1946

Constitutional Law Cases in the United States Supreme Court: 1941-1946 (Refresher Materials for Returned Service Men)

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CONSTITUTIONAL LAW CASES IN THE UNITED STATES
SUPREME COURT: 1941-1946
(Refresher Materials for Returned Service Men)

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Outline of Case Material

I. Federal-State Relations
   A. Taxation
   B. Regulation

II. Separation of Powers

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1. The materials here printed were, in large measure, presented in lecture and outline form as part of a Veterans' Refresher Course conducted at Springfield, Missouri, April 22-26, 1946. An attempt has been made to include a fairly complete listing of the more important constitutional law cases decided by the United States Supreme Court from the beginning of the 1941 October Term to the close of the 1945 October Term on June 10, 1946.

Cases involving some aspects of constitutional law but which deal primarily with problems normally covered in courses in administrative law, labor law, taxation, public utilities, or similar courses, are, for the most part, not included.

Law review materials are cited occasionally but it has not been possible to make these complete.

These materials are not presented as a finished product of exhaustive legal research, but largely as a guide to the returning lawyer veteran who, it is hoped, may find them useful in familiarizing himself with constitutional development during the past five years.

The outline of case material set out above is not intended as an outline for a complete course in constitutional law, but merely as a basis for grouping the more important decisions of the Supreme Court during the past past five years.

The following general references are to collections of cases that should be useful to anyone attempting to review the work of the Supreme Court over the past few years.

Carpenter, A series of notes on current constitutional law cases published in Southern California Law Review. See for this period (1941-42) 15 So. CALIF. L. Rev. 128, 281, 382, 534; (1942-43) 16 So. CALIF. L. Rev. 49, 112, 220, 345; (1943-44) 17 So. CALIF. L. Rev. 54, 177, 310, 389; (1944-45) 18 So. CALIF. L. Rev. 80, 167, 238, 319; (1945) 19 So. CALIF. L. Rev. 144.

Cushman, An annual review of constitutional decisions of the Supreme Court in the April issue of The American Political Science Review. See (1943) 37
III. War Powers of the National Government
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IX. Thirteenth Amendment (Peonage Cases)

X. Citizenship, Suffrage and Related Matters

XI. Freedom of Speech, Press, Assembly and Religion: First Amend-
    ment and Due Process Clause of Fourteenth Amendment

Dodd, 1945 Supplement to Dodd's Cases on Constitutional Law (West Publishing Company).
Sears, The Supreme Court and The New Deal—An Answer to Texas (1945) 12 Univ. of Chi. L. Rev. 140-178, containing a review of a large number of the cases reported in volumes 55 to 64 inclusive of the Supreme Court Reporter.
CONSTITUTIONAL LAW CASES

A. Freedom of Speech and Press and Contempt of Court
B. Freedom of Speech, Press and Assembly in Labor Controversies
C. Freedom of Religion and the Jehovah's Witnesses Cases
D. Miscellaneous

I. FEDERAL-STATE RELATIONS

A. Taxation

In Federal Land Bank of St. Paul v. Bismarck Lumber Co. the Court unanimously held invalid the attempt of the State of North Dakota to apply its sales tax to the Federal Land Bank in its purchase of materials to make repairs on buildings on farms taken over by the Bank on foreclosure of mortgages. The exemption from the application of the state tax was based on an act of Congress in terms exempting federal land banks from federal, state, municipal and local taxation, and, while the case rests partially on a matter of statutory construction, an important constitutional doctrine is also involved.

The state contended that Congress could properly confer tax immunity only as to governmental functions performed by the bank and that the only governmental functions of the bank were those performed in "acting as depositaries and fiscal agents for the federal government and providing a market for government bonds." And that here in the handling of property taken over by mortgage foreclosure the bank was "engaged in an activity incidental to its business of lending money, an essentially private function," therefore the tax immunity could not be applied.

This argument on behalf of the state was apparently based on the oft-asserted doctrine applied to the states that the principle of intergovernmental tax immunity has no application to prevent federal taxation in relation to state activity except as applied to the performance of essential governmental functions by the state, a doctrine best illustrated by South Carolina v. United States and Ohio v. Helvering denying immunity from federal taxation of state owned and operated liquor enterprises.

In response to this contention the Court reasserted, and for the first time expressly applied, a doctrine first promulgated by Mr. Justice Stone in the case of Graves v. New York ex rel. O'Keefe, that the "federal gov-

ernment is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers, is governmental. . . . It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental.”

On the same day two other somewhat similar cases worthy of brief attention were decided.

In *Alabama v. King & Boozer* the State of Alabama was permitted to apply its sales tax to the sale of materials to a contractor building an army camp for the federal government on a cost-plus basis; and in *Curry v. United States* a contractor building an army camp for the government on a cost-plus basis was held properly subjected to the application of a state use tax on materials purchased outside the state and to which its sales tax was not applicable. The fact that the cost to the federal government was increased by the amount of the tax in each case was held to be unimportant.

All three of these cases were decided without dissent. The controlling factor differentiating the cases was the existence of an immunity statute applicable to the land bank case while Congress had not passed any legislation that could be used to give immunity from state taxation to cost-plus contractors building for the federal government.

The second constitutional principle applied in these cases was one first clearly formulated by Mr. Chief Justice Hughes in *James v. Dravo Contracting Co.*, and by Mr. Justice Stone, again in *Graves v. New York ex rel. O'Keefe* to the effect that any tax not laid on the government itself and paid out of its treasury will only be subjected to an application of the constitutional doctrine of immunity by a showing that it creates an undue burden upon the performance of a governmental function. Here the Court asserted that, “So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the government

6. 314 U. S. 1, 62 Sup. Ct. 43 (1941).
and who have been granted no tax immunity. So far as a different view has prevailed . . . (citing Panhandle Oil Co. v. State ex rel. Knox\(^{10}\) and Graves v. Texas\(^{11}\)) . . . we think it no longer tenable."

The implication seems clear that Congress could have provided for immunity from the state tax in these cases if it had seen fit to do so.

The validity of acts of Congress in withdrawing from the states the privilege of taxing stock of national banks owned by the Reconstruction Finance Corporation was sustained in *Maricopa County v. Valley National Bank of Phoenix,*\(^{12}\) the Court pointing out that the authority of the state to tax in the first place came from a grant by Congress and is not based on the Tenth Amendment. The fact that this destroyed previous tax liens was held not controlling. A similar statutory exemption from state taxation of property belonging to the Federal Public Housing Authority was sustained in *City of Cleveland v. United States*\(^{13}\) and was held properly applied to low-cost dwellings leased by the Federal Public Housing Authority to an agency of the State of Ohio and by the latter sublet to individual tenants.

In like manner property in the form of machines owned by the federal government and leased to a contractor engaged in construction work for the government was held to be exempt from state and local taxation, in the absence of legislation of Congress expressly consenting to such taxation.\(^{14}\)

Where the whole of the beneficial ownership of Minnesota realty, formerly owned by the United States for federal buildings, had passed to a private party under an executory contract of purchase, the United States retaining legal title for security purposes only, the whole value may be taxed by Minnesota to the private owner without any deduction for the interest of the government.\(^{15}\)

A state may levy a payroll tax for unemployment benefits even though the employer subjected to the tax is engaged in interstate or foreign commerce, the vessels employed are operating under a federal license, the employees involved are members of the crew of vessels subject to admiralty

jurisdiction, and the Federal Unemployment Tax Act specifically exempts officers or members of the crew of a vessel on navigable waters of the United States from application of the federal tax.\(^6\)

For a consideration of the application of state inheritance taxes to restricted Indian lands and restricted cash and securities held for Indians by the Secretary of the Interior, see Oklahoma Tax Commission v. United States.\(^7\)

**B. Regulation**

A statute of the State of Florida regulating the sale and distribution of commercial fertilizers, in an effort to prevent fraud and secure proper quality, required that each bag of fertilizer shall be inspected by state authorities and shall bear a stamp showing that the state inspection fee has been paid. The Court held that such a requirement could not be applied to the distribution of fertilizer brought from outside the state by the federal government through the agency of the Secretary of Agriculture acting under authority of the Soil Conservation and Domestic Allotment Act of Congress. The Court emphasized that Congress could have authorized such regulation, including taxation or the imposition of the inspection fee, but it had not done so in this case.\(^8\)

Some interesting cases involving state price control and its impingement upon the federal government or its agencies have been before the Supreme Court during the period under consideration. In *Penn Dairies v. Milk Control Commission of Pennsylvania*\(^9\) there was involved the question whether the minimum price regulations set up by the State Milk Control Commission under the Pennsylvania Milk Control Law may constitutionally be applied to the sale of milk by a dealer under contract to the United States Army for milk to be used in a military encampment located on land belonging to the State of Pennsylvania but leased to the United States. The question was answered in the affirmative in an opinion emphasizing that those who contract to furnish supplies or render services to the government are not thereby agencies of the federal government performing


\(^{19}\) 318 U. S. 261, 63 Sup. Ct. 617 (1943).
governmental functions such as to bring them within any implied constitutional immunity from state taxation or regulation; and it was asserted that "the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity. . . ." The Court further asserted that "the trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents." And while it was recognized that "state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders . . . we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system."

In the very similar case of Pacific Coast Dairy v. Department of Agriculture of California the Court denied applicability of the California Milk Control Act to control prices at which milk was sold to the War Department of the United States at Moffett Field within the State of California. Since the sales were being made within the area of Moffett Field and since the area had been acquired by the United States under an Act of Congress with resulting exclusive jurisdiction over the area in the federal government within the meaning of Article I, Section 8, paragraph 17 of the Constitution providing that Congress shall have power "to exercise exclusive legislation in all cases whatsoever, over (among other things) all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, etc. . . .", the regulations of the state could have no application. It is this exclusive jurisdiction of Congress which brings about a different result from that arrived at in the Penn Dairies case where the military camp was on land owned by the state and merely leased by the federal government.

In like fashion Oklahoma liquor laws were held inapplicable to the Fort Sill area in the case of Johnson v. Yellow Cab Transit Co.\footnote{21. 321 U. S. 383, 64 Sup. Ct. 622 (1944).}
A case that should be mentioned under the general heading of federal-state relations, but in which the opinions are not sufficiently definite to bear detailed discussion within the appropriate limits of this presentation, is *Screws v. United States*, in which a sheriff, policeman, and special deputy arrested a negro and beat him to death and were convicted in a federal court in Georgia for willfully depriving the negro of his rights under the Fourteenth Amendment.

The statute involved is Section 20 of the Federal Criminal Code which provides that: "Whoever, under color of any law . . . willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishment . . . on account of being an alien, or by reason of his color, or race . . . shall be" subjected to certain named penalties.

The indictment charged that the petitioners, acting under color of the laws of Georgia "willfully" caused the negro to be deprived of "rights, privileges, or immunities secured or protected" to him by the Fourteenth Amendment—namely the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia. . . ."

The defense in the case was primarily that Section 20 of the Federal Criminal Code thus involved is too indefinite and that there is no ascertainable standard of guilt.

Four justices joined in what purports to be the opinion of the Court, saying among other things that "if Section 20 is confined more narrowly than the lower courts confined it, it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment is designed to secure," and reversed and remanded the case for further consideration in a new trial. Mr. Justice Rutledge thought the conviction should be affirmed but, in order to avoid a stalemate and to secure a disposition of the case, concurred in the result announced by Mr. Justice Douglas for the four to remand the case for a new trial. Mr. Justice Murphy dissented on the ground that the conviction should be affirmed, and three justices dissented on the ground that the judgment should be reversed absolutely.

The case is important as a step in a development that may have a

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far-reaching bearing on the matter of subjecting to federal control the action of state officers where constitutional rights are at stake.

II. SEPARATION OF POWERS

In *Pope v. United States*, after the Court of Claims had rendered final judgment against a claimant under a government contract and the United States Supreme Court had denied certiorari, an Act of Congress directed the Court of Claims to determine and render judgment at contract rates upon the claims for that part of the work performed and of which the government had received the benefit for which compensation had been denied before as not covered by the contract. The Supreme Court held this was proper as giving legal status to a moral obligation and not an encroachment upon the judicial function.

The case of *Colegrove v. Green* presented to the United States Supreme Court the problem of determining whether qualified voters in an Illinois congressional district having a much larger population than other districts in the state may secure a court order restraining the Illinois Primary Certifying Board from proceeding with an election in November, 1946, under provisions of the Illinois law of 1901 governing congressional districts, on the ground that, by subsequent changes in population, districts so provided "lacked compactness of territory and approximate equality of population."

The district court had dismissed the petition below on the ground that the Congressional Reapportionment Act of 1929 had eliminated the earlier requirements "as to the compactness, contiguity and equality in population of districts" and that the case was controlled by *Wood v. Broom* decided by the Supreme Court in 1932.

In affirming the district court's dismissal of the complaint the Supreme Court went further and emphasized that what the petitioners had asked was beyond the competence of the Court to grant, because "due regard for the effective working of our Government [has] revealed this issue to be

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23. 323 U. S. 1, 65 Sup. Ct. 16 (1944).
25. No redistricting had taken place in the state for more than forty years and the population of the Seventh District is now some 914,000 as compared with the Fifth District with some 112,000 population.
27. 287 U. S. 1, 53 Sup. Ct. 1 (1932).
of a peculiarly political nature and therefore not meet for judicial determination."

The opinion pointed out that "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" and that "in effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation." Then it was pointed out that clearly "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system," and suggested that the most any court could do would be to declare the existing system invalid, necessitating election on a state-wide ticket if the legislature chose not to act, and that this might be worse than the condition then existing. Also it was pointed out that if Illinois acquiesced "in the selection of its representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives," in the exercise of its constitutional power to judge the qualifications of its own members, might not acquiesce.

Then turning to what was obviously regarded as more fundamental, the opinion quoted from Article I, Section 4 of the Constitution to the effect that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations. . . ." This, said the Court, makes it clear "that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. . . . An aspect of government from which the judiciary . . . has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate."

Finally, said the Court, "to sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfair distributing is to secure State Legislatures that will apportion properly, or to invoke the ample powers of Congress."

This opinion of Mr. Justice Frankfurter, joined in by Justices Reed and Burton, presented what purported to be the judgment of the Court.
Mr. Justice Rutledge concurred in the result. A dissenting opinion by Mr. Justice Black was joined in by Justices Douglas and Murphy. Since Justice Jackson was absent and the case was decided after the death of Mr. Chief Justice Stone, the case was disposed of by a seven man Court and by a division of four to three.

In view of this division of the Court and a prevailing opinion supported by less than a majority of the full Court, it may be particularly worthwhile to observe the basis of Mr. Justice Black's dissent.

In the first place, the Black opinion emphasizes the basis of petitioners' contention that the reduction of the effectiveness of their vote, due to the disparity in the population of election districts ranging from 914,000 to 112,000 "is the result of a willful legislative discrimination against them and thus amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment," that "this reduction of the effectiveness of their vote also violates the privileges and immunities clause of the Fourteenth Amendment in abridging their privilege as citizens of the United States to vote for Congressmen, a privilege guaranteed by Article One of the Constitution," and finally that the "State Apportionment Act directly violates Article One which guarantees that each citizen eligible to vote has a right to vote for Congressmen and to have his vote counted," and that this last right is "abridged unless that vote is given approximately equal weight to that of other citizens." On this basis Mr. Justice Black takes the position that the "District Court had jurisdiction; that the complaint presented a justiciable case or controversy; and that petitioners had standing to sue, since the facts alleged show that they have been injured as individuals."

This opinion would sustain the contention that application of the 1901 State Apportionment Act to the 1946 election, resulting in a "wholly indefensible discrimination against petitioners and all other voters in heavily populated districts," would be violative of the equal protection clause. It points out that such cases as *Nixon v. Herndon*\(^{28}\) and *Nixon v. Condon*\(^{29}\) recognize the efficacy of the equal protection clause to prevent a state from picking out certain qualified citizens or groups of citizens and denying them the right to vote, asserts that it would be likewise effective to invalidate a law expressly giving certain citizens a half-vote and others a full vote.

\(^{28}\) 273 U. S. 536, 47 Sup. Ct. 446 (1927).
\(^{29}\) 286 U. S. 73, 52 Sup. Ct. 484 (1932).
and reasons that in like manner it should be applicable here where "the probable effect... will be that certain citizens, among them the petitioners, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens."

Mr. Justice Black would also sustain the contentions that the reduction in the effectiveness of petitioners' votes has the effect of abridging their privilege as citizens to vote for Congressmen, and violates Article I of the Constitution providing that Congressmen "shall be... chosen... by the people of the several states." This, it is asserted, "gives those qualified a right to vote and a right to have their vote counted." Then it is pointed out that "while the Constitution contains no express provision requiring that Congressional election districts established by the states must contain approximately equal populations, the Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. To some extent this implication of Article One is expressly stated by section (2) of the Fourteenth Amendment which provides that 'Representatives shall be apportioned among the several states according to their respective numbers...,'" evidencing a purpose "to make the votes of the citizens of the several states equally effective in the selection of members of Congress."

The matter of this being a political question "not meet for judicial determination," Mr. Justice Black would dispose of without very serious consideration, citing Nixon v. Herndon, supra, and other cases, and asserting that neither Wood v. Broom, supra, nor Smiley v. Holm require a different result.

31. 317 U. S. 1, 63 Sup. Ct. 1 (1942). As something of a sequel to, and growing out of the facts of, this case, and involving alleged collaboration with the Nazi saboteurs, there came to the United States Supreme Court the case of Cramer v. United States, 325 U. S. 1, 65 Sup. Ct. 918 (1945) presenting for the first time in its history the necessity for that tribunal to review a conviction for the crime of treason. (See 325 U. S. 24, 25, 65 Sup. Ct. 930) By a division of five to four the court reversed the conviction in an opinion by Mr. Justice Jackson. Mr. Justice Douglas wrote a dissenting opinion joined in by Mr. Chief Justice Stone and Justices Black and Reed. These two opinions, together with an appendix to the dissenting opinion, present a very exhaustive and critical consideration of the elements making up the crime of treason, the proper interpretation to be given to the constitutional provisions defining the crime and controlling its prosecution, and the nature of proof necessary to sustain a conviction. The two opinions furnish a wealth of material, historical and otherwise, that should be of great value to the lawyer and the research students alike interested in this problem.
III. WAR POWERS OF THE NATIONAL GOVERNMENT

A. Use of Military Tribunals

1. Trial of Saboteurs and War Criminals

In the case of *Ex parte Quirin* the nazi saboteurs were held to be properly subjected to trial for their crimes against the law of war by a Military Commission appointed by order of the President for that purpose. In like manner, with two justices dissenting, the Court sustained the use of military tribunals to try the so-called war criminals, in the persons of Generals Yamashita and Homma, where peace had not been agreed upon, or proclaimed, notwithstanding actual hostilities in the field had ceased. While there were no dissents in *Ex parte Quirin*, the dissenting opinions of Justices Murphy and Rutledge in the *Yamashita* and *Homma* cases, largely on due process grounds, are worthy of careful consideration.

2. Trial of Civilians for Non-War Offenses Where Civil Courts Are Open

For a case dealing with the proper extent of martial law in Hawaii and holding that the trial and punishment by military tribunals of civilians not connected with the armed forces for embezzlement and assault in an area which the military had not required civilians to evacuate and in which the civil courts were open and functioning was not proper, see *Duncan v. Kahanamoku*.

B. Standing of Enemy Aliens in United States Courts

In *Ex parte Kumezo Kawato* it was held that a resident alien born in a country at war with the United States but lawfully residing in this country can maintain an action in a United States court since the President had not prevented it by proclamation under the Trading with the Enemy Act. But in *Ex parte Colonna* it was held that an official representative of an enemy country cannot maintain an action in United States courts while this country is at war with plaintiff's country, a holding apparently made mandatory by Sections 2 (b) and 7 (b) of the Trading with the Enemy Act.

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33. 66 Sup. Ct. 606 (1946).
34. 317 U. S. 69, 63 Sup. Ct. 115 (1942).
C. Executive Control Applied to Citizens of Japanese Ancestry

Exclusion of persons of Japanese ancestry, including citizens whose loyalty was not questioned, from the West Coast area in 1942 was held to be within the war power of Congress and the President.\textsuperscript{25}

Curfew for Japanese who were citizens in the Pacific Coast area did not violate the due process or the equal protection clause of the Fifth Amendment. Curfew established by Executive Order did not involve invalid delegation of legislative powers.\textsuperscript{26}

A citizen of Japanese ancestry, whose loyalty was conceded, was held to be entitled to habeas corpus for release from detention by War Relocation Authority after leave clearance had been granted.\textsuperscript{27}

D. Selective Training and Service Act of 1940\textsuperscript{28}

General problems of constitutionality of the Selective Training and Service Act of 1940 had been so far foreclosed by cases sustaining the validity of the Selective Draft Act of 1917\textsuperscript{29} that few controversies involving constitutionality arose regarding the provisions of the later Act. Of the numerous cases reaching the Supreme Court involving this Act, practically all were restricted to matters of statutory construction and for that reason have been eliminated from consideration here with the exception of a single case that appears to carry more than ordinary interest for the returning veteran for whose benefit this material has been compiled.

