba* case the Court had, at the 1940 Term, divided evenly. Lisenba v. California, 313 U. S. 537 (1941). But in other than civil liberties cases Justices Byrnes and Jackson differed in numerous instances.

shall discuss first the cases arising out of the conduct of criminal trials, taking next various substantive rights and, last, the labor cases.

A. Rights of Those Accused of Crime

While no new principle was laid down by the Court in this field, some of the decisions are nevertheless noteworthy for their explanations of earlier cases. In several instances, although not without dissent, the Court narrowed rights previously thought to exist in broad terms. In one case, again not unanimously, it refused to reconsider an earlier restrictive decision. Several cases dealt with confessions; two, with the right to counsel; two with jury problems; one with the right to appeal; two with wiretapping or related devices.

1. *Confessions.* In *Lisenba v. California,*[8] a case in which the Court had evenly divided at the previous term, the majority refused to reject a confession and only Justices Black and Douglas dissented. But in *Ward v. Texas*[9] a different result was reached. In both cases defendant was held by the police in violation of state laws requiring immediate arraignment; in both he was questioned for prolonged periods; in both evidence of alleged brutality was disregarded by the Supreme Court, having been found incredible by the state courts. But in the *Lisenba* case the majority affirmed, because they found the confession had been induced, not by the illegalities and the prolonged questioning, but by a confession made by a confederate. Mr. Justice Roberts stressed the fact that Lisenba was advised by counsel and that he showed self possession and acumen throughout. In the *Ward* case, on the other hand, defendant, an ignorant Negro house-servant, was given no opportunity to consult with counsel or friends. Justice Byrnes said:

> "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case."[10]

And in *Waley v. Johnston*[11] the Court unanimously, in a *per curiam* opinion, vacated the denial of a writ of habeas corpus and ordered a hearing. In that case petitioner charged that agents of the F. B. I. had, by coercion, induced him to plead guilty in a federal court

8. 314 U. S. 219 (1941).
9. 62 Sup. Ct. 1139 (1942).
10. *Id* at 1143.
11. 62 Sup. Ct. 964 (1942).

to the crime of kidnapping. Although the Circuit Court of Appeals affirmed [12] on the ground that petitioner, having been represented by counsel, had waived the right to question the manner in which his plea was obtained, the government confessed error. This, of course, is not binding on the Supreme Court, which, in such cases always examines the facts and law for itself.[13] Here the Court said:

> "True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature, their lack of any necessary relation to the other threats alleged, and the failure of respondent to deny or to account for his failure to deny them specifically, we cannot say that the issue was not one calling for a hearing within the principles laid down in Walker v. Johnston, supra. If the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession." [14]

The Court ruled that habeas corpus was the proper remedy and that an earlier denial of the writ did not operate as a bar, there having been no hearing on the merits of the claim.

The remaining case, *Hysler v. Florida*,[15] differed from the others in that it involved, not the confession of a defendant, but that of a confederate. It arose, not in review of the original conviction, but many years later, on application for a writ *coram nobis*. In this respect it resembled the *Mooney* case [16]. And there was here, as there, the claim that the authorities knew the accusation to be false. It will be recalled that in the *Mooney* case the Supreme Court had found the claim in this respect substantial enough to require a hearing; that it had, however, directed that hearing to be held in the state courts; and that it had finally refused to review the decision of the state court which denied relief after the hearing. There the original proceeding had been in the federal courts after the state courts had declared that the grounds asserted afforded no basis for relief. Here the state courts recognized a right to relief on the grounds asserted, but, according to the majority of the Supreme Court, found that there was no substance to the claim that any officials knew the accusation of defendant by his confederate was false or that it had been obtained through coercion. The majority of the Supreme Court ruled that this finding was justified and that the

12. 124 F. (2d) 587 (C. C. A. 9th, 1941).
13. Young v. United States, 315 U. S. 257 (1942).
14. 62 Sup. Ct. 964, 965-966 (1942).
15. 62 Sup. Ct. 688 (1942).
16. Mooney v. Holohan, 294 U. S. 103 (1935); *In re* Mooney, 10 Cal. (2d) 1, 73 P. (2d) 554 (1937), *certiorari denied*, 305 U. S. 598 (1938) (Black and Reed dissenting); *Ex parte* Mooney, 305 U. S. 573 (1938).

due process clause requires only a fair appraisal of the evidence by the state court. Justices Black, Douglas and Murphy disagreed. They concluded that it was not essential that the officials had knowledge of the falsity of the accusation, that it was enough to allege it had been obtained by third degree methods. And they were unwilling to follow the majority in its holding that, on that issue, there was no substance to the claim made in the motion papers, particularly since, according to them, the state court had not so ruled and had, in other cases, ordered hearings without weighing the probable truth of the charges made.

Where such violent disagreement as this exists concerning the basis of a state court's decision, one might well expect that, in a case involving life and death, the majority would at least have sent the case back to the state court for fresh consideration.

2. *Jury Questions.* The Supreme Court reiterated its oft-declared rule that discrimination in the selection of jurors because of race would result in reversal of conviction.[17] After the *Scottsboro* case[18] had again brought this issue into prominence, the Court set aside a number of convictions without extended discussion.[19] Apparently moved by the continuation of discriminatory practices, in *Hill v. Texas*[20] the Chief Justice wrote an opinion designed to redirect attention to this evil. Yet, in the *Waller* case[21] the Court twice refused to grant review, despite the claim—perhaps not properly presented—that there had been discrimination in the selection of jurors on a class basis, defendant having been an indigent sharecropper and only payers of the poll tax in good standing having been accepted as jurors.