The case of \textit{Fishgold v. Sullivan Drydock & Repair Corporation},\textsuperscript{40} decided by the Supreme Court on May 27, 1946, involves the much disputed question of super-seniority under this legislation for veterans returning to jobs which they held before entering the armed service of their country.

The employee, Fishgold, whose rights are involved in this case was re-employed by the company at his former job after his return from the armed service in full compliance with the provisions of the statute, and was given the same seniority that he would have had if he had continued his employment without a break during the whole time he was away in the service of his country.

\begin{itemize}
\item \textsuperscript{35.} Korematsu v. United States, 323 U. S. 214, 65 Sup. Ct. 193 (1944).
\item \textsuperscript{36.} Kiyoshi Hirabayashi v. United States, 320 U. S. 81, 63 Sup. Ct. 1375 (1943).
\item \textsuperscript{37.} \textit{Ex parte Mitsuye Endo}, 323 U. S. 283, 65 Sup. Ct. 208 (1944).
\item \textsuperscript{38.} 54 STAT. 885, 50 U. S. C. A. Appendix Sec. 301 \textit{et seq}.
\item \textsuperscript{39.} 40 STAT. 576, 50 U. S. C. A. 165.
\item \textsuperscript{40.} 66 Sup. Ct. 1105 (1946).
\end{itemize}
A collective bargaining agreement between the company, Fishgold's employer, and a union as the recognized collective bargaining agent, contained a common type of seniority clause providing that,

"Promotions and reclassifications and increases or decreases in the working forces shall be based upon the length of service and ability to do the job. Whenever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

As work at the company's shipyards decreased and it became necessary to lay off employees, such lay-offs were made in accordance with this seniority clause and Fishgold was laid off for a period of nine days while non-veterans with greater seniority were continued on the job.

The decision to lay off Fishgold was based on an arbitrator's determination that the seniority clause required it and that as so interpreted the seniority clause did not conflict with the provisions of the Selective Training and Service Act, section 8 (b)B, and (c), requiring reemployment in a "position of like seniority, status, and pay . . .," and "shall not be discharged from such position without cause within one year after such restoration." In a suit for a declaratory judgment as to his rights, and for compensation for the days laid off, the district court gave Fishgold judgment for the nine days' pay, on the ground that he had been laid off in violation of the statute. This holding was based on absence of a clear showing that the non-veterans permitted to work had greater seniority than Fishgold and not squarely on the super-seniority conception advanced by the ruling of the Director of Selective Service.

The Supreme Court, in an opinion by Mr. Justice Douglas, construed the provisions of the statute, especially that prohibiting "discharge" without cause within a year which Fishgold claimed protected him also from "lay-off" for a like period, and came to the conclusion that Congress had no purpose to destroy existing seniority systems but rather to protect the returned veteran in his seniority rights the same as if there had been no break in his employment. But, said the Court, "we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. . . . Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provision for restoration without loss of seniority to his old position or to a position of like seniority mean no more."
In like manner the Court found that the guarantee that he shall not be "discharged from such position" was not intended to provide "a gain or step-up in seniority."

The position to which the veteran is restored, said the Court, "is the position which he left plus cumulated seniority." Continuing, the Court asserted, "Congress recognized . . . the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. . . . What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

One of the principal arguments in the case for a different result was based on an administrative interpretation by the Director of Selective Service to the effect that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority," plus the fact that Congress had amended the Act in 1944 and extended it in 1945, without change, and knowing of this administrative interpretation, therefore, Congress in effect gave approval to that interpretation and thus read it into the statute.

Two answers to this contention were supplied by the Court. One was that such an interpretation is not consistent with either the wording or the history of the statute and so could not preclude the Court from placing its own interpretation upon the provisions in question, and second, there was a second and contrary administrative interpretation rendered by the National War Labor Board in an adversary proceeding in a dispute case. Aside from the fact that an interpretation thus rendered by "administrative agencies entrusted with the responsibility of making inter partes decisions" are recognized as being entitled to superior weight as compared with other types of administrative determination, it is clear that Congress was faced at least at the time of its 1945 extension, with conflicting administrative interpretations which would preclude the conclusion that Congress had preferred one over the other.

There was no indication that any member of the Court disagreed with this conclusion denying the super-seniority contended for, though Mr. Justice Black dissented on procedural grounds, holding that the appeal to the

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Circuit Court of Appeals should have been "dismissed "because the Union was not a proper party to appeal."

E. Emergency Price and Rent Control

Many cases involving the constitutional validity and the application of the price and rent control provisions of the Emergency Price Control Act of 1942 have reached the Supreme Court of the United States. Only a few of the more important will be briefly referred to here.

Perhaps the leading case on this matter is that of Yakus v. United States which involves problems of both constitutional law and administrative law of great importance, the decision of which is calculated to be of farreaching significance for the future.

The Emergency Price Control Act of 1942, adopted as a temporary wartime measure, provided for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President and set up a "comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes."

Section 1(a) of the Act declares that it was passed "in the interest of the national defense and security and necessary to the effective prosecution of the war;" and sets forth seven purposes as follows:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;
"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;
"to assure that defense appropriations are not dissipated by excessive prices;
"to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions from undue impairment of their standard of living;
"to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to Federal, State, and local

42. 321 U. S. 414, 64 Sup. Ct. 660 (1944).
governments, which would result from abnormal increases in prices;
"to assist in securing adequate production of commodities and facili-
ties;
"to prevent a post emergency collapse of values. . . ."

"In short," said the Court in its majority opinion by Mr. Chief Justice
Stone in the Yaksus case sustaining the validity of its application on all
counts, "the purposes of the Act specified in Section 1 denote the objective
sought by the Administrator in fixing prices—the prevention of inflation
and its enumerated consequences."

The existence of a broad power in Congress to regulate prices in time
of war was not seriously questioned, and the Court’s recognition of the
constitutional validity of such a power appears to be implicit in the language
of Mr. Chief Justice Stone’s opinion. "That Congress has constitutional
authority to prescribe commodity prices as a war emergency measure, and
that the Act was adopted by Congress in the exercise of that power, are
not questioned here, and need not now be considered save as they have a
bearing on the procedural features of the Act later to be considered which
are challenged on constitutional grounds." No other member of the Court
indicated disagreement with a broad recognition of such a power.

The first challenge to the validity of price fixing under the Act is
directed to the lack of sufficient standards to control the action of the
Administrator and the consequent alleged invalidity of the Act and its
application on the ground of too broad a delegation of legislative power
to the Administrator. Pointing out that the statute clearly enunciated the
policy to be followed "to stabilize commodity prices so as to prevent war-
time inflation and its enumerated disruptive causes and effects," contained
the direction to so fix prices as to "effectuate the declared policy of the
Act," and at the same time prices that will "be fair and equitable," in the
fixing of which "due consideration, so far as practicable," is to be given to
"prevailing prices during the designated base period, with prescribed ad-
ministrative adjustments to compensate for enumerated disturbing factors
affecting prices," the Court found that sufficient standards had been fixed
by Congress. Pointing out that "the Constitution as a continuously opera-
tive charter of government does not demand the impossible or the imprac-
tical," and "does not require that Congress find for itself every fact upon
which it desires to base legislative action or that it make for itself detailed
determinations which it has declared to be prerequisite to the application
of the legislative policy to particular facts and circumstances impossible for
Congress itself properly to investigate," and asserting that it is "irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed," that "it is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards," the majority opinion found the Act involved to be "unlike the National Industrial Recovery Act of . . . 1933" invalidated in the case of *Schechter Poultry Corporation v. United States*, and that "no unauthorized delegation of legislative power" was to be found in the Act.

Turning to the procedural provisions of the Act by which exclusive jurisdiction was conferred on the Emergency Court of Appeals, created by the Act, and the Supreme Court on review, to determine validity of any regulation prescribed by the Price Administrator, the Court squarely held that the federal district courts had no authority to consider the alleged invalidity of such regulations as a defense to a criminal prosecution for their violation. Such holding was based upon the "constitutional power of Congress to prescribe the jurisdiction of the inferior federal courts." In supporting the due process validity of this provision, in spite of individual hardships that might arise, the Court called attention to the fact that, unlike the situation involving the validity of public utility rates, no one is required to continue selling products to which the price regulations apply, and emphasized the "circumstances attending its enactment and application as a war-time emergency measure . . ., the grave danger of war-time inflation and the disorganization of our economy from excessive price rises, . . . the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country . . ., and the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation in eighty-five district courts continued by separate appeals through eleven separate courts of appeal to this Court, to say nothing of litigation conducted in state courts." Then emphasizing the procedure open through administrative appeal with ultimate determination by the Emergency Court of Appeals and review by the Supreme Court, the opinion asserts that "such a procedure, so long as it affords to

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44. 295 U. S. 495, 55 Sup. Ct. 837 (1935).
those affected a reasonable opportunity to be heard and present evidence, does not offend against due process."

In denying the alleged invalidity of the provision of the statute precluding any interlocutory injunction staying enforcement of a price regulation pending final adjudication of its validity, Mr. Chief Justice Stone asserted that "if the alternatives, as Congress could have concluded, were war-time inflation or the imposition on individuals of the burden of complying with price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation." Congress was thus only doing, said the Court, what a court of equity could have done in the exercise of its discretion to protect the public interest in a particular case. "What the courts could do, Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions."

Mr. Justice Roberts wrote a vigorous dissenting opinion asserting general invalidity on the basis of too broad a delegation of legislative power to the Administrator, asserting that the majority opinion must of necessity have the effect of overruling the unanimous opinion of the Court in the Schechter Poultry Corporation case. He then criticized the procedure prescribed for the administrator as ideally calculated to prevent the "making of an issue" between the parties, and concluded that the "court review is a solemn farce."

Mr. Justice Rutledge, with whom Mr. Justice Murphy joined, agreed with the majority upon the substantive issues and also upon the due process validity of denying the right to an interlocutory injunction, but dissented with respect to that part of the Court's ruling which sustained the validity of the provisions conferring jurisdiction upon federal and state courts in enforcement proceedings, especially criminal suits, yet withheld from them jurisdiction to consider the constitutional validity of the regulations sought to be enforced and upon the validity of which must ultimately depend the binding force of a conviction. Determination of validity being restricted to the administrative protest procedure with appeal through the Emergency Court of Appeals to the Supreme Court, while the criminal prosecution for violation of regulations proceeds in another Court without any right in the criminal trial to question the constitutionality of the regulation on which prosecution and conviction depend, evokes from Mr. Justice Rutledge the
exclamation that "clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." He concludes that Congress cannot properly forbid the enforcing court, exercising criminal jurisdiction, to consider the constitutional validity of a regulation whose violation is called in question.

A companion case decided the same day and which must be considered along with Yakus v. United States is Bowles v. Willingham involving application of the rent control provisions of the same Emergency Price Control Act. In similar fashion the majority opinion by Mr. Chief Justice Stone, this time with but a single dissent, upheld the constitutional validity of the rent control provisions against a charge of improper delegation of legislative power by Congress to the Administrator. Then, pointing out the police power character of the regulation involved in both commodity price and rent control, it is asserted that such control, "the same as other forms of regulation, may reduce the value of the property regulated" without violating any constitutional provision. Facing the contention that the direction to the Administrator to fix rents which are "generally fair and equitable" without the necessity of considering the effect upon each individual to whose property the order may be applied was violative of due process, the Court called attention to the impossibility as a practical matter of fixing rents on an individual basis, emphasized that Congress could validly, as a war emergency measure, have fixed maximum rents in the various areas in question, again emphasized that nobody is required to offer any accommodations for rent, thus avoiding the matter of a "taking" of property after the manner alleged in public utility rate fixing, and asserted that "it has never been thought that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis." Then emphasizing the war-time emergency nature of the statute, the Court asserted that "A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property."

With equal ease the Court swept aside the contention of due process invalidity under the Fifth Amendment because no provision had been made for granting a hearing to landlords before the rents were fixed. Asserting on the basis of the World War I District of Columbia rent case, Block v. Hirsh,46

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45. 321 U. S. 503, 64 Sup. Ct. 641 (1944).
that "Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia," the Court found no necessity for such "requirement when it delegates the task to an administrative agency," and pointed out that "delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. . . . To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control. . . . Where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." 

Mr. Justice Rutledge concurred separately distinguishing the problem here involved in a suit in a state court to enjoin issuance of certain rent orders from the criminal proceedings involved in the Yakus case. Mr. Justice Roberts dissented on substantially the same grounds as in the Yakus case.

In Lockerty v. Phillips, previously decided the Court had dealt more specifically with the question whether the jurisdiction of the federal district courts to enjoin enforcement of price control regulations had been validly withdrawn by provision of Section 204(d) of the Emergency Price Control Act which set up the administrative remedy with exclusive equity jurisdiction in the Emergency Court of Appeals with review by the Supreme Court. That such provision was valid, including the requirement that resort must first be had to the administrative remedy by one seeking equitable relief in the Emergency Court, was apparently not seriously doubted, as evidenced by the brief opinion by Mr. Chief Justice Stone for a unanimous Court, based upon the power of Congress under Article III, Section 1 of the Constitution to "ordain and establish" inferior courts as broadly interpreted by numerous previous decisions.


For cases interpreting the provision of the Emergency Price Control Act authorizing the Price Administrator to bring injunction proceedings to


enforce the Act in either state or federal courts as an implied amendment to that part of the Judicial Code prohibiting federal courts from issuing injunctions staying state court proceedings and justifying a federal court injunction to restrain an unlawful eviction of a tenant in a state court proceeding, see Porter v. Dicken and Porter v. Lee. For a case indicating the extent of equitable relief under the Act to enjoin collection of rents in excess of the legal maximum and join therewith an order of restitution of overcharges, see Porter v. Warner Holding Co.

In spite of the Emergency Price Control Act and the Inflation Control Act of 1942, and against the intervention of the Director of Economic Stabilization and the Price Administrator, the Public Utilities Commission of the District of Columbia was permitted to increase utility rates which were not shown to be necessary to prevent actual hardship in the case of Vinson v. Washington Gas Light Co.

IV. INTERSTATE COMMERCE

A. Scope of National Power

One of the most important and farreaching decisions of the Supreme Court during the period here under consideration in the field of interstate commerce is that of United States v. South-Eastern Underwriters Association, holding that the modern large-scale insurance business as conducted across state lines is interstate commerce within the regulatory power of Congress under the commerce clause, and subject to the provisions of the Sherman Anti-Trust Act of 1890. Only seven members of the Court participated in this important decision and three justices dissented, at least in part, so that the majority opinion of Mr. Justice Black represented the conclusions of only four members of the Court.

49. 66 Sup. Ct. 1094 (1946).
51. 66 Sup. Ct. 1086 (1946).

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All lawyers are familiar with the principal cases in this field from the old landmark of Paul v. Virginia in 1869 through numerous other more recent cases all echoing the original statement that “issuing a policy of insurance is not a transaction of commerce,” “the business of insurance is not commerce,” “contracts of insurance are not commerce at all, neither state nor interstate,” or similar statements. As pointed out by Mr. Justice Black, in all of these cases the attention of the Court was “focused on the validity of state statutes” and “the extent to which the commerce clause automatically deprived the states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint,” in spite of the recognition before Paul v. Virginia that the insurance business, “though still in its infancy, was subject to widespread abuses.” All that had been decided in the preceding cases (before 1944) was that the “Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories.” No case of the preceding period had involved an act of Congress or “required the court to decide the issue of whether the Commerce Clause grants Congress the power to regulate insurance transactions stretching across state lines.” That issue was presented for the first time in this South-Eastern Underwriters case. Approaching this new issue, Mr. Justice Black asserted what every student of constitutional law knows, when he said that “past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause.”

There were two aspects of the issue before the Court. First, whether Congress had the power, and second, whether the Sherman Act was intended to apply to the insurance business. Any even casual consideration of the farreaching organization and operations charged in the indictment by which the member companies of the Underwriters Association were alleged to have controlled 90% of the insurance business in six states, fixed premiums an agents’ commissions, employed boycotts, coercion and intimidation to force non-member companies to cooperate, and to compel persons needing insurance to buy only from member companies on association terms, makes

54. 8 Wall. 168 (1869).
http://scholarship.law.missouri.edu/mlr/vol11/iss3/1
it clear that what was here charged was "exactly the type of conduct which the Sherman Act has outlawed for American 'trade or commerce' among the states," and the truth of the charges was not denied, the defense being that they are not required to conform to the standards set up by the Sherman Act because "the business of insurance is not commerce."

In holding that the business of insurance as here conducted is commerce, Mr. Justice Black emphasized the "continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts," and the further fact that the insurance involved "covered not only all kinds of fixed properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation."

Pointing out that the reasoning supporting the contention that insurance is not interstate commerce so as to bring it within the regulatory power of Congress is inconsistent with Supreme Court decisions regarding such matters as lottery tickets, the white slave traffic, telegraphic communication, transporting liquor for personal consumption, and others, Justice Black asserted that "not only . . . may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."

An important argument made against the conclusion arrived at by the majority of the Court and one accepted by Mr. Justice Jackson in his dissent was that such a holding would mean that "all control over it [insurance business] is taken from the states and the legislative regulations which this Court has heretofore sustained must be declared invalid." In reply to this it was pointed out that, "for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation." And again the obvious answer was also that "there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states."

Finally, said Mr. Justice Black, "no commercial enterprise of any kind..."
which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.”

The other issue before the Court in the case was whether or not Congress in passing the Sherman Act intended to “exercise its power over the interstate insurance trade.” Finding the language comprehensive and indicating an “attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states,” and disclosing an apparent purpose of Congress “to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements,” Justice Black found no basis in its passage through Congress or otherwise to justify “reading into the Act an exemption for insurance.”

Mr. Justice Stone’s dissent admitted that the insurance business has many aspects and incidents of an interstate character properly subject to regulation by the federal government under its commerce power, but sought to restrict the issue solely to the narrow question whether the business of entering into contracts of insurance in one state insuring against the risk of loss by fire of property in other states is interstate commerce subject to the Sherman Act. This business or act of entering into the insurance contract he thought did not constitute interstate commerce, and also that in 1890, fully aware of the decision in Paul v. Virginia, Congress did not, by the Sherman Act, intend to include insurance.

Mr. Justice Frankfurter concurred in this dissent but on the basis of statutory construction, that congress did not intend in 1890 to cover insurance by the Sherman Act. He made it clear, however, that he thinks the relation of insurance to interstate commerce is such that Congress has full power to regulate, though he did not squarely pass on the question of whether the business of insurance is, in itself, commerce.

Mr. Justice Jackson dissented separately, admitting that our modern insurance business is interstate commerce subject to the regulatory powers of Congress, and took the position that the Court should so hold if it were passing on the matter for the first time. But he approaches the problem largely as a matter of policy to guide the Court and concerns himself primarily with the effect of two possible decisions. First he reasons that the majority holding that insurance as here carried on is interstate commerce means that the power of Congress is paramount and complete and the effect of Congressional legislation may be construed as so “occupying
the field" as to exclude state action, thus nullifying all state regulations, certainly as preventing states from excluding foreign insurance companies from coming in to do business in interstate commerce, and probably also rendering invalid state license fees.

The second possible course for the Court which is the one Justice Jackson thinks should be followed is to accept the early holdings that insurance is not commerce, but to recognize that Congress can regulate to so far as it affects burdens interstate commerce, and on this basis there would be no question of Congress so "occupying the field" as to exclude state action, but would displace state action only when the two are in conflict. In this connection he would agree that to the extent insurance is used to manipulate, or restrain interstate commerce the anti-trust laws would apply. This last suggestion is also accepted by Mr. Justice Stone.

Many questions, particularly as to the limits of state regulatory power, are left unanswered by this decision.55

For an insurance case dealt with on the basis of Mr. Justice Jackson's last suggestion, which did not involve any problem of applying the anti-trust laws, and which, without the necessity of deciding whether insurance is or is not commerce, held that the "National Labor Relations Act prohibits insurance companies . . . from engaging in unfair labor practices which affect commerce," see Polish National Alliance v. National Labor Relations Board.56 (This case was decided the same day as the Underwriters case and there were no dissents.)

On June 3, 1946, the Supreme Court decided two cases, Prudential Ins. Co. v. Benjamin57 and Robertson v. California,58 involving problems of state taxation and regulation and dealt with in the light of the South-Eastern Underwriters case. These cases will be discussed infra under B (1) and (2).