But in *Glasser v. United States*[22] the Court stated that the process of jury selection should "comport with the concept of the jury as a cross-section of the community."[23] There it had been charged that the women on the panel had been taken from a list furnished to the clerk by the League of Women Voters. Such a method of selection was unanimously condemned. But the convictions of the defendants were nevertheless affirmed (except, as we shall see, as to one of them

17. Beginning with Strauder v. West Virginia, 100 U. S. 303 (1879).
18. Norris v. Alabama, 294 U. S. 587 (1935).
19. Hollins v. Oklahoma, 295 U. S. 394 (1935); Hale v. Kentucky, 303 U. S. 613 (1938); Pierre v. Louisiana, 306 U. S. 354 (1939); Smith v. Texas, 311 U. S. 128 (1940).
20. 62 Sup. Ct. 1159 (1942).
21. Waller v. Yeuell, 62 Sup. Ct. 1106 (1942); *Ex parte* Waller, 62 Sup. Ct. 1285 (1942). The Court also refused to consider a more direct attack upon the poll tax when it refused to review Pirtle v. Brown, 118 F. (2d) 218 (C. C. A. 6th, 1941), *cert. denied*, 314 U. S. 621 (1941). That case involved the right to vote at an election held only for members of Congress, in that respect differing from Breedlove v. Suttles, 302 U. S. 277 (1938); however, the Circuit Court considered this a difference of no consequence.
22. 315 U. S. 60 (1942).
23. *Id.* at 86.

and on different grounds) because at the trial the defendants had made no attempt to prove their charges. In cases of this kind it is well to remember that even when no denial of the charges is made, the defense must actually offer to prove the facts when the case is called for trial. This is ancient doctrine,[24] albeit technical.

3. *The Right to Counsel.* In the *Glasser* case, just cited, one of the defendants, Glasser, obtained a new trial in the light of peculiar circumstances. This defendant, himself a lawyer, complained that the lawyer he had chosen to represent him had, over his objection, been assigned to represent a co-defendant whose interests were in part hostile to Glasser's own. Mr. Justice Murphy held this to be a violation of the constitutional guaranty, saying:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." [25]

But the Court refused to set aside the conviction of the other defendant represented by the same lawyer, apparently because he did not urge the point and because the record showed no prejudice as to him. Justice Frankfurter, with whom the Chief Justice agreed, saw no basis for this decision. Both said that Glasser had not made the point of constitutional deprivation until long after the trial, that he had not objected when the arrangement was finally made, although he had done so when it was first suggested, and that no actual prejudice was shown. The dissenters were motivated in part by the consideration that Glasser was a lawyer experienced in criminal trials.

But in the case of *Betts v. Brady* [26] the majority of the Court by Justice Roberts affirmed a conviction, even though defendant was altogether denied counsel. The difference here arose from the fact that this was a state case. The majority refused to read into the due process clause of the 14th Amendment the precise requirements of the 6th,[27] thus, perhaps, pursuing a course which may yield many abberations in the field of civil liberties. These may not be confined to procedural rights, but may also run over into substantive fields, such as free speech. They stem from the belief of many of the judges, Frankfurter in particular,[28] that the states must be allowed wide latitude in

24. Smith v. Mississippi, 162 U. S. 592 (1896); Tarrance v. Florida, 188 U. S. 519 (1903); Brownfield v. South Carolina, 189 U. S. 426 (1903).

25. Glasser v. United States, 315 U. S. 60, 76 (1942).

26. 62 Sup. Ct. 1252 (1942).

27. Justice Black recognized that the Court had never yet so held and cited dissenting opinions to the effect that it should have. *Id.* at 1262, n. 1.

28. In addition to the cases discussed here which reflect that view, see Justice Frankfurter's separate concurring opinion in Tax Commission v. Aldrich, 62 Sup. Ct. 1068, 1112 (1942).

legislation as well as in procedure. The decision in this case was motivated in part by the fact that defendant had waived a jury trial and had shown himself competent to conduct his own defense. The majority stressed the fact that only a few of the thirteen original states had, in 1789, guaranteed the right to counsel by constitutional provision. Justices Black, Douglas and Murphy dissented on broad grounds, stressing especially defendant's indigence. The views of the two sides are well expressed by the following extracts from the opinions. Mr. Justice Roberts said:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." [29]

Mr. Justice Black, on the other hand, viewed the matter thus:

> "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right', which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. No one questions that due process requires a hearing before conviction and sentence for the serious crime of robbery. As the Supreme Court of Wisconsin said in 1859, '. . . would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?' *Carpenter v. Dane County*, 9 Wis. 274, 276, 277.
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> "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country." [30]

4. *Wiretapping.* In *Goldman v. United States* [31] the Supreme Court was called on to reconsider its five to four ruling in the *Olmstead* case [32] that wiretapping was not forbidden by the Fourth Amendment.

29. Betts v. Brady, 62 Sup. Ct. 1252, 1262 (1942).
30. *Id.* at 1263.
31. 62 Sup. Ct. 993 (1942).
32. 277 U. S. 438 (1928), (Holmes, Brandeis, Butler, and Stone, J. J., dissenting), (1928) 77 U. of PA. L. REV. 139.

It refused to do so. The question arose in a case which involved not wiretapping, but a device known as a detectaphone. This instrument consists of a microphone placed on the outside of a dividing wall between two rooms. It is so delicate that listeners in one of the rooms can hear ordinary conversations held in the next. By its use several lawyers were convicted of a bankruptcy fraud. They claimed a violation of the Fourth Amendment, on the ground that the placing of the microphone had been made possible by an earlier, unlawful, entry into the room in which the conversation took place. On this point the trial court and Circuit Court [33] ruled against them on the facts and the Supreme Court refused to review the evidence. Defendants urged also that, regardless of the *Olmstead* case, the use of a detectaphone was the equivalent of an illegal search, because they had intended not to project their voices outside the room in which they were. This, said the majority, by Justice Roberts was a "distinction too nice for the practical application of the constitutional guaranty." On this point only Justice Murphy dissented, saying that it could hardly be doubted that the use of the device was a "direct invasion of the privacy of the occupant."

On the main issue the majority said that nothing could "profitably" be added to what had been said in the *Olmstead* case. The Chief Justice and Justice Frankfurter filed a brief memorandum to the effect that they would have been "happy" to join in overruling the earlier decision, had there been a majority ready to do so. But Justice Murphy wrote an extended dissent in which he stressed the purpose of the Fourth Amendment as guaranteeing privacy and pointed out that the Supreme Court had not restricted broad constitutional principles to the literal scope of the language used. In view of the change in the manner of carrying out business and personal affairs, the protection afforded by the Fourth Amendment should also be extended. He said:

> "Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment and equally call for remedial action." [34]

33. 118 F. (2d) 310 (C. C. A. 2d, 1941).
34. Goldman v. United States, 62 Sup. Ct. 993, 998 (1942).

And he thus indicated the fallacy of the *Olmstead* case decision:

> "The error of the stultifying construction there adopted is best shown by the results to which it leads. It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters, thoughts perhaps too intimate to be set down even in a secret diary, or indeed, utterances about which the common law drew the cloak of privilege—the most confidential revelations between husband and wife, client and lawyer, patient and physician, and penitent and spiritual adviser. Nor can I see any rational basis for denying to the modern means of communication the same protection that is extended by the Amendment to the sealed letter in the mails." [35]

That Justices Black and Douglas should not have concurred in this dissent and so made it a majority decision, is hard to explain. It may be that they were influenced by Justice Roberts' Pearl Harbor report [36] which was published a few days before the argument and was relied on by the government. The fear that conduct of the war might be hampered if unrestricted wiretapping were declared unconstitutional seems, however, far fetched in view of Congress' long continued unwillingness to amend the Communications Act as requested by the administration and permit wiretapping by certain government agencies.[37] Moreover, overruling the *Olmstead* case would not have denied all possibility of wiretapping. As Justice Murphy pointed out, referring to procedure adopted in New York,[38] wiretapping under judicial scrutiny, analogous to the search warrant procedure, would not be unreasonable and, therefore, not forbidden.

A different aspect of wiretapping was decided in *Goldstein v. United States.*[39] There complaint was made that a confederate had been induced to testify, by being confronted by wiretaps. Since none of the wires of any of the defendants had been tapped, the Circuit Court of Appeals for the Second Circuit,[40] ruled that these defendants could not complain of the tapping which had occurred. In a five to three decision, the Supreme Court affirmed. Justice Roberts again wrote for the majority and Justice Murphy for the minority. This time the Chief Justice and Justice Frankfurter agreed with the latter. (Justice Jackson took no part in this case, nor in the *Goldman* case.) The majority took the view that only those whose conversations had

35. *Id.* at 999.
36. N. Y. Times, Jan. 25, 1942, p. 1, col. 8.
37. See S. 3756, 75th Cong. 3d Sess. (1938); H. R. 2266, 77th Cong. 1st Sess. (1940); H. R. 3099, 4228, 77th Cong. 1st Sess. (1941).
38. *N. Y. Const.* Art. 1, § 12 (as amended 1938).
39. 62 Sup. Ct. 1000 (1942).
40. 120 F. 2nd, 485 (1941).

been overheard could complain of the violation of the Communications Act, just as only those whose property had been seized could complain of a violation of the Fourth Amendment [41] (a point on which the Supreme Court had, however, never previously spoken); that the use of testimony obtained in the manner complained of might be a violation of the law did not render the testimony itself inadmissible; only the intercepted communications or information obtained from them were barred, and here these were not used at the trial. The dissent took issue with both propositions of the majority. Justice Murphy argued that, whether or not the rule under the Fourth Amendment was sound, the language of the Communications Act [42] forbade all use of intercepted material. He said:

> "It is immaterial, for the object to be served by that section, whether objection is made by the one sending the communication or by another who is prejudiced by its use. The rule that evidence obtained by a violation of § 605 is inadmissible is not a remedy for the sender; it is the obedient answer to the Congressional command that society shall not be plagued with such practices as wire-tapping." [43]

5. *Miscellaneous.* There remains *Cochran v. Kansas* [44] in which the Court unanimously reversed a state denial of habeas corpus. Many years after conviction, a prisoner, sentenced for life, sought a writ of habeas corpus on the ground that he had been denied essential rights at his trial and then deprived of an opportunity to appeal. The state court rejected his plea, on the ground that he had been represented by counsel and the record of the trial did not bear out the claim of denial of any rights. But, said Mr. Justice Black, this did not affect the claim with regard to the suppression of the appeal; if true, it constituted a denial of equal protection—apparently on the ground that other prisoners were otherwise treated, although the opinion does not disclose the particulars. Accordingly, this case was remanded to the state court for the purpose of inquiring into the truth of the claim.

B. Substantive Issues

Three new subjects received constitutional protection: publications charged with contempt of court, travel from state to state, and sterilization. On the other hand, the right to distribute leaflets, recently given broad protection, was severely curtailed. For the first time, the

41. See Connolly v. Medalie, 58 F. (2d) 629 (C. C. A. 2d, 1932).
42. 48 Stat. 1103 (1934), 47 U. S. C. A. 605 (Supp. 1941).
43. Goldstein v. United States, 62 Sup. Ct. 1000, 1006, 1007 (1942).
44. 62 Sup. Ct. 1068 (1942).

Court considered employers' rights of free speech under the National Labor Relations Act.

1. *Peonage.* We deal first with *Taylor v. Georgia*[45] a unanimous decision which reaffirmed *Bailey v. Alabama.*[46] It held void under the Thirteenth Amendment a state law which punished the making of a contract to perform services with intent not to perform them and to obtain something of value, because the statute created a presumption that the failure to perform or to return what was paid established the wrongful intent at the time of making the contract. Such a law, said Justice Byrnes, creates forced labor, a condition forbidden by the constitution. There is no basis, he held, for assuming that breach of the contract establishes fraudulent intent at the time of making it. He rejected an attempt made to distinguish the *Bailey* case on the ground that there the accused was forbidden to make a statement as to his motives while here he was allowed to make such a statement, though not under oath. That factor Justice Byrnes held not controlling.

2. *Travel from State to State.* Whether the right to move freely from state to state is protected by the federal constitution, and, if so, under which of its provisions, has for some time been uncertain.[47] The question has assumed new importance in recent years due to the depression and the migration of needy persons in search of work, or even of better relief. A case arising in New York failed in an attempt to test the question, on account of procedural complications.[48] There was involved a statute permitting removal to the state of origin of one who applied for relief. In the case which finally reached the Supreme Court, *Edwards v. California,*[49] the statute made it a criminal offense to bring an indigent person into the state with knowledge of his indigence. The Supreme Court unanimously held the California law void, but it split five to four in assigning reasons for so doing. The majority, by Justice Byrnes, rested its decision on the commerce clause; Justices Black, Douglas and Murphy, speaking by Justice Douglas, rested their views on the privileges and immunities clause of the 14th Amendment; Justice Jackson thought that both grounds were possible, but preferred the latter.