On April 1, 1946, a case of farreaching significance was decided involving important problems with regard to the scope of Congress' power under the Commerce Clause, and also important considerations from the standpoint of due process of law as guaranteed by the Fifth Amendment. The case of North American Co. v. Securities and Exchange Commission59 was

55. An interesting discussion of some of these problems and steps being taken for their solution is to be found in the February, 1946, issue of the Journal of the Missouri Bar (vol. 2, p. 22), under the title, Some Implications Inherent in the SEUA Case and Public Law No. 15, by Edward L. Scheufler.
56. 322 U. S. 643, 64 Sup. Ct. 1196 (1944).
57. 66 Sup. Ct. 1142 (1946).
58. 66 Sup. Ct. 1160 (1946).
59. 66 Sup. Ct. 785 (1946).
first filed with the Supreme Court and *certiorari* granted more than three years ago. The principal problems have to do with the validity of the famous "death penalty" provision of Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, authorizing the Securities and Exchange Commission to bring about the geographic and economic integration of public utility holding company systems by requiring such holding companies engaged in interstate commerce to confine themselves to a single integrated public utility system (with certain exceptions), by disposing of security holdings of geographically and economically unrelated properties. The Commission instituted appropriate administrative proceedings against the North American Company which culminated in an order limiting its holdings to certain properties and requiring it to sever relationships with all of its other properties. Whether such action properly comes within the scope of the national commerce power, and whether the requirement constitutes a deprivation of the company's property without due process of law were the issues.

The Court pointed out that North American is a typical utility holding company, the pinnacle of a great pyramid of corporations, the majority of which operate electric and gas utility properties scattered throughout the United States, comprising some 80 corporations with an aggregate capitalized value of over 2¼ billions, the interest of North American in which is through the medium of stock ownership.

The various companies in the system perform a wide variety of functions from electric and gas service to railroad transportation, warehousing, coal mining, amusement park operation, and others, in seventeen states and the District of Columbia.

North American claims that its sole business is that of acquiring and holding for investment purposes stocks and other securities of the subsidiaries, its relationship being essentially that of a "large investor seeking to promote the sound development of this investment." It was admitted that its active intervention in the activities of these companies was of a limited character, though the Court found ample basis in the relationship for it to dominate them if thought necessary, and that it had largely dominated their financial operations and completely taken over their flotation of securities.

Then the Court pointed out that through the use of the mails and instrumentalities of interstate commerce in conducting its relationships with its subsidiaries, many of whom were operating in interstate commerce by
transmitting gas and electric energy across state lines, North American must be held not only to bear a "highly important relation to interstate commerce and the national economy," but was actually engaged in interstate commerce, and clearly "subject to appropriate regulatory measures adopted by Congress under its commerce power."

The issue in that connection was whether Section 11 (b) (1) of the Act authorizing the Commission to restrict operations of a holding company engaged in interstate commerce to a single integrated public utility system is permissible as an exercise of the commerce power.

By definition of the statute a holding company is "a company that controls or possesses a controlling influence over an electric or gas utility company." Thus a company that is merely an investor in utility securities but does not control or possess a controlling influence is not within the section. Only such holding companies as defined by the statute must register under the act and obey the commands of this Section, "if it uses the mails or instrumentalities of interstate commerce directly or indirectly through its subsidiaries in the operation of its business." The Court found that North American was engaged in interstate commerce both directly and through its subsidiaries.

In reply to the argument that mere ownership of securities has no necessary relationship to interstate commerce, the Court asserted that, "The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise. ... The ownership of securities of operating companies," continued the Court, "has a real and intimate relation to the interstate activities of holding companies and cannot be effectively divorced therefrom. That ownership is the generating force of the constant interstate flow of reports, letters, equipment, securities, accounts, instructions and money—all of which constitute the life blood of holding companies and allow the numerous abuses to be effectuated. ... We may assume ... that the ownership of securities, considered separately and abstractly, is not commerce. But when it is considered in the context of public utility holding companies and their subsidiaries, its relationship to interstate commerce is so clear and definite as to make any other conclusion unreasonable. ... The constitutionality of Section 11 (b) (1) under the commerce clause thus becomes apparent."

The Court then reiterated a "well-settled principle that Congress may impose relevant conditions and requirements on those
who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. . . . The fact that an evil may involve a corporation's financial practices, its business structure or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. . . . Congress [in this act] was concerned with the economic evils resulting from uncoordinated and unintegrated public utility holding company systems . . . polluting the channels of interstate commerce. . . . Congress therefore had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible."

From the due process of law angle North American argued that by compelling it to divest itself of its scattered subsidiaries and to confine its operations to a single integrated system is violative of the Fifth Amendment, through "a vast destruction of values" by depriving shareholders of the valuable right to pool their investments and thereby obtain the benefit alleged to flow from efficient, common management of diversified interests. But, said the Court, "Congress balanced the various considerations and concluded that this right is clearly outweighed by the actual and potential damage to the public, the investors, and the consumers resulting from the use made of pooled investments. . . . Congress has concluded from the extensive studies made prior to passage of the Act that the economic advantages of a holding company at the top of an unintegrated, sprawling system are not commensurate with the resulting economic disadvantages."

Finally North American asserted that it had always been a good holding company and engaged in none of the evil practices that led Congress to enact the statute, and as applied to it the Act should be held unconstitutional. "But," said the Court, "if evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally . . . to remove what . . . [it] considered to be a potential if not an actual evil" in a particular case. "And nothing in the constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality."

There were no dissents in this case but Justices Reed, Douglas and Jackson took no part in the decision.

It might be noted that four other important cases involving application of various provisions of the same Public Utility Holding Company Act, all
filed and certiorari granted from one to two years ago, were argued before the Court in November 1945 at the same time as the North American case but all are still awaiting decision.

It is well recognized that the power to regulate interstate commerce is not wholly exclusive in Congress but that matters primarily of local concern may be regulated by the states in the absence of conflicting federal legislation or the expression of a clear purpose to occupy the field and exclude state regulation. Particularly is this true in the matter of state legislation directed to the protection of public health and safety in the common exercise of the state's police power. Not infrequently the problem involved is as much or more one of statutory interpretation than of constitutional principle yet the determination may have far-reaching importance. In this general category may be classed the case of Cloverleaf Butter Co. v. Patterson, in which it was held that provisions of a federal statute providing for federal inspection and supervision of the production of renovated butter, excluding the impure product from interstate commerce and authorizing the confiscation of the finished product if found to be deleterious to health, but with authority relative to the ingredients going into the finished product restricted to inspection as a means of determining whether the finished product contains a deleterious ingredient, had the effect of so far occupying the field of regulating renovated butter in interstate commerce as to exclude application of a state statute authorizing seizure and destruction of spoiled packing stock butter, the principal ingredient going into the manufacture of renovated butter, once the packing stock butter had been acquired by the manufacturer for the purpose of using it in making the finished product for shipment in interstate commerce. The fact that under the federal statute there was no authority to confiscate the deleterious packing stock butter, but only to inspect it, and the further fact that the federal statute provided that importations of the renovated butter should be subject to the laws of the state as though produced therein which the Court construed as allowing state confiscation of the finished product if found unfit for food, did not prevent the majority from holding that state confiscation of spoiled packing stock butter as an ingredient for the manufacture of renovated butter was in conflict with the federal statute.

Four dissenting justices, while recognizing that Congress could have excluded the application of such state regulation, felt that it had not done.
so and asserted that the majority opinion departed "radically from the salutary principle that Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy." It then asserted that "one can hardly infer a congressional purpose to restrict the states' power over the ingredient which Congress did not seek to control; or that Congress could have had any object in denying to the states power to seize the offensive ingredient when it left them free to seize the product because it contained the ingredient." Not only did the dissent find no conflict between the two statutes but found compelling evidence that they were intended to provide federal-state cooperation for the protection of the public health, while the effect of the majority opinion was that "both the federal and the state governments are left powerless to condemn an article which is a notorious menace to health. . . ." The dissenting view appears to be both more consistent with previously announced court policy set forth in other recent cases and better calculated to achieve the sort of result manifestly intended by both state and national legislation.

During recent years the scope of Congress' power to regulate interstate commerce has been greatly broadened to include many things not in themselves a part of interstate commerce where their relation to or effect upon that which is interstate commerce is deemed sufficient to justify such control. Federal statutes such as the Agricultural Marketing Agreement Act, National Labor Relations Act, and the Fair Labor Standards Act have given rise to much of the litigation involved in this development. And while many of the cases have involved more of statutory construction and interpretation than the promulgation of new constitutional principles the broadening scope of the national power in this field merits some consideration of several of these cases.

Important among these cases is that of United States v. Wrightwood Dairy Co. raising questions whether certain price regulation by the Secretary of Agriculture of milk produced and sold intrastate is within the authorization of the provisions of the Agricultural Marketing Agreement Act of 1937, and if so, whether such regulation is properly within the commerce power of Congress under the Constitution. The statute authorizes the Secretary of Agriculture to issue marketing orders fixing minimum prices to be
paid to producers of milk and certain other commodities, and provides that orders of the Secretary "shall regulate . . . only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof." The order involved in the case was directed to the regulation of the handling of milk in the Chicago marketing area and classified milk according to its uses and established a formula for determining minimum prices to be paid to producers for each class of milk. The Wrightwood Dairy Company bought all of its milk from producers within the state and without mingling with any milk that had crossed state lines, sold it all within the state, but in competition with the milk of other handlers in the area. On the whole about 60% of all the milk sold within the marketing area was produced within the State of Illinois and about 40% was brought in from other states.

The court asserted broadly, what had already been decided in United States v. Rock Royal Cooperative,\textsuperscript{62} that "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, and it possesses every power needed to make that regulation effective. . . . Hence the reach of that power extends to intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." Then said the Court, "the marketing of intrastate milk which competes with that shipped interstate would tend seriously to break down price regulation of the latter." The question of whether the person who conducts the intrastate activity is or is not also engaged in interstate commerce was held to be wholly immaterial since it is the effect of the activity upon interstate commerce or its regulation by Congress and not the source of the injury or obstruction which justifies the exercise of national power. This sustaining by the Court of the National power to control prices intrastate was without dissent.

In Wickard v. Filburn\textsuperscript{63} marketing penalties provided by the Agricultural Adjustment Act of 1938 were applied to a farmer with respect to the excess of wheat produced over his allotted quota, though it does not appear that any of it was sold either in interstate commerce or locally in competition therewith but used apparently for feeding purposes. Two-thirds of the wheat growers had consented to application of quotas to be fixed by the

\textsuperscript{63} 317 U. S. 111, 63 Sup. Ct. 82 (1942).
Secretary of Agriculture under authorization of the statute, and the requirements were held to be applicable to all wheat produced, as being necessary to the effective operation of the marketing program, since wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating its purpose. The purpose was to "control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. . . . The effect of consumption of home grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop." Even if none of the wheat is ever marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."

In arriving at this conclusion which appears to amount to sanctioning federal control of production and to be wholly inconsistent with the very questionable decision six years earlier in United States v. Butler which invalidated the Agricultural Adjustment Act of 1933, the Court, without dissent, appeared clearly to repudiate the sort of reasoning responsible for the Butler decision and others of the same period, such as Carter v. Carter Coal Company in invalidating the Bituminous Coal Conservation Act, and Schechter Poultry Corporation v. United States invalidating the National Industrial Recovery Act insofar as predicated on the commerce clause. In the earlier cases the Court had emphasized production, manufacturing, and mining as strictly local activities to be distinguished from transportation in determining what is and what is not interstate commerce, and purported to maintain a distinction between direct and indirect effects of local transactions upon that which is interstate, for purposes of determining whether the commerce power of Congress is applicable. In refusing to apply this reasoning in the case under consideration the court said "we believe a review of the course of decision under the Commerce Clause will make plain . . . that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."

64. 297 U. S. 1, 56 Sup. Ct. 312 (1936).
This case goes further, perhaps, than any previous case in giving recognition to the economic effect of local activity upon that which is interstate as a basis for applying the commerce power of Congress. In this connection it was asserted that "the Court's recognition of the relevance of economic effects in its application of the Commerce Clause ... has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect'. Whether the subject of the regulation in question was 'production', 'consumption', or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us. ... But even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'."

It is perhaps worthy of comment that the case of United States v. Butler, previously referred to as being inconsistent with the reasoning in this case, was not mentioned in the Filburn opinion, and that Mr. Justice Roberts who wrote the opinion in the Butler case joined in the unanimous opinion in the Filburn case. That was really not surprising, however, inasmuch as Mr. Justice Roberts himself, in writing the opinion for the Court in Mulford vs. Smith had effectively departed from the reasoning of the Butler case and had largely repudiated the basis upon which it had been decided three years before. (The Mulford case upheld the constitutional validity of this same Agricultural Adjustment Act of 1938 as applied to the marketing of tobacco where penalties were imposed on the amounts marketed in excess of fixed quotas.)

If a slight digression may be permitted at this point to refer to a case closely related to the case of United States v. Butler in that part of the opinion dealing with the general welfare clause, and in which Mr. Justice Roberts again wrote the opinion, attention may profitably be called to City of Cleveland v. United States upholding the constitutional validity of the United States Housing Act of 1937. The Housing Act declares a

policy to promote the general welfare of the nation by using federal funds to assist the states to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions. The whole of the opinion relative to this issue is as follows: "Challenge of the power of Congress to enact the Housing Act must fail". Any necessity for elaborating on the matter Mr. Justice Roberts eliminated by merely citing his own opinion in the Butler case.

The Fair Labor Standards Act of 1938 provides for the regulation of the wages to be paid by employers to employees "engaged in commerce or in the production of goods for commerce" (meaning interstate or foreign commerce) and provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state." The constitutional validity of the Act in its general provisions was fully sustained in 1941 in United States v. Darby Lumber Co. and Opp Cotton Mills v. Administrator of Wage and Hour Division, but the scope of its application and the extent of the reach of the commerce power as thus applied has continued to give rise to much important litigation.

In Kirschbaum v. Walling firemen, elevator operators, watchmen and other similar employees in buildings the occupants of which manufactured clothing principally for interstate markets were held to be properly included within the scope of the Act and thus sufficiently related to interstate commerce to be brought within the regulatory power of Congress. The Court asserted that "without light and heat and power" provided by the employees in question "the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." Further the Court asserted that it was not essential that "employees must themselves participate in the physical process of making the goods before they can be regarded as engaged in their production," and concluded that the work of these employees "had


70. 312 U. S. 657, 61 Sup. Ct. 524 (1941).

such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce,' within the meaning of the Act of Congress.

In like manner similar maintenance employees attached to a building, owned by the Borden Milk Company, seventeen of the twenty-four stories and 58% of the rentable area of which building were occupied by the Borden Company by its executive and administrative employees engaged in directing, controlling, and administering the whole enterprise of the company which consisted in manufacturing various milk products and shipping them in interstate and foreign commerce, were held to come within the scope of the Fair Labor Standards Act.

For purposes of comparison it is interesting to note that the Court denied application of the same statute to the maintenance employees of an ordinary office building devoted to the housing of the usual miscellany of offices, despite the fact that 42% of the rentable area and 48% of the rented area was occupied by executive offices, sales agencies, et cetera, of concerns engaged in interstate commerce. The distinction from the Kirschbaum v. Walling and Borden cases was said to lie in the difference between a building devoted to manufacture for commerce or one owned by an interstate producer and predominantly occupied by its offices, and an ordinary office building, a substantial portion of whose tenants chanced to be engaged in interstate commerce. "Running an office building as an entirely independent enterprise," said the Court, "is too many steps removed from the physical process of the production of goods."

Other cases quite similar to Kirschbaum v. Walling and Borden Co. v. Borella are Martino v. Michigan Window Cleaning Co., holding that employees of a company engaged in window cleaning, painting, and maintenance work in industrial plants for customers engaged in the production of goods for interstate commerce, such services being necessary to the production of the goods produced within those plants, are properly brought within the application the Fair Labor Standards Act, and Roland Electrical Co. v. Wal-


74. 66 Sup. Ct. 379 (1946).
holding the same as to employees of a company engaged in repairing and reconditioning electric motors for customers producing goods for interstate commerce. Worthy of notice also is Warren-Bradshaw Drilling Co. v. Hall, applying the Act to members of a rotary drilling crew employed by an independent oil well drilling contractor, who had no interest in the oil leases involved, and the drilling went only to an agreed depth short of the sand stratum containing the oil, since they were engaged in a "process or occupation necessary to the production" of oil for interstate commerce. So also as to employees engaged in maintaining and operating a toll road and drawbridge over a navigable waterway where both the road and bridge were used extensively by persons and vehicles traveling in interstate commerce.77

In the case of Walling v. Jacksonville Paper Co.78 the Court held that paper products received at seven branch houses from interstate shipments where they were unloaded into the warehouse and checked and then delivered wholesale to the customers for whom they had been ordered were in interstate commerce throughout until delivered to the customers, although none of the deliveries from these warehouses went across state lines, and that the employees working at these seven branch houses were properly subjected to the application of the Fair Labor Standards Act.

This situation is to be distinguished from that in the case of Higgins v. Carr Brothers Co.,79 decided the same day, where Carr Brothers Company conducted a wholesale fruit and grocery business at Portland, Maine, buying its merchandise from local and out of state producers, having it all delivered to its warehouse and then selling and distributing it to the local retailers. The interstate commerce was held to come to an end with delivery into the wholesaler's warehouse and Higgins, employed as a night shipper putting up orders and loading trucks for delivery to local retail dealers or driving a truck making deliveries, was held not to be a proper subject for application of the Fair Labor Standards Act. The absence of prior sales was important in bringing the interstate commerce to an end when the merchandise was delivered into the wholesaler's warehouse, though that factor is not emphasized by the

78. 317 U. S. 564, 63 Sup. Ct. 332 (1943).
Court, and the further fact that the dealer here was operating in competition with wholesalers doing an interstate business was regarded as wholly immaterial since the Fair Labor Standards Act, unlike such federal legislation as the National Labor Relations Act, does not apply to business “affecting commerce”.

The Federal Natural Gas Act of 1938 conferring upon the Federal Power Commission broad powers in the regulation of rates and charges in connection with the transportation and sale of natural gas in interstate commerce gives rise very largely to problems in the field of administrative law and public utility regulation normally excluded from the usual course in constitutional law, and such is also true of the cases arising under this Act and such problems will not be discussed here. However, certain broad constitutional principles asserted in such cases as Federal Power Commission v. Natural Gas Pipeline Co. of America, the first important rate case arising under the Act, are worthy of passing mention, the most significant of which bears on the matter of price regulation then becoming increasingly important. Said Mr. Chief Justice Stone, “It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a state. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as that of the states under the Fourteenth to regulate the prices of commodities in intrastate commerce. . . . The price of gas distributed through pipelines for public consumption has been too long and consistently recognized as a proper subject of regulation under the Fourteenth Amendment to admit of doubts concerning the propriety of like regulation under the Fifth.”

For cases marking the limits of federal power to replace state rates prescribed for intrastate commerce because of adverse effect upon interstate commerce, see Illinois Commerce Commission v. Thompson and North Carolina v. United States.

The fact that the Interstate Commerce Commission has broad authority

81. 318 U. S. 675, 63 Sup. Ct. 834 (1943).
to regulate railroad rates and to remove rates giving any unreasonable preference to any particular region was held, in \textit{State of Georgia v. Pennsylvania Railroad Co.},\textsuperscript{83} not to preclude the State of Georgia from maintaining suit for injunctive relief against railroads charged with having conspired to fix rates which discriminated against that state.

\textbf{B. State Regulation and Taxation}

\textit{1. Regulation}

One of the most farreaching state regulatory acts to come before the Supreme Court in recent years is the California Agricultural Prorate Act under which there was set up a program for controlling the marketing of the 1940 California raisin crop involved in the case of \textit{Parker v. Brown}.\textsuperscript{94} This state regulatory program set up drastic restrictions upon the marketing of raisins, requiring every producer to deliver the whole of his crop which he expects to market to receiving stations for official grading and classification, with rigid requirements as to the marketing of each class, the placing of fifty per cent of the crop in a "stabilization pool," and other restrictive provisions calculated to maintain prices and protect the industry from over-production and destructive competition. Approximately 95\% of the entire California raisin crop habitually is shipped in interstate and foreign commerce and this restrictive program was charged with invalidity as being in conflict with the Sherman Anti-Trust Law, the Federal Agricultural Marketing Agreement Act of 1937, and, as an obstruction of interstate commerce, violative of the commerce clause of the Constitution. The Supreme Court, speaking through Mr. Chief Justice Stone, unanimously sustained the validity of the state program against all charges, disposing of the first charge by pointing out that the Sherman Act is directed against combinations of individuals or corporations based on private contract and has no application to a state or its officers or agents carrying out activities directed by its legislature. Neither did the state program conflict with the Agricultural Marketing Agreement Act nor


\textsuperscript{94} 317 U. S. 341, 63 Sup. Ct. 307 (1943).
improperly enter a field pre-empted from state regulation by the federal Act. This was thought to be particularly clear because the federal statute expressly contemplates state cooperation in effectuating the marketing regulations and the state program was put into operation with the collaboration of officials of the United States Department of Agriculture aided by loans from the Commodity Credit Corporation, and the Secretary of Agriculture had not taken steps to set up a federal marketing program for the crop here in question.

More important than either of these was the charge of invalidity under the commerce clause of the Constitution. The Court reasserted its well recognized doctrine that the "grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate commerce with respect to matters of local concern, on which Congress has not acted." The Court referred to the so-called mechanical test formerly employed, not too happily, by the Court by which "manufacture" and "production" were treated as not being a part of interstate commerce and thus reserved to the regulatory power of the states regardless of the effect upon interstate commerce, as being a basis upon which the state regulation here in question could easily be sustained. But it denied that it was "confined to so mechanical a test," and preferred to apply the broader doctrine by which states are permitted to regulate matters of local concern even though interstate commerce be involved, so long as Congress has not acted to fully occupy the field or the state act is not in conflict with regulation by the federal government. While the Court recognized that state regulation could have been excluded by complete federal control, it asserted that "when Congress has not exerted its power under the Commerce Clause and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted [to Congress] with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." Pointing out that evidence in the case left "no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries," the Court said "such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct'" in their effect upon interstate commerce, but "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately
be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." The history of the industry was said to show "that the adoption of legislative measurers to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state."

This case, in its reference to the mechanical tests used by the Court at an earlier time to distinguish local from interstate, does not represent a return to the use of those tests, now happily repudiated, but indicates that by either those tests or the broader tests more recently promulgated by the Court and as emphasized in the Case of *Wickard v. Filburn* previously discussed, the same conclusion may be arrived at that this "California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case . . . , does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution."

A case decided expressly on the basis of the principles enunciated in the opinion in *Parker v. Brown* just discussed but which involves more direct and immediate inpingement of state regulations on actual interstate commerce is that of *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen.*85 The terminal association is engaged in performing terminal services in and about East St. Louis, Illinois, for a number of railroad companies, the work consisting of the sorting, classification, interchange and switching of cars, the great majority of which are moving in interstate commerce and many of which are taken across the river into Missouri. One man of each switching crew is required to ride on the rear of each train at all times and, due to bad weather and frequent small clearance at top or on sides compelling riding on the drawbar projecting at the end, is exposed to hardship and danger. At the request of the Brotherhood the Illinois Commerce Commission issued an order requiring the Association to provide cabooses on all of certain designated runs within the confines of the state for the protection of the health, safety and comfort of the rear switchmen.

There were not in existence and it was apparently not reasonably practicable to install facilities for taking on and dropping off cabooses at points
where the trains crossed the state line into Missouri, so that the practical result was that they must be used at least as far as the nearest switching point in Missouri. Thus as to the interstate trains handled wholly in Illinois, and as to those taken across into Missouri, the requirement in some measure retarded and increased the cost of movements in interstate commerce, and affected a matter clearly within the scope of the power of Congress to regulate interstate commerce.

Recognizing the general principle that state regulations directed at local protection of health and safety may be sustained, in the absence of federal action, even though interstate commerce may be substantially affected, the Terminal Association based its claims of invalidity on the ground that Congress had already occupied the field by the Interstate Commerce Act, the Boiler Inspection Act, the Safety Appliance Act and the Railway Labor Act. The first three of these measurers were disposed of by pointing out that by themselves and unimplemented by action of the Intertate Commerce Commission they clearly do not lay down any requirements that cabooses shall or shall not be used on any of these runs, and even if such requirements could have been set up by the Interstate Commerce Commission under authorization contained in some of these acts, it had not done so.

The Railway Labor Act providing for the prompt and orderly settlement of all disputes concerning (among other things) working conditions is broad enough to cover the dispute which arose over failure of the Terminal Association to furnish cabooses on these runs. Thus the very issue here might have been taken up under the machinery set up by this Act. But the Court pointed out that this Act "does not fix and does not authorize anyone to fix generally applicable standards for working conditions," but instead merely provides the machinery for prompt and orderly settlement of disputes relative thereto when they arise, not for the purpose particularly of controlling or improving working conditions, but to prevent disruption and obstruction of interstate commerce by failure to settle such disputes promptly. The Court concluded that "the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question." Thus with the field not occupied by existing federal regulation the Court asserted that "the governing principles were recently stated in Parker v. Brown," and sustained the application of the state order.

It furnishes a somewhat interesting contrast with the last mentioned
case to consider the Arizona Train Limit Law recently involved in *Southern Pacific Co. v. Arizona*., making it unlawful to operate within the state a railroad train of more than fourteen passenger or seventy freight cars, and enacted as a safety measure, allegedly as a proper exercise of the state's police power. A regulation promulgated by the Interstate Commerce Commission in 1942 suspending operation of all state train limit laws for the duration of the war, and which the Court assumes may be valid under a provision of the Interstate Commerce Act authorizing the Commission in time of "emergency" to make or suspend rules and practices "with respect to car service" and the "supply of trains", was not yet in operation when this case arose so the question before the Court was whether the state act was invalid under the commerce clause or whether the grant of power to the Interstate Commerce Commission "operated to supercede the state act before the Commission's order." The Court found no indication that Congress in enacting the statute intended, apart from Commission action, to supercede state laws regulating train lengths before the Commission finds an "emergency" to exist, and dismissed that part of the contention.

Referring to the principle previously mentioned that in the "absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent, regulate it," the Court emphasized especially that the "states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has generally been held to be within state authority." Such, however, is not true if the state regulation materially restricts "the free flow of commerce across state lines, or interfere(s) with it in matters with respect to which uniformity of regulation is of predominant national concern." Thus it becomes necessary in each case to determine from all the facts and circumstances "the nature and extent of the burden which the state regulation . . . imposes on interstate commerce . . . ." It becomes a matter of balancing the importance to the state of the safety requirement against the extent of the resulting inter-

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ference with the national interest in the uninterrupted flow of interstate commerce.

The Court then referred to findings of the court below not seriously questioned here, that "the operation of long trains . . . of more than fourteen passenger and more than seventy freight cars is standard practice over the main lines of the railroads of the United States, and that, if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system." From 93% to 95% of Arizona's freight and passenger traffic is interstate and the effect of applying the state law would be to require the "breaking up and reassembling (of) long trains at the nearest terminal points before entering and after leaving the regulating state" with its obvious impediment to the free flow of interstate commerce. This is an effect that would not flow from the caboose requirement just discussed, or the full train crew laws which have been upheld.

The real issue the Court said was "whether in the circumstances the total effect of the law as a safety measure (of the state) in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." Finding the safety aspect of the state regulation to be of doubtful value in the light of the extremely heavy traffic thrown into confusion by the necessity of multiplying the number of trains, the Court concluded that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical, and efficient transportation service, which must prevail."

Much has been said and written in recent years about state barriers to interstate commerce, and perhaps no state has gone further in this respect than has California. Noteworthy among such state erected restrictions was the so-called anti-okie law of California penalizing the bringing into the state of indigent persons, held invalid in Edwards v. California.7 Edwards was a citizen and resident of California who took his family automobile; drove to Texas and brought back his brother-in-law, a citizen and resident of Texas, who was unemployed and without funds except for about $20.00,
and these facts were known to Edwards. The $20.00 was exhausted on the way to California and the brother-in-law lived with Edwards for ten days until he obtained financial assistance from the Farm Security Administration and became employed. The California courts found the brother-in-law to be an indigent person within the meaning of the statute and convicted Edwards for its violation. This conviction was reversed by the United States Supreme Court by unanimous action, declaring the statute of California unconstitutional, five members of the Court grounding invalidity on its effect as a burden on interstate commerce, while four concurring justices based their conclusion on the privileges and immunities clause of the Fourteenth Amendment. The majority opinion, in emphasizing that the "social phenomenon of large scale interstate migration is . . . a matter of national concern" requiring uniform regulation by the national government and "does not admit of diverse treatment by the several states," turned a deaf ear to the plea for application of the doctrine asserted by the early case of City of New York v. Miln88 to the effect that it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported . . . ", and asserted instead that, "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." Thus they denied that such a statute was a proper exercise of the state's police power.

Mr. Justice Douglas' concurring opinion emphasizes that "the right to move freely from state to state is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference", and to allow the states to restrict migration on the part of those who are poor would "contravene every conception of national unity" and "introduces a caste system utterly incompatible with the spirit of our free government."

Mr. Justice Jackson concurred separately on the basis of the privileges and immunities clause and also emphasized the doctrine of Truax v. Raich89 by which the Supreme Court denied the authority of a state to exclude an

88. 11 Pet. 102 (1837).
89. 239 U. S. 33, 36 Sup. Ct. 7 (1915).

http://scholarship.law.missouri.edu/mlr/vol11/iss3/1
alien admitted to the country under the federal immigration laws from “entering and abiding in any state of the union” or engaging therein on a par with citizens in a lawful occupation for earning a livelihood, and asserted that the Court should not hesitate to hold “that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens” without the necessity of treating “them as subjects of commerce.”

A statute of Arkansas making it unlawful for any person to ship liquor into the state without first having secured a permit from the state commissioner of revenue and paid a nominal fee was held validly applied to a person shipping a truck load of liquor through Arkansas from a point in Illinois to a point in Mississippi in the case of Duckworth v. Arkansas. Shipments under the permit were subjected by the statute to rules and regulations promulgated by the commissioner. The Court felt that the permit requirement did not impede the transportation “more than is reasonably necessary” as “a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and afford opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion, in conformity to the permit.” Mr. Justice Jackson regarded as unwise any such extension of state power over interstate commerce but based his concurring opinion on the Twenty-first Amendment, it being admitted that the transportation into Mississippi was for an illegal purpose. The majority had excluded consideration of this matter, apparently properly, on the ground that the provisions of the Twenty-first Amendment prohibiting the “transportation or importation” of intoxicating liquors “into any state . . . for delivery or use therein in violation of its laws” were not violated in Arkansas by the transportation across that state of liquor intended for importation into Mississippi for illegal use in the latter state.

For a case probably going somewhat further in sustaining a state requirement for a bond signed by a responsible person as applied to a shipment of liquor through the state in interstate commerce, and prohibiting such shipment except upon a showing that the liquor is to be lawfully delivered at its place of consignment, see Carter v. Virginia. The Court did not base its holding as to this last matter upon the Twenty-first Amendment,

but said, "It is enough that Virginia could conclude, in the absence of contrary Federal regulation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the laws of a neighboring state."

In the case of Morgan v. Virginia a state statute requiring the segregation of passengers on public motor carriers according to color, and making it a misdemeanor for any passenger to refuse to change seats as required by the driver was held to violate the commerce clause of the Constitution as a burden upon interstate commerce in a matter requiring for its regulation "a single, uniform rule to promote and protect national travel" across state lines. The fact that the legislation was passed as an exercise of the state's police power to avoid friction between the races could not prevail against the charge of being a burden on interstate commerce since "a state cannot avoid the operation of this rule by simply involving the convenient apologetics of the police power." The case is decided solely on the basis of the commerce clause and leaves wholly open all questions relating to the power of a state to apply such segregation requirements to purely intrastate commerce.

The case of Robertson v. California came to the Supreme Court as a sequel to United States v. South-Eastern Underwriters Association discussed above and based on the contention that this decision would sustain immunity from state regulation for the business of insurance. The appellant in the case had been convicted in a state court for violation of certain regulatory provisions of a California statute applicable to insurance agents which provisions were alleged to constitute forbidden regulations of interstate commerce in view of the South-Eastern Underwriters case. The statute set up prohibitions against acting as an insurance agent within the state until a license is procured from the proper authority, or acting for a non-admitted insurer except in the case of specially licensed "surplus line brokers."

The Court interpreted the statutory provisions as regulations "reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice," and emphasized their "regulatory" as distinguished from "exclusory" character, having no "discriminatory" effect, and characterized them as being "designed appropriately to secure the public from

92. 66 Sup. Ct. 1050 (1946).
93. 66 Sup. Ct. 1160 (1946).
http://scholarship.law.missouri.edu/mlr/vol11/iss3/1
those evils of uncontrolled insurance solicitation. . . .” In view of these facts, said the Court, “the regulation ‘neither discriminates against nor substantially obstructs the commerce?’”

Concerning that provision of the statute which prohibited all except specially licensed “surplus line brokers” from acting as agent for non-admitted insurers, the Court said substantially the same thing relative to the complaint of the agent here involved, but there was the added contention here that this provision coupled with the restrictions on the admission of foreign insurance companies, in effect requiring them to operate on a legal reserve basis, would result in the complete exclusion of appellant and the First National Benefit Society, a mutual insurance corporation of Arizona which he represents, from coming into the state to do interstate commerce business as determined by the South-Eastern Underwriters case, and would thus be violative of the commerce clause of the Constitution. This argument, says the Court, “becomes identical with the contention that the state cannot exclude foreign companies . . . or their agents from carrying on their business in California for failure to meet her reserve requirements.”

In answering the above contention the Court emphasized that “evils flowing from irresponsible insurers and insurance certainly are not less than those arising from the activities of irresponsible, incompetent or dishonest insurance agents,” and that the restrictions here in question are not prevented by the decision in the South-Eastern Underwriters case, which “did not wipe out the experience of the states in the regulation of the business of insurance . . . with requirements designed to secure minimum guaranties of solvency and ability to pay claims as they mature.” Admitting that the California statute set up a “form of licensing,” the Court asserted “we are far beyond the time-when, if ever, the word ‘license’ per se was a condemnation of state regulation of interstate business done within the state's borders. The commerce involved here is not transportation. Nor is it of a sort which touches the state and its people so lightly that local regulation is inappropriate or interferes unreasonably with the commerce of other states. Not the mere fact or form of licensing, but what the license stands for by way of regulation is important. So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative. For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.
That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance."

Thus the Court appears to be applying the old "quarantine" theory by which states have been permitted to keep out dangerous articles, food products unfit for human consumption, et cetera, as evidenced by its reference to "diseased cattle" and the citation of numerous of the so-called "quarantine" cases, including the "colored oleomargarine" case based on alleged fraud. To make this point doubly clear the Court asserted that "Every consideration which supports the licensing of agents and brokers... sustain the state's requirements in this respect, as do also the decisions which have sustained various measures of exclusion in protection of the public health, safety and security not only from physical harm but from various forms of fraud and imposition." That Congress might take over and control all such matters is fully recognized by the Court in the statement that "in the absence of compliance [with reserve requirements, et cetera] the state can exclude the company and its representatives as it did, until Congress makes contrary command."

In addition to the importance obviously attached to the "quarantine" cases, the Court relied strongly on the recent case of California v. Thompson which was largely grounded on the principles set forth in the early cases of Willson v. Blackbird Creek Marsh Co. and Cooley v. Board of Port Wardens giving recognition to the proposition that in spite of the plenary authority conferred upon Congress by the commerce clause "there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress," or which because of their local nature may be more effectively handled by local regulations, and concerning which, because of their local character, "there is a wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause."

Mr. Justice Douglas dissented very briefly on the ground that prior to the time when the McCarran Act (discussed infra with the Prudential...
case) became applicable, "California could not under our decisions under the commerce clause exclude an interstate business, at least in the absence of a showing that it was a fraudulent enterprise or in an unsound condition," and he found no such showing here. The majority admitted there was no such showing by saying: "We do not intimate that this particular society's insurance is unsound or fraudulent." On that basis it is probably safe to suggest that this case goes somewhat beyond the so-called "quarantine" cases of an earlier date cited as justification for the holding, though possibly not further than the Plumley case referred to above.98

2. Taxation

As has been true throughout most of our national history, the matter of state taxation in its relation to interstate and foreign commerce continues to give rise to perplexing problems and to constitute a source of considerable Supreme Court litigation. A very interesting case that reaffirms the doctrine of the old case of Brown v. Maryland99 in which Mr. Chief Justice Marshall promulgated his famous original package doctrine and denied the right of a state to apply its tax to an article imported so long as the article retains its character as an import, is that of Hooven & Allison Co. v. Evatt.100 Justice Marshall's decision was based both upon the commerce clause and the exports-imports clause forbidding any state, without consent of Congress, to "lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The chief items of concern for the Court in this case were two. First, whether goods brought from the Philippine Islands are "imports" within the meaning of that term as used in the Constitution, and second, whether goods being held in the original package by the importer for purposes of use by him in manufacture rather than for sale come within the meaning of the original package doctrine so as to prevent a state from applying its property tax. On these issues the Court was so scrambled that it is extremely difficult to know exactly what was decided.

Mr. Chief Justice Stone wrote what purports to be the opinion of the Court, answering both questions in the affirmative and invalidating the state's tax, but in so doing he spoke for only four members of the Court.

98. See note 94.
99. 12 Wheat. 419 (1827).
A casual glance at the opinions gives the impression that five justices dis- 
sented.

Mr. Justice Reed dissented on the ground that the Philippine Islands 
are not to be regarded as a foreign country and that goods coming there-
from are not properly to be considered imports, but said nothing about the 
fact of the goods being held for sale rather than use making any difference 
so, presumably, he agreed with the Chief Justice that this fact would not 
prevent the character of import continuing so as to exempt them from the 
tax, if, in fact, they could properly be regarded as imports when they first 
arrived.

Mr. Justice Black dissented on the ground that the original package 
doctrine as originally promulgated was never intended to apply to goods 
which, after their importation, are being held for use and not for sale, and 
that the doctrine should not be so expanded now. He did not concern him-
self with whether or not the Philippine Islands were to be regarded as a 
foreign country so as to give the goods the original character of an import.

Justices Douglas, Murphy and Rutledge joined in Justice Black's opin-
ion, with Justice Douglas adding that “accepting the Court's ruling that 
these products are 'imports' (presumably referring to their being held for use 
rather than sale) the rule should be applied without discrimination against 
the Philippines.”

Mr. Justice Murphy, while listed as concurring in Justice Black's opin-
ion, that goods being held for use rather than for sale do not retain their 
character as imports so as to exempt them from the state tax, also wrote 
a separate opinion concurring in part with the Chief Justice on the ground 
that goods coming from the Philippines are to be regarded as imports.

The net result of this rather complicated alignment seems to be that of 
the five justices dissenting in part, two—Justices Douglas and Murphy— 
agreed that goods coming from the Philippines could properly be treated 
as imports, thus making a total of six justices adhering to that proposition 
in the opinion of the Chief Justice, while Justice Reed alone of the dis-
senters, by confining his dissent to the assertion that the Philippine Islands 
are not a foreign country and goods coming from there are not imports, 
appeared willing to accept the other proposition that goods held for use 
rather than sale retain their character as imports, to give us a total of five 
for that proposition. What may have been the attitude of Justices Black 
and Rutledge on the matter of goods coming from the Philippines being 
properly placed in the category of imports does not appear.
Of perhaps greater interest and of more widespread practical importance, but certainly not attended with less confusion, have been the various attempts of the states to apply sales and use taxes in a way to impinge upon interstate commerce. The old dogma asserted by the courts for so many years that the states cannot tax interstate commerce has recently been forced into retirement in favor of the requirement that the courts must examine each and every instance of attempted state taxation to see what the practical effect upon interstate commerce may be.

The cases necessary to any adequate understanding of the many, varied, and complex problems arising out of the states' attempted application of their sales and use taxes to transactions in or having a close connection with interstate commerce date back at least to 1937 or 1938, and some of the earlier cases are cited\textsuperscript{101} for the purpose of furnishing background material. The cases are far too numerous, however, the problems far too complex, and the distinctions which the Supreme Court has made far too nice and shadowy to make it possible in the space here available to give anything like a clear and adequate presentation of the whole matter—if such a feat is humanly possible under the present state of the law.

There are, however, at least three cases of considerable interest, and possibly more confusion, falling within the period here under consideration, all decided the same day in 1944, which should be briefly dealt with. They are \textit{International Harvester Co. v. Department of Treasury of Indiana},\textsuperscript{102} \textit{McLeod v. Dilworth Co.},\textsuperscript{103} and \textit{General Trading Co. v. State Tax Commission of Iowa.}\textsuperscript{104}

By way of introduction it may be well to go back at least to the case of


\textsuperscript{102} 322 U.S. 340, 64 Sup. Ct. 1019 (1944).

\textsuperscript{103} 322 U.S. 327, 64 Sup. Ct. 1023 (1944).

\textsuperscript{104} 322 U.S. 335, 64 Sup. Ct. 1028 (1944).
McGoldrick v. Berwind-White Coal Mining Co. in which the Berwind-White Coal Mining Company of Pennsylvania maintained sales offices in New York City, entered into contracts there for sale and delivery of coal to New York purchasers, and made delivery in New York by interstate shipment directly from the point of production in Pennsylvania to the purchaser in New York in response to the sales previously made. The application of a non-discriminatory sales tax by New York was sustained by the Supreme Court, the opinion emphasizing that the local activity of “delivery of the goods within the state upon their purchase for consumption” was a sufficient local event upon which to make the tax apply. In this opinion the Court made it clear that instead of being guided by a dogmatic rule that the states cannot tax interstate commerce, it must be recognized that the purpose of the commerce clause is merely to protect interstate commerce from discriminatory or destructive taxation, and that it is proper that interstate commerce should bear its fair share of financial burdens of the states whose protection it enjoys. Thus said Mr. Justice Stone, “courts are called upon to reconcile two competing constitutional demands, (1) that commerce between the states shall not be unduly impeded by state action, and (2) that the power of the states to lay taxes for the support of state government shall not be unduly curtailed.”