Justice Byrnes rejected the contention of the state that it had power to exclude paupers, but did not refer to the problem presented

45. 315 U. S. 25 (1942).
46. 219 U. S. 219 (1919).
47. See Crandall v. Nevada, 6 Wall. 35 (U. S. 1868); Williams v. Fears, 179 U. S. 270 (1900); Wheeler v. United States, 254 U. S. 281 (1920); Colgate v. Harvey, 296 U. S. 404 (1935). (1936) 84 U. of PA. L. REV. 655.
48. Matter of Chirillo, 283 N. Y. 417 (1940); see also Chirillo v. Lehman, 312 U. S. 662 (1941).
49. 314 U. S. 160 (1941).

by the New York law concerning the power of a state to expel them. He pointed out, however, that under modern conditions poor relief was no longer a wholly local problem and that the policy adopted by California would lead to retaliation. He rejected the view expressed over a century ago that paupers could be classed with infectious articles,[50] saying:

> "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." [51]

Justice Douglas expressed no opinion on the commerce aspects of the case, as Justice Byrnes had expressed none on the privileges and immunities clause. But Justice Douglas said that the right of human beings to move freely should occupy a "more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal." He insisted that this right was one of national citizenship and, therefore, protected by the 14th Amendment. He rejected the notion that the state could curtail the movement of the destitute:

> "But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality." [52]

Mr. Justice Jackson pointed out that the states were bound to receive aliens admitted by the national government: [53] could the rights of citizens be less? If so, then "the world is even more upside down than I had supposed it to be." On the subject of indigence he said:

> "Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow

50. As said in New York v. Miln, 11 Pet. 103, 149 (U. S. 1837).
51. Edwards v. California, 314 U. S. 160, 177 (1941).
52. *Id.* at 181.
53. Truax v. Raich, 239 U. S. 33 (1915).

at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire. . . . A contention that a citizen's duty to render military service is suspended by 'indigence' would meet with little favor. Rich or penniless, Duncan's citizenship under the Constitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument. Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." [54]

3. *Contempt of Court.* The punishment of out-of-court publications as contempts has been a much criticized feature of our judicial system.[55] Until now, the United States Supreme Court had refused to interfere with instances arising from the states [56] and had even emasculated federal law intended to afford a measure of protection.[57] But at the 1940 Term, in *Nye v. United States* [58] the Court had receded from the latter position, and, by hearing argument in the *Bridges* and *Los Angeles Times* cases [59] had given indication of a possible change in its attitude toward state prosecutions. These two cases were, however, not decided then, but were reargued during the following October. And, on the day after Pearl Harbor, in a 5 to 4 decision, the Court for the first time set aside a punishment for contempt as in violation of the guarantees of freedom of speech and of the press. Justice Black wrote for the majority; Justice Frankfurter for the minority, consisting, besides himself, of the Chief Justice, Justice Roberts and Justice Byrnes. But, despite harsh language in the minority opinion, the disagreement was not fundamental. For all the minority judges agreed with the majority in setting aside the convictions based on two of the three editorials involved in the *Los Angeles Times* case. Thus the Court was unanimous in pronouncing the principle that it would scrutinize convictions for contempt to assure protection for freedom of speech. The Judges differed in the formula to be applied in giving this protection.

54. Edwards v. California, 314 U. S. 160, 185, 186 (1941).
55. See Nelles and King, *Contempt by Publication* (1928) 28 Col. L. Rev. 525.
56. Patterson v. Colorado, 205 U. S. 454 (1907).
57. Toledo Newspaper Co. v. United States, 247 U. S. 402 (1918).
58. 313 U. S. 33 (1941).
59. Bridges v. California, 314 U. S. 252 (1941). These cases were first argued in October 1940, and were set down for re-argument in October 1941.

Justice Black rejected the "reasonable tendency" test applied by the state court and insisted on the application of the "clear and present danger" test urged by the defendants. He said:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits 'any law abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." [60]

To this Justice Frankfurter answered:

> "Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guaranteees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized but just as great that they be allowed to do their duty. . . .
>
> "The Constitution, as we have recently had occasion to remark, is not a formulary. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 85 L. ed. 267, 279, 61 S. Ct. 246, 130 ALR 1229. Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck v. United States*, 249 US 47, 63 L. ed. 470, 39 S. Ct. 247. Our duty is not ended with the recitation of phrases that are the short-hand of a complicated historic process. The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension." [61]

The real difference here between the judges' opinions can be understood only by reference to the character of the publications about

60. *Id.* at 263.
61. *Id.* at 284, 295.

which they disagreed. One of these was a telegram, sent by Harry Bridges to Secretary of Labor Perkins, characterizing as "outrageous" a state court decision in a labor controversy and intimating that a strike might result if the decision were carried out. Actually, it was for the publication of that telegram in the local press while a motion for a new trial was pending that Bridges was charged with contempt. The other publication was an editorial in the Los Angeles Times which denounced two persons who had been convicted and, before they were to be sentenced, stated that the judge in the case would "make a serious mistake" if he granted probation and failed to send them to prison. Justice Frankfurter held that both these publications were direct threats to the freedom of action of the judge involved, and that, therefore, they denied to the litigants the impartial adjudication to which they were entitled:

> "Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. Comment after the imposition of sentence—criticism, however unrestrained, of its severity or lenience or disparity, cf. Ambard v. Atty. Gen. (1936) AC 322, is an exercise of the right of free discussion. But to deny the states power to check a serious attempt at dictating from without the sentence to be imposed in a pending case, is to deny the right to impartial justice as it was cherished by the founders of the Republic and by the framers of the Fourteenth Amendment. It would erect into a constitutional right opportunities for abuse of utterance interfering with the dispassionate exercise of the judicial function."
>
> "The publication of the telegram was regarded by the state supreme court as 'a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up' and 'a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision.' This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that in the context of the immediate case—the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made—this could not have dominated the mind of the judge before whom the matter was pending." [62]

62. *Id.* at 300, 302.