Coming now to the first of the three more recent cases, that of International Harvester Co. v. Department of Treasury of Indiana, there was involved the application of Indiana’s Gross Income Tax Act of 1933. The International Harvester Company was a foreign corporation doing business in Indiana and maintaining both manufacturing plants and selling branches in Indiana and in adjoining states. Three types of transactions were involved. First were sales made by branches outside Indiana to purchasers in Indiana. Orders were solicited in Indiana and delivery was made in Indiana from local factories there to save time required for shipment from outside, though the contracts were held to have been made in other states due to the necessity of orders being accepted there. The Court held that “the fact that the sales were made by an out-of-state seller and the contracts were made outside the state is not controlling . . . delivery of the goods in Indiana is an adequate taxable event,” and sustained the tax.

The second type of transaction involved sales by branches located in Indiana to purchasers residing outside but who came to Indiana to accept
Both the agreements to sell and the delivery took place in Indiana and these were regarded as local events adequate to sustain the tax, and the fact that the goods were to be transported immediately outside the state was regarded as immaterial.

The third class of transactions involved sales by branches located in Indiana to purchasers in Indiana, the goods being shipped from factories outside to fill the contracts providing for such shipment. Thus final delivery took place in Indiana and the Court sustained the tax saying, "the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. . . . We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its powers to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way."

In McLeod v. Dilworth Co. an Arkansas sales tax was sought to be applied to transactions by which a Tennessee corporation not authorized to do business in Arkansas sent goods into Arkansas as a result of orders for goods coming to Tennessee through solicitation by traveling salesmen sent out from Tennessee, or by mail or telephone, the orders requiring acceptance in Tennessee in all cases, and goods were shipped from Tennessee. Title was said to pass upon delivery to the interstate carrier in Tennessee and collection of the sales price was not made in Arkansas. The Court characterized these transactions as "sales made by Tennessee vendors that are consummated in Tennessee for delivery of goods in Arkansas," though at another point the Court quotes with full approval from the state court to the effect that "delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." This matter of delivery was emphasized to distinguish the case from that of McGoldrick v. Berwind-White Co. where the "corporation maintained its sales office in the taxing state, took its contracts in that state and made actual delivery there." In holding the tax bad here and still comparing with the New York case, the Court said, "in Berwind-White the Pennsylvania seller completed his sales in New York; and in this case the Tennessee seller was through selling in Tennessee. . . . For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction."

Four justices dissented in this case, Mr. Justice Douglas asserting that
the case is indistinguishable from McGoldrick v. Felt & Tarrant Mfg. Co., upholding the application of New York’s sales tax to sales by the DuGrenier Company, a Massachusetts corporation not authorized to do business in New York and having no employees in New York but which has authorized another corporation to act as its exclusive agent in New York to solicit orders, which orders are forwarded to and accepted in Massachusetts, and the goods are shipped F.O.B. Massachusetts, to the purchaser in New York who pays the freight.

The third in this group of cases, General Trading Co. v. State Tax Commission of Iowa, presents a case involving the application of a use tax by the state of destination under circumstances exactly the same as those in the Arkansas case, McLeod v. Dilworth Co., with the out-of-state seller required to collect the tax. The General Trading Company is a Minnesota corporation not admitted to do business in Iowa, has no office, branch or warehouse in Iowa, but sends traveling salesmen into the state to solicit orders as a result of which, after approval by the home office in Minneapolis, goods are shipped from Minnesota directly to the purchaser in Iowa.

If it is permissible to maintain a distinction between the sales tax and the use tax, which is not always admitted, perhaps we can justify the Court’s distinction here in sustaining the validity of the tax of Iowa, but the most troublesome question has to do with forcing the out-of-state corporation to serve as the tax collector. This would appear to raise questions both of due process and under the commerce clause. The majority opinion of Mr. Justice Frankfurter, however, dismissed that whole worry with this terse statement: “To make the distributor the tax collector for the State is a familiar and sanctioned device.” For that statement he cites two cases, Monamotor Oil Co. v. Johnson, and Felt & Tarrant Mfg. Co. v. Gallagher. In the latter case all that was said to sustain the imposition of this tax collecting burden upon the out-of-state seller was to cite as authority the Monamotor Oil Co. case and two others, neither of which involved a requirement of tax collection by the out-of-state seller. Turning now to the Monamotor Oil Co. case as the original fountainhead of authority for this proposition, we find this bare statement: “This is a common and entirely

106. 309 U. S. 70, 60 Sup. Ct. 404 (1940).
107. See Mr. Justice Rutledge’s dissent in these three cases, 322 U. S. 349, 64 Sup. Ct. 1030.
lawful arrangement." Two Supreme Court cases are cited, presumably as authority, one being a retail sales tax case and the other the case of a bank being required to pay taxes on shares belonging to its shareholders, and obviously neither are in point here. Two state cases were also cited both of which are equally inapposite since only local dealers selling from a place of business within the state were involved. Also it should be observed that the Monamotor Oil Co. case concerned an oil company, which maintained a refinery and storage facilities and service stations in the state in question and sold its gasoline within the state only after it had been brought into the state, so the case is really not in point with the present Iowa case on any of its facts. Thus the propriety of the arrangement whereby the out-of-state seller is required to act as collector of the use tax on goods sold in interstate commerce and shipped into the taxing state, and the process of reasoning justifying its constitutional validity, are matters that must be taken on faith.

Two justices of the Supreme Court were lacking in the required faith, however, and dissented in an opinion by Mr. Justice Jackson emphasizing that earlier cases had only sanctioned the imposition by a state of the tax collecting duty upon those who had come in to do business within its jurisdiction and thereby submitted themselves to its power and that such cases are not precedents for the present holding, which in effect made "a tax collector of one as the price of the privilege of doing interstate commerce." He further asserted that he could think of nothing "in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens."

Mr. Justice Douglas in his dissent in the McLeod v. Dilworth case asserted that if the presence of a solicitor in Iowa constituted a sufficient basis for making the out-of-state corporation a tax collector for Iowa's use tax in the General Trading Co. case, the similar presence of solicitors in Arkansas should constitute a sufficient local incident upon which to base a sales tax in the Dilworth case.

Mr. Justice Rutledge dissented on a broader ground, asserting that no distinction should be made between the Arkansas sales tax and the Iowa use tax since both have exactly the same effect upon interstate commerce.

On the matter of sending a solicitor into a state being treated as doing business or constituting a sufficient basis upon which to ground a tax, the
more recent case of \textit{International Shoe Co. v. Washington},\textsuperscript{110} is worthy of note in that it held that continuous presence of salesmen soliciting orders and displaying samples is sufficient presence of a corporation in the state so as to make it amenable to process in a proceeding to recover unpaid contributions to the state's unemployment compensation fund measured by a percentage of the commissions payable to the salesmen.

Closely related to the cases involving use, sales, and gross receipts taxes just referred to, are those involving lump sum license taxes imposed upon solicitors taking orders for the sale of goods to be shipped in from outside the taxing state in interstate commerce. The first, and in some respects still the leading case on this matter is \textit{Robbins v. Shelby County Taxing District}\textsuperscript{111} which made it clear that the "negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made is interstate commerce." The Court asserted that a tax on the solicitor so negotiating sales is "clearly a tax on interstate commerce itself," and for that reason invalid, since "interstate commerce cannot be taxed at all," even though there is no discrimination. But there was added the suggestion that since the tax did not apply to solicitors for local business houses paying a local merchants license tax, it might well be found to be discriminatory against interstate commerce and for that reason also bad. Thirty-eight years later in \textit{Real Silk Hosiery Mills v. Portland},\textsuperscript{112} an ordinance of the City of Portland, Oregon, which required all persons taking orders for future delivery and receiving payment or a deposit on the purchase price to take out a license, pay a fee, and give bond, was declared unconstitutional as applied to the agent of the Real Silk Hosiery Mills taking orders for goods to be shipped direct to the purchaser from outside the state. The ordinance applied equally to all solicitors whether representing local, out-of-city, or out-of-state companies and the Court did not intimate that any discrimination could be involved, and no distinction was made between a fixed sum fee and a sales tax or a tax on gross receipts. The Court merely said that such solicitation is a part of interstate commerce and on the

\textsuperscript{110} 66 Sup. Ct. 154 (1945). For a case involving a corporation engaged in transporting gas in interstate commerce and selling to a distributing company under a profit-sharing contract, in which the transporting company was held to be doing business in the state in which the gas was delivered to the distributing company and properly subject to income tax on income derived from business done in that state, see Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 62 Sup. Ct. 857 (1942).

\textsuperscript{111} 120 U. S. 489, 7 Sup. Ct. 592 (1887).

\textsuperscript{112} 268 U. S. 325, 45 Sup. Ct. 525 (1925).
basis of previous decisions was not subject to tax, citing the Robbins v. Shelby County case.

As previously stated, the decision in McGoldrick v. Berwind-White Coal Mining Co. fifteen years later put an end to the holding that a tax is necessarily bad just because it applies to a transaction which is a part of interstate commerce. Necessarily this raised some questions as to the solicitor tax cases. In 1940 the case of Best & Co. v. Maxwell\(^{113}\) came to the Court and involved a statute of North Carolina levying an annual privilege tax of $250.00 on every person, not a regular retail merchant in the state, who displays samples in any temporary quarters for the purpose of securing retail orders. The Supreme Court unanimously held this invalid as having a discriminatory effect, emphasizing that the retail merchants with a place of business in the state with whom the solicitor must compete is subjected to only a fee of $1.00 per year.

These cases left the matter of a non-discriminatory fee unsettled.

Then in February of this year there was presented to the Court the case of Nippert v. City of Richmond,\(^{114}\) involving a city ordinance requiring of all agents and solicitors the payment of an annual license tax of $50.00 plus a percentage of the gross earnings for the preceding year, and made applicable to all agents alike whether representing local, out-of-city, or out-of-state concerns. Nippert, an agent of the out-of-state American Garment Company, operated in the city five days in exactly the same way as the real silk hosiery agents by taking orders and receiving a down payment which constituted her commission. Orders were sent to the company in another state and the goods shipped directly to the purchaser, C.O.D., for the rest of the purchase price. Nippert had not secured a license and was subjected to the penalties of the ordinance and directed to secure a license and pay the $50.00 fee. The state court's decision sanctioning this treatment was reversed by a majority of the United States Supreme Court in an opinion by Mr. Justice Rutledge, pointing out that the lump sum fee must be paid for a permit before any solicitation could take place, that a single act of solicitation would bring the penal sanctions into play, and that the fee, unlike the tax in the Berwind-White case, bore no relation to the volume of business done or the returns therefrom. Also it was asserted that for the small operator, or the casual or occasional one, the tax will be not only burdensome

\(^{113}\) 311 U. S. 454, 61 Sup. Ct. 334 (1940).

\(^{114}\) 66 Sup. Ct. 586 (1946).
but prohibitive, "with the result that the commerce is stopped before it is begun." The principal emphasis of the opinion, however, and apparently the basis of the decision, was a resulting discrimination "in favor of the local merchant as against the out-of-state one." This was not apparent in the terms of the ordinance but was thought to result from the fact that in many cases, like the present, the solicitor for an out-of-state concern will work only occasionally for brief periods in one city, moving on to another which may also require a fee, with the probable result that such operation may be practically prohibited. Then said the opinion, "The tax here in question inherently involves too many possibilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one."

Mr. Justice Douglas in dissent discounted the possibilities for discrimination, said the Best v. Maxwell case was based on the difference between $1.00 fee for local merchants and the $250.00 fee for out-of-state solicitors, and asserted that "one who claims that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge," and no attempt at such proof was made in this case.

There is an additional aspect of these cases that might be mentioned, and one which has always been of concern to the present writer, especially since the Berwind-White case, but which has never been clearly set out by the Court, and that is that the lump-sum fee, the burden of which bears no relation to the volume of business done and must be paid as a condition precedent to the right to begin operation as a solicitor, when applied to the representative of an out-of-state concern, amounts to a fee for the privilege of doing business in interstate commerce, and may well be held bad as an interference with and burden upon interstate commerce, entirely regardless of the matter of discrimination. This would seem to be an entirely logical conclusion to arrive at so long as we adhere to the long established doctrine of the Supreme Court that a state cannot exclude one from coming in to do purely interstate business and cannot impose a fee for the privilege of doing solely interstate business. This would in no way conflict with the theory at the basis of the Berwind-White decision that interstate commerce should pay its fair share of the state's burdens, and would not prevent the application to such a solicitor of a tax measured by the volume of business done or by a percentage of the commissions received. Neither would
it be inconsistent with the very recent decision in the insurance case of Robertson v. California discussed above.

In some respects the most interesting of the cases of state taxation affecting interstate commerce, and by no means of minor importance, is that of Northwest Airlines, Inc. v. Minnesota,\textsuperscript{115} sustaining, by a sharply divided court and a great confusion of opinion, the power of Minnesota, as the corporation's domicile, to apply its property tax to the whole value of a fleet of airplanes operating in interstate commerce over fixed routes and regular schedules covering portions of eight states and approximately 85% of whose route and plane mileage was in other than the taxing state. Problems of jurisdiction and due process of law were also involved. Since the decision of Union Refrigerator Transit Co. v. Kentucky\textsuperscript{116} in 1905 holding that "tangible personal property, permanently located in other states" is not taxable at the domicile of the owner, there has been relatively little controversy about state jurisdiction to tax tangible property. An exception to the rule asserted in this case was recognized in the case of ship property permanently outside the state of the owner's domicile but which, because of the nature of its use on the high seas, acquired no situs for taxation in any other state and thus may still be taxed in the state of the owner's domicile. In 1906, the year following the Union Refrigerator Transit case, the Supreme Court sustained a tax by the state of domicile upon the whole of a fleet of railroad cars operating in and out of the state in interstate commerce, all of which were outside the state of domicile for substantial periods during the year but all of which came into that state from time to time during the year, in the case of New York Central Railroad Co. v. Miller.\textsuperscript{117} In addition to this should be mentioned the generally accepted doctrine by which states other than domicile are permitted to tax rolling stock of railroads operating into and out of the state in interstate commerce on some reasonably proportionate part of its value. Whether the state of domicile should be required to decrease the valuation upon which it applies its tax in proportion to that part of the value subjected to taxation in other states had never been squarely decided. There was no showing in the New York Central case that any of the cars had been so used in other states as to


\textsuperscript{116} 199 U. S. 194, 26 Sup. Ct. 36 (1905).

\textsuperscript{117} 202 U. S. 584, 26 Sup. Ct. 714 (1906).
acquire a situs for taxation there, or that any other state had applied its tax.

In this state of the law the Northwest Airlines case came on for decision and Mr. Justice Frankfurter, listed as having "announced the conclusion and judgment of the Court," but speaking fully for only two justices besides himself, held that the tax by the corporate domicile on the full value of the whole fleet of airplanes was valid, since all of the planes were within the state part of the year, and grounded his opinion on the New York Central case, in spite of the fact that here the airplanes had been subjected to taxation on a proportionate basis by some of the other states by applying the doctrine previously referred to as long accepted in the case of railroad rolling stock. Whether Mr. Justice Frankfurter, or Justices Douglas and Murphy who joined in his opinion, thought the taxes by the other states were valid does not clearly appear.

It should be noted that the principal place of business for the Northwest Airlines corporation was at St. Paul, Minnesota, and there is located its principal repair base where all major work of overhauling and rebuilding of planes takes place, and the Frankfurter opinion characterized this as the home port. It is upon this basis that Mr. Justice Jackson grounds his concurring opinion, feeling that the doctrine as to ship property should apply and that only Minnesota should be permitted to tax. By thus applying the analogy to ship property and rejecting the analogy to rolling stock of railroads, he would deny the right of any other state to tax on any proportionate basis.

Mr. Justice Black also concurs in the judgment of full taxability by the state of domicile, but in a third opinion, in which he accepts the proposition that so far as problems of due process and jurisdiction are concerned, the presence of all of the property for substantial portions of the year within the state of the owner's domicile leaves no doubt about jurisdiction for tax purposes in that state, and feels that the only real problem is that of burdening interstate commerce by taxing the property in more than one state. As to that matter he follows the process of reasoning familiar to all of us since his dissents in Adams Manufacturing Co. v. Storen and Gwin, White and Prince, Inc. v. Henneford to the effect that the power of Congress to regulate interstate commerce is broad enough to permit it

to deal with this problem of overlapping state taxation affecting such commerce, and that the judiciary by its piecemeal approach is ill equipped to deal effectively with the problem, and until Congress acts the Court "should enter the field with extreme caution."

Mr. Chief Justice Stone wrote a dissenting opinion in which Justices Roberts, Reed, and Rutledge concurred, holding that the doctrine of proportionate taxation as applied in the case of rolling stock of railroads should be regarded as applicable for the purpose of allowing states other than domicile to tax a proportionate part of the value based on route and plane mileage within such state, or on some other reasonable basis of apportionment, and that, in order to prevent such property from being subjected to a tax by more than one state and thus put at a comparative disadvantage with like property used solely within a single state, with a resulting unconstitutional burden on interstate commerce, the state of domicile must be restricted to taxing only on a like proportionate basis.

While it was stated among the facts of the case that some other states had taxed, there was no showing as to which states, on what basis a valuation had been arrived at, or what the extent of the resulting tax burden may have been. This, Mr. Chief Justice Stone pointed out, is wholly immaterial. "It is enough that the tax exposes petitioner to 'the risk of a multiple burden to which local commerce is not exposed'."

From this brief resumé of the case it is apparent that no theory commanded the support of more than a minority of the Court and each theory presented is beset with certain difficulties. The so-called majority opinion of Mr. Justice Frankfurter carries with it the undesirable result of multiple state taxation on the facilities of interstate commerce. But since jurisdiction exists one may accept the theory of Mr. Justice Black that the rest is up to Congress to take such steps as it may see fit to protect interstate commerce from the burdens of multiple state taxation.

The dissenting opinion starts with the handicap of assuming that previous cases allowing states other than domicile to tax rolling stock on a proportionate basis necessarily imply that the state of domicile must be restricted to only that portion of the value which the other states cannot tax, and certainly previous cases nowhere squarely decide that. In the second place, the dissent assumes that the analogy between airplanes and rolling stock is so complete that the same theory of jurisdiction to tax must apply, though Mr. Justice Jackson emphasizes that the analogy is more nearly that of ship property since, unlike railroad rolling stock, the
airplanes operate over no right of way, require no trackage, are high above the earth's surface most of the time, and are not directly within the physical control of the state at all times as are railroad cars, but touch at "port" only occasionally after the manner of a ship stopping to unload or take on cargo, and may at times be over the sea and like ships not within the jurisdiction of any state.

It will be interesting to see what the Court will do with the attempt by states other than domicile to tax such airplane property on a proportionate basis when that problem is presented. It would seem that the whole matter of taxing rolling stock of railroads on a proportionate basis by such states may need to be given fresh consideration, and certainly the prospects for greatly increased air commerce calls for greater clarification of the problems of state taxation than can be derived from this case.

The last case in this five year period involving state taxation alleged to burden interstate commerce is the insurance case of Prudential Insurance Co. v. Benjamin,120 companion case of Robertson v. California discussed above. A statute of South Carolina imposed upon foreign insurance companies a tax of three per cent of the aggregate of premiums received from insurance business done within the state, without reference to the interstate or local character of the business, as a condition of receiving a certificate of authority to carry on the business of insurance within the state. No similar tax was required of South Carolina insurance companies.121 Prudential claimed that the major portion of its business in South Carolina was in interstate commerce within the doctrine of the South-Eastern Underwriters decision, that the tax discriminates against interstate commerce in favor of local business, and that in the light of Supreme Court decisions from Welton v. Missouri122 to Nippert v. Richmond,123 supra, invalidating state taxes discriminating against interstate commerce, this tax cannot stand. The effect and validity of the McCarran Act124 of 1945, enacted by Congress as a direct consequence of the South-Eastern Underwriters decision,

120. 66 Sup. Ct. 1142 (1946).
121. A somewhat similar case involving a state tax discriminating against foreign insurance companies and in favor of domestic companies is that of Lincoln National Life Ins. Co. v. Read, 325 U. S. 673, 65 Sup. Ct. 1220 (1945), which did not involve any question of interstate commerce, and which is discussed infra under Due Process and Equal Protection.
122. 91 U. S. 275 (1876).
123. 66 Sup. Ct. 586 (1946).
were directly drawn in question. The pertinent provisions of that Act are as follows:

"Sec. 1. The Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

In sustaining the validity of the state tax, without dissent, the Court gave recognition to the fact that in the decisions from Paul v. Virginia to the South-Eastern Underwriters case the negative implications from the commerce clause had never been held to place any limitations upon state power over the insurance business, "however conducted with reference to state lines," and that the states had taken over "exclusively the function of regulating the insurance business . . .," and in so "grappling with [this] nation-wide, but nationally unregulated, business [had] exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition."

The contention is set up that the process of readjustment necessarily begun with the South-Eastern Underwriters case requires that conceptions developed with reference to other commerce must now be extended to the commerce of insurance, and by the negative implications of the commerce clause such taxation as that of South Carolina must be invalidated, regardless of anything contained in the McCarran Act. The contention in this regard was that the Act was not intended to apply to such discriminatory taxation, and if so would be beyond the power of Congress to enact.

The Court, in an opinion by Mr. Justice Rutledge, pointed out that the cases relied on which, from Welton v. Missouri to the present, have "outlawed state taxes found to discriminate against interstate commerce . . . arose when Congress' power lay dormant" and hence "presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity." Then it was pointed out that whenever in the past "Congress' judgment has been uttered affirma-
tively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval," the most familiar illustration being the second Wheeling Bridge case.

Without determining whether the South Carolina "tax would be valid in the dormancy of Congress' power," the Court found, in reliance upon the second Wheeling Bridge case, the liquor cases, and the convict-made goods cases, that the McCarran Act was within the power of Congress, interpreted it to be applicable to the tax here in question and sustained the tax as applied to the insurance business of the Prudential Company. In so holding it was asserted that by the McCarran Act "Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for" and amounted to a "determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business." Since state taxes similar to that here involved were common at the time the McCarran Act was passed the "statute clearly included South Carolina's tax now in issue." Any effort that might have been made to show actual adverse effects of the application of the discriminatory tax so destructive of interstate business as to call for its invalidity was effectively answered by the statement that "the record of Prudential's continuous success in South Carolina over decades refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies."

Important among the broad principles enunciated by the opinion in this case is the assertion that "the power of Congress over commerce exercised entirely without reference to coördinated action taken by the states is not restricted, except as the Constitution expressly provides [such as "no preference . . . to ports . . .", and "no Tax . . . on" exports], by any

limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons.\textsuperscript{128} The italicized statement above, together with that in Mr. Chief Justice Stone's opinion in Southern Pacific Co. v. Arizona,\textsuperscript{129} discussed previously, to the effect that “Congress has undoubted power to redefine the distribution of power over interstate commerce” may seem to go somewhat beyond the doctrine asserted in the numerous earlier cases cited in both opinions to justify the conclusions reached. The full reasoning by which the Prudential case is sought to be enmeshed and articulated with past decisions is much too intricate to be successfully reproduced within the permitted scope of the present discussion. A careful reading of the full opinion is heartily commended. This case and that of Robinson v. California discussed above go far to point the way to the solution of many of the problems necessarily left for future consideration by the South-Eastern Underwriters decision.

V. Due Process and Equal Protection

A. Regulation

In Carolene Products Co. v. United States\textsuperscript{130} the Supreme Court, without dissent, reaffirmed the constitutional validity of the Federal Filled Milk Act prohibiting shipment in interstate commerce of filled milk, so defined as to include any milk to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, and sustained its application to the products of petitioner manufactured from skim milk from which a large percentage of the butterfat had been removed and to which cottonseed or cocoanut oil and vitamin-containing fish oil had been added. Petitioners contended that since these vitamin-enriched compounds were admittedly wholesome and were being sold under trade names with proper labels without the commission of any fraud upon the public, Congress could not prohibit their shipment in interstate commerce without denying to petitioners the right protected by the due process clause to trade in innocent articles. In justification of its holding the Court said, “Here a milk product, skimmed milk, from which a valuable food element—butterfat—has been

\textsuperscript{128} Italics supplied.
\textsuperscript{129} 325 U. S. 761, 65 Sup. Ct. 1515 (1945).
\textsuperscript{130} 323 U. S. 18, 65 Sup. Ct. 1 (1944).
removed, is artificially enriched with cheaper fats and vitamins so that it is indistinguishable in the eyes of the average purchaser from whole milk products. The result is that the compound is confused with and passed off as whole milk in spite of its proper labeling.” For a similar holding as to a state statute prohibiting the sale of such filled milk products within the state, see Sage Stores Co. v. Kansas.131

In Railway Mail Ass'n v. Corsi232 the validity of a New York statute was challenged which prohibits a labor organization from denying membership in the union by reason of race, color, or creed, or from denying to any member equal treatment for similar reasons. This provision was alleged to offend the due process clause of the Fourteenth Amendment as an interference with the right of the union in the selection of its members. The Court said the Fourteenth Amendment “was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business interests of employees.”

In Chase Securities Corporation v. Donaldson233 the Court, without dissent, asserted that “where lapse of time has not invested a party with title to real or personal property, a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after the right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.”

The Habitual Criminal Sterilization Act of Oklahoma providing for the sexual sterilization of persons convicted a third time of felonies involving moral turpitude came before the Supreme Court in Skinner v. Oklahoma134 and was held invalid as being violative of the equal protection clause of the Fourteenth Amendment. The statute provided rather elaborate safeguards, including jury trial, for determining whether the individual is an “habitual criminal” and whether he “may be rendered sexually sterile without detriment to his or her general health,” but made exceptions for “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.”

Skinner had been convicted once of stealing chickens and twice of robbery with fire arms, all of which were felonies and was proceeded against as an "habitual criminal." In holding the statute violative of the equal protection clause because of the exception for embezzlement although also a felony where the amount involved is more than twenty dollars, Mr. Justice Douglas asserted that "sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks." There were no dissents. The Court did not pass on the broader question of validity aside from the discrimination.

A New York statute requiring all existing lodging houses of non-fireproof construction to comply with certain stipulated requirements, including the installation of an automatic wet pipe sprinkler system, as applied to a lodging house which had been constructed in compliance with all building laws and regulations in existence at the time and which was fireproof in part and as to the remainder admittedly not dangerous to its occupants, was recently sustained by the Supreme Court against a claimed violation of the due process clause, and in spite of a showing that the required installation would cost approximately one-third the value of the building.\textsuperscript{135}

In like fashion a claimed violation of the equal protection clause of the Fourteenth Amendment, based on the fact that the statute applied in terms only to existing structures and not to similar houses that might in the future be erected or converted into lodging houses, was denied by a unanimous Court. In rejecting his latter contention the Court called attention to the well established principle that a legislature may frame its legislation to fit what it conceives to be an existing evil without taking "account of new and hypothetical inequalities that may come into existence as time passes or as conditions change," and emphasized that "lack of equal protection is found in the actual existence of an invidious discrimination . . ., not in the mere possibility that there will be like or similar cases which will be treated more leniently."

In \textit{Snowden v. Hughes}\textsuperscript{136} in which the complainant alleged that a

\begin{footnotes}
\item[135] Queenside Hills Realty Co. v. Saxl, 66 Sup. Ct. 850 (1946).
\item[136] 321 U. S. 1, 64 Sup. Ct. 397 (1944).
\end{footnotes}
state statute regulating primary elections had been violated by the State Primary Canvassing Board with the result that he failed to secure the office to which he was entitled, the Court denied that any right under the Fourteenth Amendment based on the due process, equal protection or privileges and immunities clauses had been violated. It was emphasized that such rights as he might have as a candidate for state office were privileges of state citizenship rather than United States citizenship, that any denial by state action of a right to a state political office was not a deprivation of liberty or property within the meaning of the due process clause, and that there was no such showing of intentional discrimination between persons or classes as to establish a denial of equal protection.

State action requiring transfer to the State Department of Revenue of all bank deposits inactive for a stipulated period of time under a rebuttable presumption of abandonment was sustained as not being violative of due process in Anderson National Bank v. Luckett,\textsuperscript{137} where a provision permitted recovery by the depositor if he made proper claim within five years after the transfer.

In State Farm Mutual Automobile Insurance Co. v. Duel\textsuperscript{138} the Court sustained a state statute construed as requiring of a foreign Mutual Automobile Insurance Company seeking a license to do business in the state a reserve of fifty per cent of the amount of all premiums and membership fees exacted in all states in which it was admitted to do business against a contention of denial of due process of law.

For a case holding that due process of law is not denied to a street railway company by using as the rate base the price at which it offered to sell its property, and for consideration of other due process problems in rate regulation, see Market Street Railway Co. v. Railroad Commission of California.\textsuperscript{139}

**B. Taxation**

The problem of due process of law in connection with state jurisdiction to tax intangible property or to apply an inheritance tax with respect

\textsuperscript{137} 321 U. S. 233, 64 Sup. Ct. 599 (1944).
\textsuperscript{138} 324 U. S. 154, 65 Sup. Ct. 573 (1945).
thereto on the death of its owner has occupied the Supreme Court on numerous occasions during the past two decades with the Court getting itself into no little confusion at various times, particularly by departing some fifteen years ago from the previous conceptions of jurisdiction in favor of adherence to a policy of protecting such property against the undesirable aspects of multiple state taxation, only to find that the necessity of choosing between the claims of two or more competing states was resulting in the placing of restrictions upon state taxing power which no rational conceptions of jurisdiction or due process of law could reasonably justify. The process of retreating, piecemeal, from that position occupied the Court on occasion over a period of years culminating in the case of State Tax Commission of Utah v. Aldrich,\(^\text{140}\) which sustained the application of an inheritance tax upon the value of shares of stock by the state of the corporation's domicile upon the death of the owner resident in another state. In so holding the Court recognized that the state of the owner's domicile could also tax, and expressly overruled the case of First National Bank of Boston v. Maine\(^\text{141}\) which had invalidated taxation by the state of the corporate domicile under exactly the same sort of circumstances and had very vigorously asserted that due process of law requires that only one state be permitted to tax and that it is the function of the Court to determine which state has the better basis on which to tax. While other restrictive cases such as Farmers Loan and Trust Co. v. Minnesota\(^\text{142}\) and Baldwin v. Missouri\(^\text{143}\) were not specifically overruled, the Court seemed clearly to repudiate the whole doctrine responsible for all of the restrictive tax cases of the 1930-32 period and return state taxing power to the jurisdictional basis previously existing based on the finding of a relationship between the taxing state and the subject matter of the tax which makes the imposition of the tax not a mere arbitrary extortion. "There is no constitutional rule of immunity from taxation of intangibles by more than one state," said Mr. Justice Douglas, "we restore these intangibles to the constitutional status which they occupied up to a few years ago." Further, he said, and this is the real explanation of and unassailable justification for the Court's position,


\(^{141}\) 284 U. S. 312, 52 Sup. Ct. 174 (1932).

\(^{142}\) 280 U. S. 204, 50 Sup. Ct. 98 (1930).

\(^{143}\) 281 U. S. 586, 50 Sup. Ct. 436 (1930).
"even though we believed a different system should be designed to protect against multiple state taxation, it is not our province to provide it."

Perhaps the nature of the Court's reasoning and the justification for its conclusion is made even clearer by a quotation from the concurring opinion of Mr. Justice Frankfurter.

"Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the nation. It does so because the transaction in its entirety may receive the benefits of more than one government. And the exercise by the States of their constitutional power to tax may undoubtedly produce difficult political and fiscal problems. . . . But whether a tax is wise or expedient is the business of the political branches of the government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that come into play in justifying disapproval of a tax [by a legislative body] on the score of political or financial unwisdom."

Two cases decided in 1944 involved the Wisconsin Privilege Dividend Tax Act of 1935 previously sustained in its general features in the case of State of Wisconsin v. J. C. Penny Co. The statute in question provides that "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state, there is . . . imposed a tax equal to 2½% of the amount of such dividends declared and paid by all corporations," foreign and domestic, and that such tax shall be deducted and withheld by the corporation from such dividends payable to residents and non-residents. The Supreme Court asserted in the J. C. Penny case that the "practical operation of the tax is to impose an additional income tax on corporate earnings within Wisconsin, but to postpone the liability for payment of the tax until such earnings are paid out in dividends."

Following the J. C. Penny case in the Supreme Court, the Wisconsin Supreme Court held that the tax was not on the income of the corporation and that the burden of the tax is imposed upon the stockholders.

In International Harvester Co. v. Wisconsin Department of Taxation two foreign corporations were involved and the dividends were declared at directors meetings held outside the state, the dividend checks were drawn on bank accounts outside the state, and the nonresident share-

144. 311 U. S. 435, 61 Sup. Ct. 246 (1940).
holders received their dividends outside the state. Upon the basis of these facts it was contended that the tax applied beyond the jurisdiction of the state and thus denied due process of law.

In sustaining the tax as here applied, the Court said "the power to tax the corporation's earnings includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. . . . In taxing such distributions, Wisconsin may impose the burden of the tax either upon the corporation or upon the stockholders who derive the ultimate benefit from the corporation's Wisconsin activities." Then referring to other cases sustaining state income taxes on incomes earned or derived from within the state though accruing to persons outside, the Court said, "the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there." Thus, while the Court seemed to be flirting with the proposition that the tax was one upon the shareholder and not upon the corporation, it was not necessary to make that decision since the tax would be valid imposed upon either.

Mr. Justice Jackson dissented on the ground that as construed by the Court to be a "tax on the shareholder when and because he receives a dividend," such receipt of the dividend becomes the taxable event, and being paid by a foreign corporation to a non-resident stockholder out of funds in the surplus account held outside the state, such taxable event is something outside the jurisdiction of the taxing state.

In Wisconsin Gas and Electric Co. v. United States, a domestic corporation claimed the amount of such tax under this same statute as a tax paid by the corporation and deductible by it in determining the amount of its taxable income subject to the federal income tax. Here it became necessary for the Court to decide specifically whether the tax was one upon the shareholder or upon the corporation, a decision which the Court had successfully avoided in the International Harvester case. Pointing out that the tax is aimed at corporate earnings derived from property located and business transacted in Wisconsin, the Court observed that while "all taxes on corporate earnings are, to a greater or lesser extent, translated into economic burdens upon the shareholder . . . here the burden is placed upon him directly and exclusively. . . . The thrust of the tax . . . is at their
[corporate earnings] transfer as dividends to the shareholder rather than their receipt as income by the corporation.” Thus the tax was held to be one imposed upon the shareholder, not upon the corporation and not deductible by it. The constitutional validity of the tax apparently stands without question as a result of these cases.

In 1942 another tax case of considerable significance was decided involving the troublesome problem of allocating income for tax purposes among the states in which parts of a unitary business may be conducted. The leading case on the problem had long been *Underwood Typewriter Co. v. Chamberlain*\(^{147}\) in which there was sustained a provision for taking that proportion of the whole net income of a foreign corporation which the value of real and personal property in the state used in the business, bear to all the real and tangible property of the corporation everywhere and used in the business; or that proportion of total net income which gross receipts from the business within the state bear to total gross receipts in all states. Such valuation as is thus obtained is to be treated as income within the state and subjected to the state’s income tax rate. The use of some such formula as thus approved in the *Underwood Typewriter* case came to be widely accepted and used among the states, until it was subjected to considerable confusion by the decision of the case of *Hans Rees’ Sons v. North Carolina*\(^{148}\) in 1931.

In the case of *Butler Bros. v. McColgan*\(^{149}\) a similar problem was presented to the Supreme Court involving the application of California’s so-called Bank and Corporation Franchise Tax Act, providing for an annual corporate franchise tax payable by a corporation doing business within the state and measured by 4% of the corporation’s net income for the preceding year. For corporations doing a unitary business across state lines the portion of net income to be regarded as derived from business done within the state is to be determined by “an allocation upon the basis of sales, purchases, expenses of manufacturer, payroll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation.” This left con-

147. 254 U. S. 113, 41 Sup. Ct. 45 (1920).
considerable leeway to the discretion of the tax commissioner in applying the formula.

Butler Brothers is a wholesale dry goods and merchandising concern with home offices in Chicago and branch wholesale distributing houses in seven states, including one in San Francisco. Each house serves a separate territory, has its own sales force and keeps its own accounts, costs of goods received are charged to it and receipts from sales are credited to it. But the Company maintains a central buying division for all houses, and a central advertising division. Expenses for these central services, including executive salaries, and certain accounting expenses, were allocated by the Company among the houses. For the year in question the amount of this expense allocated to the San Francisco house was something in excess of $100,000.00, although it was admitted that at least 75% of that $100,000.00 expense would have been incurred if the San Francisco house had not been operated. But as a result of charging this whole $100,000.00 expense item to the San Francisco house the Company claimed a net loss in California of some $82,000.00, though it had a total net income of over $1,000,000.00 for all seven states.

The California Franchise Tax Commissioner determined that some 8% of this total net income was properly allocable to California by averaging the percentages which (a) value of real and tangible personal property, (b) compensation to employees, and (c) gross sales, attributable to the San Francisco house bore to the corresponding items of the whole business, with the result that nearly $4,000.00 tax was demanded by California.

There was no complaint about the method of allocation, but only a claim that the nature of the business was not such as to justify the allocation of any portion of the company's income from all sources to California, and that by so doing a loss of some $82,000.00 had been converted into a profit of $93,000.00, and that this difference of $175,000.00 has either been created out of nothing or appropriated by California from other states, either of which would be violative of due process.

In sustaining the tax by unanimous opinion the Court emphasized that at least since Adams Express Co. v. Ohio State Auditor decided in 1897 "this Court has recognized that unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis;" that unity of

150. 165 U. S. 194, 17 Sup. Ct. 305 (1897).
ownership and management, and central buying was a sufficient basis for justifying such treatment; that "one who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed;" and that at least in the absence of proof that factors responsible for that net income are present in other states and not in California, that state "was justified in assuming that the San Francisco branch contributed its" proportionate "share to the advantages of centralized management of this unitary enterprise and to the net income earned."

In the case of *Lincoln National Life Ins. Co. v. Read*\(^{151}\) was presented a rather striking case of state taxation discriminating against foreign corporations in favor of domestic corporations. The Constitution of Oklahoma provided that a foreign insurance company seeking a permit to do business in the state must, among other things, agree to pay such taxes and fees as may at any time be imposed by state law, and a refusal to pay any such taxes or fees shall work a forfeiture of the permit, which must be renewed each year. The Constitution further provided for an annual tax of 2% on all premiums collected in the state, no similar tax being imposed on domestic insurance companies. Lincoln National Life was admitted first in 1919 and its permit was renewed each year, and each year it paid the 2% tax. In 1941 the tax was increased to 4% which it paid under protest and sought to recover back on the ground of violation of the equal protection clause of the Fourteenth Amendment, since no similar tax was imposed on domestic insurance companies.

The Supreme Court, in an opinion by Mr. Justice Douglas, with Mr. Justice Roberts alone dissenting and without opinion, asserted that by the state constitution the payment of any tax thus imposed was made a condition precedent to the right to secure a permit for the succeeding year and went back to cases like *Paul v. Virginia*\(^{152}\) and *Philadelphia Fire Ass'n v. New York*\(^{153}\) as authority for the proposition that a "state may impose on foreign corporations for the privilege of doing business within its borders more onerous conditions than it imposes on domestic corporations." It quoted from the latter case with full approval the statement that,

"The state, having power to exclude entirely, has the power to change the conditions of admission at any time for the future, and

\(^{151}\) 325 U. S. 673, 65 Sup. Ct. 1220 (1945).
\(^{152}\) 8 Wall. 168 (1869).
to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

This quotation was apparently intended as the answer to the claim that the tax amounted to an unconstitutional condition since it discriminated in favor of domestic corporations and violated the equal protection clause. But since the equal protection clause applies only to persons within the jurisdiction, and the corporation is, at the end of each year, in effect, on the outside asking for re-admission, it is not a person within the jurisdiction entitled to the benefits of the equal protection clause. The opinion disposed of the troublesome case of *Hanover Fire Ins. Co. v. Harding*\(^\text{154}\) decided twenty years earlier by saying that there the foreign insurance company had been given an unequivocal license to do business in the state, with no conditions attached, and then was later subjected to discriminatory taxation, while here each annual license is granted upon condition that the corporation agree to pay all taxes which the legislature may impose, thus it never received an unequivocal license at any time. In so holding the Court largely reasserted the early doctrine that a state can admit or refuse to admit a foreign corporation on such conditions as it may see fit. Since the corporation made no claim that it was doing an interstate business it was not necessary to deal with the effect of the *South-Eastern Underwriters Ass’n* case upon the power of a state to admit or exclude a foreign insurance company doing business in interstate commerce.\(^\text{155}\)

In *Charleston Federal Savings & Loan Ass’n v. Alderson*\(^\text{156}\) the Court held that the equal protection clause of the Fourteenth Amendment does not prevent a state from placing notes and accounts receivable in a different class from livestock and other personalty used in agriculture and assessing the two differently for purposes of taxation; nor prevent the assessment of notes of building and loan associations at full face value while notes of small loan companies are assessed at only 85% of face value, in the absence of a showing that the difference in valuation may not have been justified as a

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\(^\text{154}\) 272 U. S. 494, 47 Sup. Ct. 179 (1926).

\(^\text{155}\) Cf. Robertson v. California, 66 Sup. Ct. 1160 (1946), discussed above.

means of getting at true value, in view of the higher grade securities held by building and loan associations, usually backed by better security.

VI. FIFTH AMENDMENT: JUST COMPENSATION

Several eminent domain cases decided during the period here under consideration have been omitted, partly because most of them appeared to add little that was new and partly in the interest of conserving space. One case, however, because of its novelty, should be briefly considered. In United States v. Causby the Court determined that where the Federal Government permitted its airplanes to fly so low over plaintiff's land which adjoined a municipal airport leased by the Federal Government as to deprive the plaintiff of the use of his property for the purpose of raising chickens, there was a "taking" within the meaning of the just compensation clause of the Fifth Amendment so as to require payment. While the Court does not go into the matter of value in detail it emphasizes that "it is the owner's loss and not the taker's gain" that is to measure the value of the property for compensation purposes. It was also asserted that the fact that the path of the glide over the plaintiff's land taken by the airplanes in taking off and landing had been approved by the Civil Aeronautics Authority would not prevent the flights from constituting a taking, since the path of the glide is not the same thing as the "minimum safe altitude of flight" prescribed by Civil Air Regulations as the downward reach of the navigable air space placed within the public domain by act of Congress. The fact that there was no purpose by the Government to actually occupy the surface of the land and that the plaintiff was not occupying the space above the land in the physical sense by the erection of buildings, or otherwise, was regarded by the Court as unimportant, since the flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" by its owner.