Justice Black thought, on the other hand, that the possibility the judges in question might have been influenced was remote. He pointed out that it was the nature of the cases themselves which raised the element of pressure:

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.
>
> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case." [63]

4. *Sterilization.* In *Skinner v. Oklahoma* [64] the Court unanimously held void a law permitting the sterilization of criminals, although, again, there was difference in the reasons given. The majority, through Justice Douglas, relied on the equal protection clause because the law excepted certain crimes from its scope: thus sterilization was permitted of one convicted of common law larceny, but not of one convicted for embezzlement. Concerning the power to sterilize, Mr. Justice Douglas said:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power

63. *Id.* at 268-269.
64. 62 Sup. Ct. 1110 (1942).

to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." [65]

The Chief Justice thought the law bad due to its lack of machinery whereby the convict could obtain a judicial hearing on the appropriateness of sterilization in his case. He distinguished an earlier case [66] in which the Court had upheld a sterilization law dealing with imbeciles because that law had provided such machinery. He said:

"Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. Whether the procedure by which a statute carries its mandate into execution satisfies due process is a matter of judicial cognizance. A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process." [67]

Mr. Justice Jackson believed the law was bad on both counts and expressed doubts about the validity of any broad sterilization laws.

5. *Leaflet Distribution.* Several years ago the Supreme Court held unconstitutional ordinances designed to restrict the distribution of leaflets both from house to house and on the public streets. In *Lovell v. Griffin* [68] it voided such an ordinance, on the ground that it gave officials powers of censorship; and in *Schneider v. Irvington* [69] it set aside three ordinances which completely banned all street distribution and voided one ordinance which affected house to house canvassing for religious purposes because it gave the municipal authorities censorial powers. In neither case was it considered material that contributions

65. *Id.* at 1113.
66. Buck v. Bell, 274 U. S. 200 (1927).
67. Skinner v. Oklahoma, 62 Sup. Ct. 1110, 1115 (1942).
68. 303 U. S. 444 (1938).
69. 308 U. S. 147 (1939).

were asked by the distributors.[70] At this term the Court was confronted with two new questions: Did these decisions apply to leaflets of commercial character? Did they prevent the exaction of a license fee, at least where money passed? To both questions the Court gave a negative answer. In *Valentine v. Chrestensen* [71] it unanimously upheld a New York City ordinance which completely forbade the distribution of commercial leaflets on the streets. Mr. Justice Roberts simply said that the constitution "imposes no such restraint on government as respects purely commercial advertising."

On the other question the Court divided five to four. Justice Reed wrote for the majority, the Chief Justice and Justice Murphy both wrote opinions concurred in by each other and by Justices Black and Douglas, and a memorandum was also filed, concurred in by Justices Black, Douglas and Murphy. The problem arose in three cases, all involving Jehovah's witnesses. These preachers of their own interpretation of the Bible are accustomed to distribute religious leaflets, both on the streets and from house to house. Sometimes they ask a price for the leaflets, sometimes they request a contribution for their work, sometimes they give the leaflets away. In many places they have been arrested for failure to comply with local ordinances requiring licenses for "peddling." The courts have differed widely when confronted with this situation. Sometimes the ordinances have been held inapplicable, on the ground that the accused were not peddling.[72] In some states the courts have declared such ordinances unconstitutional as restrictive of religious freedom;[73] in others, on the ground that they violated freedom of the press.[74] In Alabama,[75] Arizona [76] and Arkansas,[77] however, the ordinances were upheld as

70. That element existed in both these cases.

71. 62 Sup. Ct. 920 (1942). The Court also overruled the contention that the leaflet was not commercial because on one side it protested against actions of the municipal authorities.

72. State *ex rel* Hough v. Woodruff, 147 Fla. 299, 25 (2d) 577 (1941); Thomas v. City of Atlanta, 59 Ga. App. 520, 1 S. E. (2d) 598 (1939); State *ex rel.* Semansky v. Stark, 196 La. 307, 199 So. 129 (1940); City of Shreveport v. Teague, 8 So. (2d) — (La. 1942); People v. Finkelstein, 170 Misc. 188, 9 N. Y. S. (2d) 941 (N. Y. 1939); City of Cincinnati v. Mosier, 61 Ohio App. 81, 22 N. E. (2d) 418 (1939); State v. Meredith, 197 S. C. 351, 15 S. E. (2d) 678 (1941). See *contra* cases cited in notes 75-77 *infra*; Busey v. Dist. of Columbia, 45 F. (2d) — (App. D. C. 1942) (Rutledge dissenting), application for certiorari pending.

73. State *ex rel* Hough v. Woodruff, 147 Fla. 299, 2 S. (2d) 577 (1941); Thomas v. City of Atlanta, 59 Ga. App. 520, 1 S. E. (2d) 598 (1939).

74. Village of South Holland v. Stein, 373 Ill. 472, 26 N. E. (2d) 868 (1940); City of Blue Island v. Kozul, 379 Ill. 511 (1942); Herder v. Shahadi, 125 N. J. L. 153, 14 A. (2d) 475 (1940); People v. Banks, 168 Misc. 515, 6 N. Y. S. (2d) 41 (N. Y. 1938); City of Cincinnati v. Mosier, 61 Ohio App. 81, 22 N. E. (2d) 418 (1939); Comm. v. Reid, 20 A. (2d) 841 (Pa. 1941); State v. Greaves, 112 Vt. 222 (1941); McConkey v. City of Fredericksburg, 179 Va. 556 (1942).

75. Jones v. Opelika, 241 Ala. 279 3 S. (2d) 76 (1941).

76. State v. Jobin, 118 P. (2d) 97 (Ariz. 1941).

77. Cole v. Fort Smith, 202 Ark. 614, 151 S. W. (2d) 1000 (1941) (as the State Court reversed Cole's conviction the case was taken to the Supreme Court under the name of Bowden, another defendant).

appropriate exercises of the power of taxation. These cases were decided by the Supreme Court under the name of *Jones v. Opelika.*[78]

The majority opinion proceeded on the assumption that the ordinances were regulatory and that the fees exacted constituted compensation for policing. It left open the question whether the amounts exacted were reasonable—indicating that to determine that question proof would have to be forthcoming concerning the volume of sales, the margin of profit and the cost of policing. Mr. Justice Reed stated that the distribution of the leaflets accompanied by the passing of money was "incidental" to the exercise of religion or freedom of the press; that the "sales" partook more "of commercial than religious or educational transactions," that "ordinary commercial methods" were used to raise propaganda funds. He rejected the contention raised in the *Jones* case, itself, that the ordinance there was void because it gave the licensing authority arbitratory power to revoke, saying that the hazard was "too contingent."

The minority attacked all the assumptions of the majority, pointing out that the ordinances did not purport to exact compensation for services rendered, that they were not regulatory, that the state courts had not sustained them on either such theory. The Chief Justice, in particular, thought that the ordinance in the *Jones* case was void because of the arbitrary power to revoke, considering it a "more callous disregard of the constitutional right" than exhibited in the *Lovell* case —for here an applicant might pay for a license only to have it taken away at once. Both dissenting opinions stressed the substantial amount of the fees exacted, pointing out that, at least in one case, the amount in relation to population was prohibitive. The Chief Justice rejected the concept implicit in the majority opinion that only discriminatory attempts to wipe out the free exercise of speech or religion were unconstitutional:

> "On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it." [79]

Chief Justice Stone believed that flat license taxes were void because they restrained and tended to suppress the activities taxed:

> "It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists, are

78. 62 Sup. Ct. 123 (1942).
79. *Id.* at 1244.

to be sustained, a way has been found for the effective suppression of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by eighteenth century newspapers and pamphleteers, and which were a moving cause of the American Revolution." [80]

Mr. Justice Murphy wrote a comprehensive opinion dealing with the cases both from the point of view of freedom of the press and freedom of religion. As to the first, he said:

"It matters not that petitioners asked contributions for their literature. Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas. The pamphlet, an historic weapon against oppression, . . . is today the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great. If freedom of speech and freedom of the press are to have any concrete meaning, people seeking to distribute information and opinion, to the end only that others shall have the benefit thereof, should not be taxed for circulating such matter." [81]

As to the second, he concluded:

"By applying these occupational taxes to petitioners' noncommercial activities, respondents now tax sincere efforts to spread religious beliefs, and a heavy burden falls upon a new set of itinerant zealots, the Witnesses. That burden should not be allowed to stand, especially if, as the excluded testimony in No. 280 indicates, the accepted clergymen of the town can take to their pulpits and distribute their literature without the impact of taxation. Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights." [82]

Finally, an opinion filed by Justices Black, Douglas and Murphy indicated their belief that this decision was a further step in the direc-

80. *Id.* at 1245.
81. *Id.* at 1249.
82. *Id.* at 1251.

tion the Court had taken in the flag salute case [83] (in which they had concurred with the majority). They stated their present belief that that case had been wrongly decided and said:

> "Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be." [84]

In view of this decision it is not surprising that the Court refused to review a conviction for violation of a village ordinance which prohibited house to house circulation of leaflets without the consent of the householder, though it excepted from its provisions distribution by persons who had been residents of the village for more than six months.[85]

6. *Other Free Speech cases.* In *Chaplinsky v. New Hampshire* [86] another Jehovah's witness case, the Court unanimously upheld a conviction for breach of the peace based upon a charge that defendant called a policeman a fascist and racketeer. Justice Murphy pointed out that certain kinds of speech are not protected, including "fighting" words, and that the words here used were likely to cause retaliation and breaches of the peace. He held that no constitutional issue was raised by the state court's refusal to allow evidence of provocation.

And in *N. L. R. B. v. Virginia Electric & Power Co.* [87] the Court considered the troublesome problem of an employer's right to discuss labor questions with his employees. The Labor Board had found that the employer was guilty of unfair practices, in part because of certain of its statements, in part because of other activities showing hostility to the union. The Court unanimously sent the case back to the Board, because it could not be sure whether it was the statements alone which had determined the result. The Court said that the statements could not by themselves be considered coercive, but pointed out that the Board had the power so to consider them in the light of all the circumstances. On the rights of the employer to discuss matters with his employees Justice Murphy said:

> "Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which

83. Minersville School District v. Gobitis, 310 U. S. 586 (1940). Stone alone dissented.
84. Jones v. Opelika, 62 Sup. Ct. 1231, 1251-1252 (1942).
85. Bolmke v. People, 287 N. Y. 154, 38 N. E. (2d) 478 (1941), *cert. denied*, 62 Sup. Ct. 1034 (1942).
86. 62 Sup. Ct. 766 (1942).
87. 314 U. S. 469 (1941).

it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." [88]

C. Labor Cases

Here, as in both the other fields, at this Term, the court handed down restrictive rulings in two five-to-four decisions. Its other rulings in this area were, however, unanimous. They dealt with the Norris-LaGuardia Act, the Wisconsin Labor Relations Board and injunctions against picketing in general.

1. The *Norris-LaGuardia Act.* In *Columbia River Packers Ass'n v. Hinton* [89] the Court, by Justice Black, held inapplicable the provisions of the Norris-LaGuardia Act to a controversy between a corporation engaged in canning fish and an association of fishermen affiliated with the C. I. O. The decision rested on the fact that the fishermen were not employed by the canner but sold their catch to it through the "union." The controversy concerned "the terms of a contract for the sale of fish," not "terms or conditions of employment; the fishermen neither were, nor sought to be employees." So the statutory definition had no application.

2. *The Wisconsin Labor Relations Board.* In two cases, *Hotel & Rest. Empl. v. W. E. R. B.*[90] and *Allen-Bradley Local v. W. E. R. B.*[91] the Supreme Court rejected contentions that orders of the state board, insofar as they interfered with activities of labor unions, were unconstitutional. In the first case the board had forbidden all picketing, but the state court had ruled that only violence, not peaceful picketing, could be forbidden by the statute. Mr. Justice Frankfurter said that, so limited, freedom of speech had not been interfered with.

The second case involved mass picketing and also a contention that the state law interfered with the workings of the National Labor

88. *Id.* at 477.
89. 315 U. S. 143 (1942).
90. 62 Sup. Ct. 706 (1942).
91. 62 Sup. Ct. 820 (1942).