Mr. Justice Black, with whom Mr. Justice Burton joined, dissented on the ground that the Court's opinion set up "relatively absolute barriers"


158. 66 Sup. Ct. 1062 (1946).


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which the "Constitution does not contain" against "possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation. . . ." Continuing in a vein reminiscent of his view relative to the function of Congress rather than the Courts in protecting interstate commerce from the burdens of state taxation, he suggested that "the future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress."

VII. BILLS OF ATTAINDER

The case of United States v. Lovett\textsuperscript{161} presented to the Court the unusual necessity of construing an act of Congress to determine whether it amounted to a bill of attainder within the meaning of the prohibition in Article I, Section IX, Clause 3 of the Constitution.

"In 1943 the respondents, [Robert Morss] Lovett, [Goodwin B.] Watson, and [William E.] Dodd, [Jr.], were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of these employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House Bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943, again appointed to jobs by the President with the advice and consent of the Senate.\textsuperscript{162} . . . Notwithstanding the Congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought . . . actions in the Court of Claims. They urged that Section 304 was unconstitutional and void" on several grounds, the most important of which was conflict with Article I, Section IX, Clause 3 of the Constitution providing that "no bill of attainder or ex post facto law shall be passed."

\textsuperscript{161} 66 Sup. Ct. 1073 (1946). A note discussing some of the problems involved in this case may be found in (1946) 40 ILL. L. REV. 541.
\textsuperscript{162} 57 STAT. 431, 450.
Counsel for Congress seeking to support the validity of Section 304 urged that it was justified under a combination of the constitutional provisions authorizing Congress to "lay and collect taxes . . ." and "to make all laws which shall be necessary and proper . . .," together with the provision that "no money shall be drawn from the Treasury, but in consequence of Appropriations made by Law," and took the position that the Section "did not purport to terminate respondents' employment" but "merely cut off respondents' pay and deprived governmental agencies of any power to make enforceable contracts with respondents for any further compensation." The Court of Claims partially accepted this latter contention and gave judgment for the respondents on the theory that their continued employment was valid, and while they could not be paid out of funds generally appropriated, actions for pay brought in the Court of Claims were justified.

A very brief resumé of the background of Section 304 is necessary to an understanding of the problem presented in this case. It may well begin with the creation in 1938 of the so-called Dies Committee on Un-American Activities as a part of a program inaugurated by the House of Representatives against alleged "subversive" activities, it being noted that several members of the House purported to believe that "many 'subversives' were occupying influential positions in the Government." In a long speech on February 1, 1943, Congressman Dies, Chairman of and controlling force in the Committee on Un-American Activities, it was asserted that "thirty-nine named government employees," including respondents, "were 'irresponsible, unrepresentative, crackpot, radical bureaucrats and affiliates of communist front organizations' . . ., unfit to 'hold a government position,' and Congress was 'urged . . . to refuse to appropriate money for their salaries'," and to "'take immediate and vigorous steps to eliminate these people from public office.'" Four days later an amendment was offered to an appropriation bill of the character finally embodied in Section 304 before the Court in this case. In the long congressional debate that ensued references to "proof of guilt" and "legislative lynching" were plentiful, and Congressman Dies "suggested that Appropriations Committee 'weigh the evidence and . . . take immediate steps to dismiss these people from the federal service.'" After deferring action pending an investigation by the Appropriations Committee in which "employees would get a chance to prove themselves 'innocent' . . . so that each 'man would have his day in Court' and 'There would be no star chamber proceedings'," a special sub-committee held hearings "in secret
executive session. Those charged with 'subversive' beliefs and 'subversive' associations were permitted to testify" without the benefit of counsel. The subcommittee formulated its own definition of "subversive activity," inasmuch as the term "had not before been defined by Congress or by the Courts," and found respondents' "views and philosophies as expressed in various statements and writings [to] constitute subversive activity . . ." and the men to be "unfit for the present to continue in Government employment." As a result Section 304 was tacked on to an appropriation bill as passed by the House and unanimously rejected by the Senate. Only after a fifth conference report showed that the House would continue to insist on inclusion of the Section did the Senate yield in order to get the vitally necessary wartime appropriation measure passed. The President signed the measure with the following comment: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional."

On the basis of these facts the majority of the Court concluded that the purpose of the Section was "not merely to cut off respondents' compensation through regular disbursing channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable" and concluded that the Section "falls precisely within the category of Congressional actions which the Constitution barred by providing that 'no bill of attainder or ex post facto law shall be passed'." The act here was construed to be a "bill of pains and penalties" embraced within the meaning of "bills of attainder" as used in the Constitution.

Earlier cited cases were asserted to "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution," and the Court concluded that this measure as a "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." In support of this conclusion the Court stated that if Congress had passed a law "stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment"
clearly this would have been within the proscription of the Constitution, and that the measure here involved, while not specifically designating the conduct as “criminal,” had the same effect.

Mr. Justice Frankfurter, with Justice Reed joining, concurred in the result that respondents were entitled to recover their unpaid compensation, but based his conclusion on the notion expressed below by the Court of Claims that Section 304 “merely prevented the ordinary disbursal of money to pay respondents’ salaries” but “did not cut off the obligation of the Government to pay for services rendered and that the respondents are . . . entitled to recover the judgment which they obtained from the Court of Claims.”

In concluding that Section 304 did not constitute a bill of attainder, Mr. Justice Frankfurter emphasized that “no offense is specified and no declaration of guilt is made. . . . Not only does Section 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. . . . Punishment presupposes an offense . . . , an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment.” Then, after emphasizing that legislation is the product of both Houses of Congress and the President, he pointed out that the Senate five times had rejected the substance of Section 304 and finally approved not because it “joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill,” and offered the novel, if not doubtful, suggestion, that “to hold that a measure, which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder disregards the historic tests for determining what is a bill of attainder.”

VIII. PROTECTION OF PERSONS ACCUSED OF CRIME

A. Exclusion From Jury Service

Cases in recent years have made it plain that systematic exclusion of negroes from either the grand jury which returns an indictment or from the jury that convicts is justifiable basis for reversing a conviction of a negro defendant subjected to either, as a discrimination violative of the equal
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protection clause of the Fourteenth Amendment. In *Hill v. Texas* a showing on behalf of a negro defendant that there were thousands of negro male citizens in the county apparently qualified for jury duty and that for at least sixteen years no negroes had been called for grand jury service was held to be a sufficient prima facie showing of discrimination, in the absence of evidence to the contrary, to justify reversal of conviction.

In *Akins v. Texas* the fact that the jury commissioners in a county, about 15% of whose population was negro, placed but one negro upon a grand jury panel of 16 and on the grand jury indicting the negro defendant was held by a majority of the Supreme Court to be insufficient to establish such deliberate and intentional discrimination as to be violative of the equal protection clause of the Fourteenth Amendment. Proportional representation of races upon a jury is not required. Three justices dissented on the ground that while a negro "cannot claim, as matter of right, that his race shall have representation on the jury," but only that members of his race shall not be wrongfully excluded, "racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause," and "to the extent that this insistence [on one negro representative on the grand jury panel] amounts to a definite limitation of negro grand jurors, a clear constitutional right has been directly invaded."

The same general principle of freedom from discrimination in jury service in both civil and criminal trials was broadly re-affirmed in a somewhat novel way in the recent case of *Thiel v. Southern Pacific Co.* where the Court asserted that prospective jurors must "be selected by court officials without systematic or intentional exclusion" of any of the "economic, social, religious, racial, political or geographical groups of the community." In a civil suit for damages for personal injury in a federal district court in California it was admitted that the officials had "deliberately and intentionally excluded from the jury lists all persons who work for a daily wage." The alleged reason was that in view of existing wages and the loss to be suffered by being forced to serve on the jury at $4.00 per day, daily wage

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earners would be excused on the ground of hardship, and it would serve no useful purpose to include them on the jury list.

In spite of evidence showing that laborers who worked for weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners, and regardless of whether the rights of the plaintiff had actually been prejudiced in his suit to recover damages from the defendant railroad, he was held to be entitled to a reversal of the judgment for the wrongful exclusion of daily wage earners as a class from the jury list. The decision was based primarily upon the function of the Supreme Court in the exercise of its power of supervision over the administration of justice in the federal courts.

A dissent by Mr. Justice Frankfurter in which Justice Reed joined took the position that no constitutional issue was involved and that such a group as here involved could be excluded from jury service "for reasons that are relevant not to their fitness but to competing considerations of public interest as is true of the exclusion of doctors, ministers, lawyers, and the like."

B. Use of Confessions

Getting back to the matter of criminal cases it is to be observed also that in recent years numerous cases have reversed convictions under the due process clause of the Fourteenth Amendment for improper use of confessions not wholly voluntary and for failure to provide proper assistance of counsel for the accused. The leading cases during the five year period here under consideration involving problems related to the use of confessions are Lisenba v. California and Ashcraft v. Tennessee. These two cases represent somewhat divergent points of view and are not too easy wholly to reconcile. In each case the justice who wrote the opinion dissented in the other case.

In Lisenba v. California the Supreme Court, two justices dissenting, sustained a conviction against a charge that a confession upon which it was based had been secured by coercion and compulsion. This was the famous California rattlesnake murder case in which a husband was convicted of murder in killing his wife to collect her insurance, under a clause providing double indemnity for accidental death, after having collected similar double indemnity for the accidental death of his first wife under highly suspicious circumstances. The first attempt was allegedly made by tying his wife blindfolded to a table and loosing rattlesnakes in the room to bite her, and

on failure of this he succeeded by holding her head under water in a fish pool. An accomplice, allegedly hired by defendant to assist in the murder, testified to these facts, and later, after protracted questioning and abusive treatment by officers and after refusal to admit guilt on two occasions when confronted by a confession of the accomplice, and being denied access to his counsel on request, Lisenba made a confession used to convict him. While the Court admits that many acts of the officers were criminally illegal, evidence as to violent treatment was conflicting and defendant had advice of counsel at least during a substantial portion of the time in question, and since the confession was removed in time from the alleged violence and the most protracted questioning, the majority of the justices accepted the state court’s conclusion that the confession had been voluntarily given and its use violated no constitutional right of the defendant.

The Court asserted that, “like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means.” The lawless practices of the officers here, said the Court, “took them close to the line.” Justices Black and Douglas thought such practices took them beyond “the line” and that the conviction should have been reversed as based on a confession resulting from coercion and compulsion.

One of the most striking cases before the Supreme Court of the United States in recent years involving the problem of questionable use of confessions, and which returned to the high court a second time as late as February of this year, is that of Ashcraft v. Tennessee. There a respectable citizen of excellent reputation whose home life, according to testimony of numerous acquaintances, had always been most pleasant and happy, and who apparently cooperated with police authorities for a period of ten days after his wife’s body was found, in an unsuccessful effort to find her murderer, was thereafter subjected to thirty-six hours of continuous grilling by “relays” of “officers, experienced investigators, and highly trained lawyers,” working in shifts because “they became so tired they were compelled to rest,” who held him incommunicado in the homicide room of the fifth floor of the county...
jail in Memphis, Tennessee, and allegedly extracted a confession which, admittedly, the accused man neither wrote nor signed but which was admitted at his trial and used as the basis for conviction and a sentence of 99 years in the penitentiary. Evidence as to abuse, physical violence, and the use of blinding lights upon the accused during the thirty-six hour period was in conflict. The state courts did not find that the alleged confession was voluntary but said that reasonable minds might differ and left the matter to the jury which made it the basis of conviction.

A six man majority of the United States Supreme Court reversed the conviction on the ground that use of the alleged confession amounted to a violation of due process of law, in an opinion by Mr. Justice Black that is worthy of very careful consideration.

Commenting on the necessary voluntary character of a usable confession and referring to the facts detailed as to the thirty-six hours of continuous questioning the opinion stated,

“We think a situation such as that here shown by uncontradicted evidence is so inherently coercive (emphasis added) that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a ‘voluntary’ confession. Nor can we, consistently with constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.

“The Constitution of the United States stands as a bar against the conviction of any individual in an American Court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to the opposite policy; governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.”

When this case was sent back to the state courts all of the same evidence used in the first trial except this alleged confession was used to secure a second conviction. Included was an alleged confession of an alleged negro
accomplice who was convicted jointly with the husband but whose conviction
the state authorities admitted could not stand if the husband’s conviction
was to be reversed. Used also the second time was the statement allegedly
made by the accused after twenty-eight hours of continuous questioning
that he knew who had committed the murder and named the negro later
convicted as the accomplice allegedly hired by the accused to kill his wife.

When the case returned to the Supreme Court in February of this year,
Mr. Justice Black, who again wrote the opinion, referring to the fact of wilful
concealment of material facts being evidence of guilt, said, “to admit know-
ledge of the murder and who committed it after these protestations,” having
purported to help the officers for ten days and having denied all knowledge
through twenty-eight hours of continuous questioning, “would be the equiv-
alent of a confession of guilty participation . . . in the crime. . . .” This is
particularly true where a husband admits that he has, “against the strongest
pressures, deliberately concealed the identity of his wife’s murderer for ten
days.” Finding “no relevant distinction between introduction of this state-
ment and the unsigned confession” the Court again reversed the conviction.

In a dissenting opinion for himself and Justices Roberts and Frank-
furter, Mr. Justice Jackson emphasized that heretofore “the state has been
given the benefit of a presumption of regularity and legality,” asserted that
“constitutional admissibility of a confession is . . . to be measured by the
mental state of the confessor” at the time, and charged that the majority,
“instead of finding that Ashcraft’s freedom of will was impaired, . . . sub-
stitutes the doctrine that the situation was ‘inherently coercive’,” and
further suggested that “the Court . . . is moving far and fast in the direction
of holding that the ‘Constitution prohibit[s] use of all confessions made after
arrest because questioning, while one is deprived of freedom, is ‘inherently
coercive.’”

Two cases of considerable interest in this general connection, though
resting on a slightly different basis, are McNabb v. United States170 and
Anderson v. United States171 where convictions in the federal courts were
reversed on the ground that accused persons had been subjected to ques-
tioning for periods varying from five or six hours to five days after arrest
and before formal arraignment, in the face of a federal statute requiring
immediate arraignment, and confessions and admissions made in the course

of such questioning were made the basis of conviction, although such admissions were repudiated when those who made them took the witness stand in the trial. The opinions emphasized the broad supervisory authority of the Supreme Court over the administration of criminal justice in the federal courts and asserted that "the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional invalidity." Referring to the illegal character of evidence in the form of confessions and admissions obtained while accused were being held before "immediate arraignment" as required by statute the Court said, "plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." 172

C. Right to Counsel

Numerous cases during the period here under consideration have involved the matter of an accused's right to counsel. In Glasser v. United States 173 a former Assistant United States Attorney with experience in the trial of criminal cases was convicted in the federal court of conspiracy to defraud the government in a trial in which the court assigned Glasser's counsel to serve also as counsel for a co-defendant. The fact that counsel could thus not devote his entire time to the protection of Glasser's interest and that his interests and those of the co-defendant were at times divergent if not conflicting was made the basis of a reversal of conviction in the Supreme Court as violative of the provision in the Sixth Amendment guaranteeing to a person accused of crime "the assistance of counsel for his defense." An interesting angle of the right to trial by jury guaranteed by the same Amendment was also raised, based on a charge that all women on the panel from which the jury had been chosen had been drawn from a list furnished to the clerk by the League of Women Voters from among those


of their own number who had attended some special school of instruction for jury duty. While this charge was not sufficiently sustained by the evidence the Court made it clear that it would have been fatal had the evidence borne out the charge, thus defeating the "concept of the jury as a cross-section of the community. . . . The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial."

Somewhat in contrast with the rather strict interpretation of the requirements of the Sixth Amendment for the "assistance of counsel" in the federal courts is the case of Betts v. Brady refusing to reverse a conviction for robbery in a state court where the court's refusal to appoint counsel for the indigent accused was alleged to be violative of his rights under the due process clause of the Fourteenth Amendment. The trial court's refusal to appoint counsel which the accused was financially unable to provide for himself was based on the customary practice in Maryland restricting the appointment of counsel at state expense for indigent defendants to prosecutions for murder and rape. The Supreme Court of the United States, speaking through Mr. Justice Roberts, admitted that if this had been a trial in a federal court the Sixth Amendment would have made such appointment mandatory, but held that, unlike the guarantees of freedom of speech, press, and religion contained in the First Amendment, those "specific guarantees found in the Sixth Amendment" are not necessarily, as such, to be read into the meaning of the term "liberty" as used in the due process clause of the Fourteenth Amendment. Asserting that such refusal might or might not be violative of due process, he said the matter was to be "tested by an appraisal of the totality of the facts in a given case." Referring to the famous Scottsboro cases as lending support to defendant's claim that such right is guaranteed in each case, it was pointed out that the Court specifically did not assert that the right existed as a part of due process in all cases but determined that "in a capital case, where defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." The Court then found that the issue here involved, reduced to a question of alibi for the defendant at the time of the robbery in question, was a very narrow.

one, and defendant was a man "of ordinary intelligence and ability to take
care of his own interests on the trial of that narrow issue." Justices Black,
Douglas and Murphy dissented in an opinion admitting that the prevailing
view on the Supreme Court did not require the appointment of counsel
in every criminal case as essential to due process, but felt that this case
of an uneducated farm hand on relief, subjected to a sentence of eight years
in the penitentiary, while denied the aid of counsel for his defense pre-
sented a case sufficiently "offensive to the common and fundamental ideas
of fairness and right" to bring it within the protection of the due process
clause.

In two Missouri cases, Williams v. Kaiser175 and Tompkins v. Mis-
souri,176 the Supreme Court reasserted in its full vigor the doctrine of
Powell v. Alabama177 by making it clear that the right to counsel in criminal
prosecutions, "at least in capital cases, . . . is a right protected by the Four-
teenth Amendment. . . ."

In the case of House v. Mayo178 the action of a Florida court in for-
ing an accused, without warning and over his protest, to plead to an infor-
mation charging burglary without the aid of his counsel whom he had hired
and whose presence he had requested, was held by the Supreme Court to
constitute "a denial of . . . [accused's] constitutional right to a fair trial
with the aid and assistance of counsel." The Court said it was not necessary
to consider whether the state court would have been required to appoint
counsel in this case, and the status of the offense of burglary under the
laws of Florida was not stated, but did assert that "it is enough that
petitioner had his own attorney and was not afforded a reasonable oppor-
tunity to consult with him."

In the case of Hawk v. Olson179 the Court held that a refusal to grant
a continuance to give a defendant accused of murder time to secure and con-
sult with counsel denied due process. In the course of the opinion the Court
asserted, "We hold that denial of opportunity to consult with counsel on
any material step after indictment or similar charge and arraignment violates
the Fourteenth Amendment."

Sup. Ct. 448 (1944); White v. Regan, 324 U. S. 760, 65 Sup. Ct. 978 (1945).
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D. Waiver of Jury Trial

With three justices dissenting rather carefully and vigorously, the Supreme Court held, in *Adams v. United States*,\(^1\) that an intelligent defendant in a federal court, acting understandingly, may waive his right to counsel, and, without the aid of counsel, with the considered approval of the court, may also waive his right to trial by jury.\(^2\)

E. Search and Seizure

In two cases decided the same day in 1942 the Supreme Court dealt with the problems of search and seizure in the use of evidence secured by wire-tapping and similar processes. In *Goldstein v. United States*,\(^3\) a conviction based largely upon testimony of co-conspirators was sought to be reversed on the ground that the evidence was obtained by wire-tapping in violation of the Federal Communications Act and in violation of the search and seizure provisions of the Fourth Amendment to the Constitution. By wire-tapping, federal officers, in clear violation of the Communications Act, had intercepted incriminating statements of co-conspirators who confessed when confronted with a transcript of their telephone conversations, and turned state’s evidence, supplying testimony on which Goldstein was convicted. None of Goldstein’s conversations had been intercepted. The Court held that Goldstein’s rights under the Fourth Amendment had not been violated, while the evidence was illegally obtained under the Communications Act and by its provisions would not have been usable against the persons whose conversations were intercepted, the Act furnishes no protection to a third person against whom the evidence may be used. Mr. Justice Murphy, with whom Mr. Chief Justice Stone and Mr. Justice Frankfurter concurred, dissented on the ground that the statute ought to be construed as a “Congressional command that society shall not be plagued with such practices as wire-tapping.”