Relations Act, on the ground that the employer was engaged in interstate commerce. Mr. Justice Douglas said that, since the National Board had not assumed jurisdiction and the order enforced by the state court was limited to a prohibition of mass picketing and various unlawful acts, there was no conflict. But he intimated that some of the provisions of the Wisconsin law were in conflict with federal policy.

3. *Injunctions. Bakery & Pastry Drivers v. Wohl*[92] and *Carpenters & Joiners Union v. Ritter's Cafe*[93] both involved the validity of injunctions against peaceful picketing issued by state courts. In the first case the Supreme Court unanimously reversed the state decision, in the second it upheld that decision by a sharply divided court. The *Wohl* case arose out of attempts by a union to persuade distributors of milk who did their own work seven days a week, to employ a union driver as a relief man one day a week, and resulted in an injunction against the picketing of manufacturers who sold to the distributors and retailers to whom they sold. In the *Ritter* case a union picketed at his place of business the owner of real estate on which a building was being erected by non-union labor; the injunction prohibited only that picketing and rested on the state's anti-trust law. The Supreme Court reached different conclusions in these two cases because the majority believed that in the first, but not the second case, the person picketed had a substantial relation to the labor dispute involved.

In the *Wohl* case the New York Courts[94] had reached the conclusion that the controversy was not a "labor dispute" within the meaning of the New York anti-injunction law.[95] So clearly did an injunction in such a situation seem a denial of constitutional guarantees, that the Supreme Court at first summarily reversed.[96] Presumably because of the later pendency of the *Ritter* case, that decision was vacated and argument heard. The final decision, however, adhered to the earlier one, though with some difference among the judges concerning the applicable principles.

Mr. Justice Jackson wrote the chief opinion. He rejected the notion that a decision that the case presented no labor dispute under the state law determined the legality of the injunction. In view of the finding that there had been neither violence nor threat of violence, he also rejected the interpretation of the case later placed on it by the

92. 62 Sup. Ct. 816 (1942).
93. 62 Sup. Ct. 807 (1942).
94. 14 N. Y. S. (2d) 198 (1939), *affd.*, 259 App. Div. 868 (1940), *affd.*, 284 N. Y. 788, 31 N. E. (2d) 765 (1941).
95. N. Y. CIVIL PRACTICE ACT § 876-a.
96. 313 U. S. 548 (1941).

New York Court of Appeals as an attempt to "coerce." [97] He concluded that there was no evil here sufficiently serious to justify restrictions on free speech. And that while the state might sometimes limit even peaceful picketing, here the repercussions on strangers to the controversy were too slight to justify any restriction.

Mr. Justice Douglas protested because he feared the opinion might be interpreted as limited to situations in which the picketing was ineffective and as permitting injunctions when it was otherwise. A decision like this seemed to him a basic departure from the *Thornhill* case.[98] To make the result turn on the possible coercive effect of the picketing would be to destroy the protection given to peaceful picketing by that decision. He recognized, however, that regulation by the state was proper to prevent abuse, since picketing involved more than free speech. Justices Black and Murphy joined with him.

The real cleavage in the Court became clear in the *Ritter* case, decided the same day. Justice Frankfurter wrote the majority opinion. Justice Black wrote a dissent concurred in by Justices Douglas and Murphy; Justice Reed filed a separate dissent of his own.

The majority upheld the power of a state to determine questions of policy for itself, and concluded that a state might properly confine picketing to an area having relation to the dispute involved—the emphasis being not so much on the fact that the place picketed was physically distant from the place where the work was being done, as upon the fact that the person picketed was not involved in the dispute. Justice Frankfurter contended that the real dispute was with the contractor who was erecting the building, not with the owner of the land. He said:

> "But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

97. In Opera-on-Tour v. Weber, 285 N. Y. 348, 357, 34 N. E. (2d) 349, 353 (1941), *cert. denied*, 314 U. S. 615 (1941) (evidently because no question under the 14th Amendment had been raised or considered).

98. Thornhill v. Alabama, 310 U. S. 88 (1940).

"In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma." [99]

Mr. Justice Black challenged the basis of this conception. He stressed the fact that the attitude of contractors on employing union labor might be influenced by those with whom they did business and held that the union had the right to inform members of the public of the situation so that they might "use their influence to tip the scales in favor of the side they think is right." He rejected the suggestion of the majority that the union be limited to an appeal to the public "at greater expense" over the radio or in the press.

Mr. Justice Reed wrote a more extensive opinion which reviewed the recent picketing cases heard by the Court. He considered the problem settled by the *Thornhill* and *Swing* [100] cases, from which he quoted at length. He was unable to see how the picketing of the manufacturers and retailers in the *Wohl* case was any different from the picketing of the owner in the present one. He feared that the decision might authorize a state to bar from the picket line workers not a part of the industry picketed, and considered such limitation on free speech "unwarranted." He said:

"Until today orderly, regulated, picketing has been within the protection of the Fourteenth Amendment. Such picketing was obviously disadvantageous to the business affected. In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line." [101]

4. *"Mutiny."* Finally, there is the case of *Southern Steamship Co. v. National Labor Relations Board,*[102] a five to four decision, which denied the N. L. R. B. the right to reinstate seamen who had struck while on board ship in a safe domestic port, even though the sit-in strike was peaceful and had been occasioned by the refusal of the employer to bargain with a union certified by the Board. This decision rested primarily on the holding that the strike was a violation of the statute against mutiny.[103] Mr. Justice Byrnes, for the majority,

99. Carpenters & Joiners Union v. Ritter's Cafe, 62 Sup. Ct. 807, 810 (1942).
100. A. F. L. v. Swing, 312 U. S. 321 (1941).
101. Carpenters & Joiners Union v. Ritter's Cafe, 62 Sup. Ct. 807, 815 (1942).
102. 62 Sup. Ct. 886 (1942).
103. 35 STAT. 1146 (1909); 18 U. S. C. A. 483, 484 (1909).

pointed out that the strike was not at the home port of the vessel, that the relationship between master and seamen was different from that of the ordinary employer and employee, that the shipping articles expressly bound seamen to obedience. He referred to the Normandie fire as indicative of the importance of obedience even in a safe port. And he stressed the difference between seamen who, striking, remain aboard a vessel and the ordinary sit-down strike, because of the necessity for providing living quarters on the ship for those who might replace the strikers. Therefore, in line with the policy expressed in the *Fansteel* case,[104] he concluded that the Board had no discretion in a situation such as this. He said:

> "It is difficult to imagine that they would have surrendered their jobs and their quarters without a struggle. They asserted their right to occupy the quarters and to eat the food which the master was required to furnish them as members of the crew and yet to refuse to work or to obey his orders. . . . In fact, as we have noted, they intended, according to the witness Tracey, to 'still be sitting there' if petitioner had not capitulated to their demands.
>
> "We cannot ignore the fact that the strike was unlawful from its very inception." [105]

For the minority, Justice Reed, without expressing an opinion on the "mutiny" aspects of the case, stressed the difference between this and the *Fansteel* case. He pointed out that the disobedience of the crew did not in fact endanger the ship and that the discharges were not for disobedience but for striking. He said:

> "We think that under these circumstances, it [the labor board] acted within its authority. We can see no justification, for an iron rule that a discharge of a striker by his employer for some particular unlawful conduct in furtherance of a strike is sufficient to bar his reinstatement as a matter of law. Fansteel teaches that there are extremes of conduct which leave no discretion to the Board. We think that the acts here fall on the other side of the line and that the Circuit Court of Appeals properly so determined." [106]

Justices Black, Douglas and Murphy concurred.

Conclusion

In retrospect, this Term appears to mark the first serious recession from the great advances made during the past decade in the field of

104. 306 U. S. 258 (1939).
105. Southern S. S. Co. v. N. L. R. B., 62 Sup. Ct. 886, 895 (1942).
106. *Id.* at 897.

civil liberties. For, while the trend was foreshadowed in several decisions of recent years such as those in the *Gobitis* case [107] of the 1939 Term and the *Meadowmoor* case [108] of the 1940 Term, these were, so to speak, merely the backwash from substantial advances as represented by the *Nardone*,[109] *Weiss*,[110] *Chambers*,[111] *Schneider*,[112] *Cantwell* [113] and *Thornhill* [114] cases, of the 1939 Term. While, at the 1941 Term, advances were scored in the *Edwards*,[115] *Bridges* [116] and *Skinner* [117] cases, it is significant that the first two of these were carried over from the year before and were decided in the first months of the new Term. Thereafter, recessions occurred in cases dealing with the right to counsel, labor's rights and the taxation of leaflet distribution.

It is nonetheless encouraging that these recessions did not pass unchallenged. A new dissenting trio has arisen, that of Justices Black, Douglas and Murphy. Some day, perhaps it will fill the place of those great trios of the past, first Holmes, Brandeis and Stone and, later, Brandeis, Stone and Cardozo, and see its views accepted by a majority of the future. It is strange that the present Chief Justice has sided with the new dissenters in only one case, *Jones v. Opelika*,[118] and that he should have differed with them when, in the *Bridges* case, they constituted the majority. Justice Reed twice joined this trio in dissent, but parted company with them in the *Jones* case. Justice Jackson was on their side in a divided court in the *Bridges* case only, when he and Justice Reed made a majority for the views of the Black trio. Thus, it will be seen, no stability as yet exists in the composition of the present Court. It is to be hoped, however, that, at least in civil liberties cases, the Chief Justice and Justices Reed and Jackson will more frequently adhere to the views of the Black trio. A clear stand in support of basic liberties is more essential now than ever before.[119]

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107. Minersville School Dist. v. Gobitis, 310 U. S. 586 (1940).
108. Milk Wagon Drivers Union v. Meadowmoor Dairies Milk Inc., 312 U. S. 287 (1941).
109. Nardone v. United States, 308 U. S. 338 (1940).
110. Weiss v. United States, 308 U. S. 321 (1940).
111. Chambers v. Florida, 309 U. S. 227 (1940).
112. Schneider v. Irvington, 308 U. S. 147 (1939).
113. Cantwell v. Connecticut, 310 U. S. 296 (1940).
114. Thornhill v. Alabama, 310 U. S. 88 (1940).
115. Edwards v. California, 314 U. S. 160 (1941).
116. Bridges v. California, 314 U. S. 252 (1941).
117. Skinner v. Oklahoma, 62 Sup. Ct. 1110 (1942).
118. 62 Sup. Ct. 1231 (1942).
119. See CHAFFEE, FREEDOM OF SPEECH (1942) 437.

APPENDIX

		Stone	Roberts	Black	Reed	Frankfurter	Douglas	Murphy	Byrnes	Jackson	
CASES UPHOLDING CLAIM											
Edwards	(49)			C1			C1	C1	O	C2	9-0 (4c)
Bridges	(59)	D	D	O		D			D		5-4
Va. El. Power	(87)		X					O		X	7-0
Taylor	(45)		X						O		8-0
Glasser	(22)	D				D		O		X	6-2 (part)
Wohl	(92)			C			C	C		O	9-0 (3c)
Waley †	(11)									X	8-0
Cochran	(44)			O							9-0
Hill	(20)	O									9-0
Ward	(9)								O		9-0
Skinner	(64)	C1					O			C2	9-0 (2c)
CASES DENYING CLAIM											
Lisenba	(8)		O	D			D				7-2
Hinton	(89)		X	O			X				7-0
Hotel & Rest. Union	(90)		X			O					8-0
Hysler	(15)			D		O	D	D			6-3
Chaplinsky	(86)							O			9-0
Ritter's Cafe	(93)			D1	D2	O	D1	D1			5-4
Allen-Bradley Local	(91)						O				9-0
Southern S. S. Co.	(102)			D	D		D	D	O		5-4
Chrestensen	(71)		O								9-0
Goldstein	(39)	D	O			D		D		X	5-3
Goldman	(31)	*	O			*		D		X	5-3
Betts	(26)		O	D			D	D			6-3
Jones	(78)	D1		D1			D1	D1			
		D2		D2	O		D2	D2			5-4

(The cases are listed, in each group, in order of decision; the numerals in parentheses refer to the footnotes of the article.)

O—Majority opinion.

C—Concurring opinion.

D—Dissenting opinion.

X—Not participating.

C—Concurring.

D—Dissenting.

*—A memorandum concurred in by these justices indicated adherence to the main point of the dissenting opinion.

†—Opinion per curiam.