In *Goldman v. United States*,\(^4\) a conviction for conspiracy to violate the Bankruptcy Act was sought to be reversed for the use in securing the conviction of evidence obtained by placing a detectophone upon a partition wall which picked up the sound waves and amplified them, enabling the

\(^{1}\) 317 U. S. 269, 63 Sup. Ct. 236 (1943).
\(^{3}\) 316 U. S. 114, 62 Sup. Ct. 1000 (1942).
officers to overhear and have transcribed the conversations. The Court held this was not a violation of the Communications Act since there was no tapping of wires and no interception of the message, but on a par with officers listening to a conversation through a crack in the door. Also the majority opinion denied that it constituted an illegal search and seizure in violation of the Fourth Amendment, relying on the *Olmstead* case of 1928 holding that obtaining evidence by wire-tapping was not such a violation. The same three justices dissented, taking the position that the position of the four dissenting justices in the *Olmstead* case was sound and that that case should be overruled. Mr. Justice Murphy also went further and reasoned that, "whatever may be said of a wire-tapping device that permits an outside telephone conversation to be overheard it can hardly be doubted that the application of a detectaphone to the walls of a home or a private office constitutes a direct invasion of the privacy of the occupant, and a search of his private quarters."

In the case of *Davis v. United States* an attendant at a gasoline station sold gasoline to government agents at above the ceiling price and without collecting ration coupons. On being arrested she asserted she was following instruction of the owner who was arrested on his arrival and his car searched. The agents demanded and received from him the keys to boxes attached to the pumps and containing ration coupons and on finding a substantial discrepancy between coupons and gasoline demanded access to the records alleged to be in a locked room with sufficient coupons to cover the apparent shortage. Davis persistently refused to unlock the door on repeated demands but after an alleged threat to break in the door by two of the agents and on discovering a third peering through a window with a flashlight and apparently trying to raise the window, Davis finally agreed to open the door. Records were inspected and excess coupons seized, the possession of which by Davis was made the basis of his conviction.

Reversal of conviction was sought on the ground that the evidence, in the form of the unlawfully possessed coupons, was secured by unlawful search and seizure in violation of the Fourth Amendment.

In sustaining the conviction, in an opinion by Mr. Justice Douglas, the Supreme Court emphasized that "possession of coupons obtained in contravention of the regulations was unlawful. The coupons remained the

185. 66 Sup. Ct. 1256 (1946).
property of the Office of Price Administration and were at all times subject to recall by it. And they were subject to inspection at all times." Then the Court held that cases involving seizure of private property were not controlling, saying that "the distinction is between property to which the government is entitled to possession and property to which it is not" and appeared to feel that the case of Wilson v. United States and the distinctions asserted to exist in the opinion in Boyd v. United States constituted justification for refusing to follow the doctrine of Amos v. United States, where private property was seized from a private residence. Then said the Court, "Where the officers seek to inspect public documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought."

Three justices dissented, Mr. Justice Frankfurter at great length, with Mr. Justice Murphy concurring and Mr. Justice Rutledge very briefly. The Frankfurter opinion asserted the inability of the government to get possession of such articles legally in view of the protection against self incrimination and the fact that the authorization of Congress for search warrants does not extend to such a situation, and denied that Wilson v. United States furnished any support for the Court's conclusion. Reliance was placed on Gouled v. United States. "The acceptance of the Government's argument," asserted Mr. Justice Frankfurter, "opens an alarming vista of inroads upon the right of privacy."

Mr. Justice Rutledge based his dissent on the ground that the consent to enter was due solely to a reasonable belief that it was necessary to prevent the threatened breaking and entry, and that the "search was justified neither by consent nor by doctrine of reasonable search as incident to a lawful arrest."

In the companion case of Zap v. United States, involving somewhat similar problems of search and seizure, petitioner entered into contracts with the Navy Department to do certain experimental work on airplane wings on a cost plus basis and employed a test pilot for some $2500.00. In the process he persuaded the pilot to endorse a blank check which he filled

186. 221 U. S. 361, 31 Sup. Ct. 538 (1911).
188. 255 U. S. 313, 41 Sup. Ct. 266 (1921).
189. 255 U. S. 298, 41 Sup. Ct. 261 (1921). In the Davis case only misdemeanors were involved and statutory authorization to search in such cases was said to be limited to felonies.
190. 66 Sup. Ct. 1277 (1946).
in for $4,000.00 with the pilot's name as payee and used this to support a voucher for a like item of expense presented to the Navy Department. Under authorization by act of Congress for inspection and audit of books and records of such contractors, and as expressly provided for in petitioner's contract, government agents lawfully conducted an audit of his books and records during regular business hours and with the express approval of his agents and employees in his absence. The $4,000.00 check was requested and produced by a bookkeeper, and was retained by the agent and used as evidence to convict petitioner, in spite of a motion to have the evidence stricken as illegally obtained.

In sustaining the conviction based on evidence thus obtained, the Supreme Court emphasized that by agreeing to audits and inspections in order to obtain government contracts petitioner had "voluntarily waived such claim to privacy as he otherwise might have had as respects business documents related to those contracts." Also emphasized was the fact that the agents were lawfully upon the premises and that they "did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the government was lawfully obtained." Then said the Court, "Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts."

In a dissenting opinion in which Justices Murphy and Rutledge joined and based on his dissent in the *Davis* case, Mr. Justice Frankfurter agreed that the government had authority, based on statute and contract, to make the inspection, and that the inspectors could properly be permitted to testify "to what they had gleaned from the inspection." But he took the position that the seizure of the check was illegal. "The Constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. ... The legality of a search does not automatically legalize every accompanying seizure." Relying upon *Marron v. United States* in its emphasis upon the necessity for a warrant to "particularly describe the things to be seized" and the invalidity of "general searches," he vigorously asserted that "if where a search instituted under the legal process of a warrant, which also

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authorizes seizure, does not permit seizure of articles other than those specified, statutory or contractual authority merely to search cannot be considered sufficient to grant that power. . . . The fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way."

F. Miscellaneous

In two cases from Kansas involving alleged prevention by prison officials of attempts by a prisoner to send out appeal documents within the time limit under state law, and alleged use of "perjured testimony, knowingly used by the State authorities to obtain . . . conviction," and "deliberate suppression by those same authorities of evidence favorable to" the accused, the Supreme Court reversed convictions and sent the cases back for further proceedings to see that constitutional rights were fully protected.\(^{192}\)

In a federal prosecution in a criminal case the use of evidence given by defendant in a state civil action does not violate the privilege against self-incrimination even though the evidence could not have been used in the state court because of a state immunity statute.\(^{193}\)

That the privilege against self-incrimination cannot be used as the basis of a refusal to produce papers belonging to a labor union, either to protect the union or the officer who has them in his possession was decided in *United States v. White*\(^{194}\) on the authority of the corporation cases dating back to *Hale v. Henkel*\(^{195}\) nearly forty years before.

In the case of *United States v. Monia*\(^{196}\) the Supreme Court reasserted the holding of many years before that the protection of the Fifth Amendment against self-incrimination includes grand jury proceedings, and held that the immunity provision of the Sherman Anti-Trust Act applies to grand jury proceedings even though the witness does not claim immunity.

The case of *Pinkerton v. United States*\(^{197}\) involved the matter of convicting \(A\) for substantive crimes actually committed by \(B\) alone, both \(A\)


\(^{195}\) 201 U. S. 43, 26 Sup. Ct. 370 (1906).


\(^{197}\) 66 Sup. Ct. 1180 (1946).
and B being convicted of conspiracy, and B being properly convicted of the substantive offenses which grew out of the conspiracy in which A had joined. The majority opinion by Mr. Justice Douglas, sustaining all of the convictions, did not find any serious constitutional problem involved, and refused to apply the "common law rule that the substantive offense, if a felony, was merged in the conspiracy." The dissent of Mr. Justice Rutledge, partly on the ground that the applicable statute properly interpreted required a finding that A had "aided and abetted" in the commission of the substantive offenses in order to sustain a conviction—a view apparently shared by Mr. Justice Frankfurter—raised strongly the issue of double jeopardy based on the fact of subjecting A to two convictions—one for conspiracy and one for the substantive crime—for the same offense.108

IX. Thirteenth Amendment: Peonage Cases

Two cases reminiscent of Bailey v. Alabama199 and other cases arising out of alleged attempts to create a condition of peonage in violation of the Thirteenth Amendment came to the Court during the period here under consideration. Taylor v. Georgia200 involved a state statute making it illegal to procure money or other thing of value on contract for personal services with intent to defraud and making proof of receipt of the money and default in performance of the service without return of the money and without good and sufficient cause the basis of a presumption of intent to defraud. Reaffirming the doctrine of the Bailey case, the Court, without dissent, invalidated the statute.

The case of Pollock v. Williams201 involved a similar statute of Florida, which state the court pointed out had retained such statutory provisions in spite of clear adjudications of invalidity. The Court invalidated this statute and reversed the conviction thereunder in spite of the fact that accused pleaded guilty and it was not necessary to make use of the presumption. The case is particularly valuable for its review of historical material relative to peonage in various parts of the country.

198. The opinion in United States v. Sall, 116 F. (2d) 745 (C. C. A. 3d 1940), was accepted as sound.
A naturalization case of more than ordinary importance recently called forth a very significant decision by the Supreme Court in which three earlier cases were repudiated. While statutory construction was primarily in issue, the case is worthy of brief consideration here. The petitioner for naturalization, a native of Canada, stated that he “understood the principles of government of the United States, believed in its form of government and was willing to take the oath of allegiance,” but when asked if he would be willing to take up arms in defense of this country he replied in the negative on religious grounds, and explained that it was “purely a religious matter with me, I have no political or personal reasons other than that.” He had not claimed total military exemption before his Selective Service board, but only from combat service, and it was pointed out that some 10,000 of his religious denomination, Seventh Day Adventist, were then serving as non-combatants in the United States Army.

While the District Court admitted him to citizenship, the Circuit Court of Appeals reversed on the authority of United States v. Schwimmer, United States v. Macintosh, and United States v. Bland, all of which denied naturalization under similar circumstances asserting the general rule “that an alien who refuses to bear arms will not be admitted to citizenship.”

In an opinion by Mr. Justice Douglas it was asserted that the “fallacies underlying” that rule “were ... demonstrated in the dissents of Mr. Justice Holmes in the Schwimmer case and of Mr. Chief Justice Hughes in the Macintosh case.” It was pointed out that the oath of allegiance required of aliens as prescribed by Act of Congress to, among other things, “support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic,” does not in terms require a promise to bear arms, that Congress has not “expressly made any such finding a prerequisite to citizenship,” and “to hold that it is required is to read it into the Act by implication.” The opinion emphasized that “the bearing of arms ... is not the only way in which our institutions may be supported and defended, even in times of great peril” and that “refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our

204. 283 U. S. 605, 51 Sup. Ct. 570 (1931).
institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle."

The Court then called attention to the fact that "petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices," since "Article VI, Clause 3 of the Constitution provides that such officials . . . 'shall be bound by Oath or Affirmation, to support this Constitution' . . . [and] significantly adds that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States'."

Finally, the majority opinion took the position that since acts of Congress subsequent to the Schwimmer, Macintosh, and Bland cases, such as the Selective Training and Service Act of 1940206 recognized religious scruples against bearing arms, and the Second War Powers Act of 1942207 "relaxed certain of the requirements for aliens who served honorably in the armed forces . . . and provided machinery to expedite their naturalization," and that no change in the oath was made by way of adopting the rule set forth in the cases mentioned, the silence of Congress could not properly be interpreted as an adoption of any such rule. The Court thus concluded that the "Schwimmer, Macintosh and Bland cases do not state the correct rule of law," and the decision below denying naturalization for failure to take an oath to bear arms was reversed.

Interestingly enough, Mr. Chief Justice Stone, who joined in the dissents in the Macintosh and Bland cases, dissented in this case on the ground, not that those decisions were sound, but that Congress had, in effect, "adopted and confirmed" the construction of the naturalization statutes set forth in those cases. This conclusion is based largely on the failure of Congress to accept proposals to amend the naturalization laws that would have embraced the doctrine of the dissenting opinions in the three earlier cases.

Two cases of unsuccessful attempts at denaturalization, Schneiderman v. United States208 involving a communist, and Baumgartner v. United States209 involving a nazi, present in striking fashion the care with which the Supreme Court protects its adopted citizens in the retention of their

206. 54 Stat. 889, 50 U. S. C. A. Appendix, Sec. 305 (g).
208. 320 U. S. 118, 63 Sup. Ct. 1333 (1943).
citizenship, once it has been officially conferred. In the latter case it was emphasized that "'Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.' . . ." One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. . . . For such is the contradictoriness of the human mind that the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation."

More recently the case of Knauer v. United States211 presented a situation in which the Supreme Court affirmed a judgment canceling a certificate of naturalization issued nine years before on the ground of fraud in that the naturalized citizen, Knauer, had, in his petition for naturalization, falsely and fraudulently represented that he was attached to the principles of the Constitution, and that he had taken a false oath of allegiance. Evidence leading to this conclusion consisted of acts and statements largely related to his associations with the German Winter Relief Fund, the German-American Bund, the Federation of German-American Societies, and the German-American Citizens Alliance, and occurring in time both before and after his naturalization. While the Court adhered to the extremely strict standard of proof emphasized to be necessary in the Schneiderman and Baumgartner cases, it concluded that "there is solid, convincing evidence that Knauer before the date of his naturalization, at that time, and subsequently was a thoroughgoing Nazi and a faithful follower of Adolph Hitler. The conclusion is irresistible . . . that when he forswore allegiance to the German Reich he swore falsely. . . . The standard of proof, not satisfied in either the Schneiderman or Baumgartner cases, is . . . plainly met here."

The Court called attention to the authorization by Act of Congress, in existence at the time of Knauer's naturalization, for the cancellation of naturalization certificates based on fraud, and felt there was "no doubt of the power of Congress to provide for denaturalization on grounds of fraud," based on Article I, Section 8 of the Constitution expressly granting to Congress power "To establish a uniform Rule of Naturalization," to-

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211. 66 Sup. Ct. 1304 (1946).
together with the "necessary and proper clause in Article I, Section 8."

Mr. Justice Rutledge, with whom joined Mr. Justice Murphy, dissented on the ground that there is no warrant in the Constitution for two classes of citizens, except for two purposes—one, providing "how citizenship shall be acquired, . . . the other to determine eligibility for the presidency. . . . The latter is the only instance in which the charter expressly excludes the naturalized citizen from any right or privilege the native-born possesses." The dissenting justice reasoned that "Congress is given no power to take away citizenship once it is conferred, other than for some sufficient act of forfeiture [such as treason] taking place afterward." Then he concluded that "unless it is the law that there are two classes of citizens, one superior, the other inferior, the status of no citizen can be annulled for causes or by procedures not applicable to all others. . . . In my opinion the power to naturalize is not the power to denaturalize. The act of admission [to citizenship] must be taken as final, for any cause which may have existed at that time."

Finally, the dissenting opinion emphasized that "the native-born citizen can be deprived of his status only by the rigidly safeguarded trial for treason or for conviction of a criminal offense which brings loss of rights as a citizen. To these procedures, with the same penalties, and for the same causes, the foreign-born citizen is subject; but also by them he is protected. He should not be less secure when it is sought to annul his citizenship than when the effort is to bring about its forfeiture."

Of probably much greater interest and perhaps of more practical importance is the latest round in the conflict over the rights of negro citizens to vote in the Democratic primaries in the State of Texas, which has extended through a twenty-year series of cases. Beginning with *Nixon v. Herndon* in 1924 where a Texas statute expressly prohibiting negroes from voting in Democratic Party primaries was held bad as a denial of equal protection, the next important landmark was *Nixon v. Condon* in 1932 where a statute authorized the political party, through its State Executive Committee, to prescribe qualifications for its own members. The State Democratic Committee excluded negroes and this action was held bad, four justices dissenting, since the committee derived its authority from the state and its rule amounted to action by the state, but the Court

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212. 273 U. S. 536, 47 Sup. Ct. 446 (1927).
213. 286 U. S. 73, 52 Sup. Ct. 484 (1932).
http://scholarship.law.missouri.edu/mlr/vol11/iss3/1
there said that the state convention was the governing body of a political party and expressly reserved any opinion as to what might happen if such exclusion were directed by convention action. Then in *Grovey v. Townsend*\(^{214}\) in 1935 the Court held that action by the party convention was action by a voluntary association and not by the state, and permitted negroes to be excluded. While this last opinion was without dissent there appeared to be doubt from the outset that the matter was fully and finally disposed of. Then in 1941 came the case of *United States v. Classic*\(^{215}\) from the State of Louisiana and based on a different issue, but in which the Court held that "the primary in Louisiana is an integral part of the procedure for the popular choice of Congressman," thus holding squarely that a primary is a part of an election, subject to congressional control under Article I, Section 4 of the Constitution when federal officers are being voted for—a question left in doubt by the famous *Newberry*\(^{216}\) case in 1921.

This determination furnished the groundwork for a re-opening of the Texas primary problem with its exclusion of negroes from voting. Its re-opening in the latest case, then, in this development—*Smith v. Allwright*\(^ {217}\)—is grounded on the proposition, asserted by the Court, that "the fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding negroes from primaries."

The *Allwright* case as presented to the Court involved allegations of violation of federal statutes, based on Sections 2 and 4 of Article I of the Constitution, directed to the protection of citizens in their right to vote against discrimination on the basis of race or color, as well as charges of action contrary to the provisions of the Fourteenth, Fifteenth, and Seventeenth Amendments, directed at election judges for their action in excluding a negro, otherwise qualified, from voting in a Democratic primary for the nomination of candidates for the United States Senate and House of Representatives, as well as state officers. The demand for reconsideration of the decision in *Grovey v. Townsend* was grounded upon the claim that it was fundamentally inconsistent with the doctrine of the *Classic* case. The same action of the Democratic State Convention in excluding negroes from

\(^{216}\) 256 U. S. 232, 41 Sup. Ct. 469 (1921).
\(^{217}\) 321 U. S. 649, 64 Sup. Ct. 757 (1944).
membership in the Democratic party as involved in *Grovey v. Townsend* was the basis upon which petitioner was excluded in this *Smith v. Allwright* case. The opinion of the Court said that "when [the opinion in] *Grovey v. Townsend* was written, the Court looked upon a denial of a vote in a primary as a mere refusal by a party [as a voluntary organization] of party membership... our ruling in *Classic* as to the unitary character of the electoral process calls for a re-examination as to whether or not the exclusion of Negroes from a Texas party primary was state action." After pointing out the many ways by which parties and party primaries in Texas are controlled by state law, such as, in effect, directing the method of selection of all party officers, and requiring certification of party candidates in a certain way by designated party officers in order to be included on the official ballot for the general election, and in other ways, the Court concluded,

"We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party... When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state officers, practically speaking, to those whose names appear on such ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment."

The case of *Grovey v. Townsend* was specifically overruled.

Mr. Justice Roberts, who wrote the opinion in *Grovey v. Townsend*, dissented, not on any theory that that decision was sound or that the present decision was not sound, saying expressly that "their soundness... is not a matter which presently concerns me," but solely on the ground that overruling a decision announced only nine years before by a unanimous
court "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

In a similar case arising recently in the State of Georgia, *Chapman v. King*,\(^2\) the 5th Circuit Court of Appeals followed the *Smith v. Allwright* decision and the Supreme Court denied certiorari,\(^2\) March 6, 1946. Of some passing interest may be the official announcement from the State of Georgia that full effect will be given to the decision and that the governor, at least, will not be a party to what he refers to as any "subterfuge scheme" such as repealing the primary laws. A somewhat different sort of announcement has emanated from the sister state of Arkansas, and more recently from Georgia. Familiarity with recent developments in primary elections in Georgia, Mississippi, and some other Southern states makes it clear that the path of the negro to the primary polls has not been wholly cleared.

**XI. Freedom of Speech, Press and Religion**

**A. Freedom of Speech and Press, and Contempt of Court**

A case that attracted wide attention and has been referred to as pushing the protection of the First Amendment for freedom of speech and freedom of the press somewhat beyond its previous boundaries is that of *Bridges v. California*\(^2\) (and *Times-Mirror Co. v. Superior Court of California*) in which the Supreme Court by a division of 5 to 4 held that freedom of speech and freedom of press had been violated by state court judgments for contempt against Harry Bridges, well known west coast labor leader, for sending a telegram released to the press, and the Times-Mirror Company for publishing editorials, both concerning pending litigation, the one severely criticizing a court for its decision while motion for a new trial was pending, the other urging certain action by the court after a verdict of guilty and before the passing of sentence. The judgments of contempt were imposed by the state courts on the ground that these publications had an "inherent tendency" or a "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration."

In reversing the judgments the five man majority of the Supreme Court clearly recognized both the importance of protecting the independence

\(^{219}\) 66 Sup. Ct. 905 (1946).
\(^{220}\) 314 U. S. 252, 62 Sup. Ct. 190 (1941).
of the courts and the necessity of giving effective application to the guarantees of free speech and a free press. Referring to the clear and present danger test promulgated by Mr. Justice Holmes in the famous Schenck case of more than twenty years earlier to the effect that in each case there must be a determination of whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils . . ." which the government "has a right to prevent," the majority asserted that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." "What finally emerges from the 'clear and present danger' cases," says the Court, "is a working principle that the substantive evil must be extremely serious and the degree of imminence (danger) extremely high before utterances can be punished."

While the "substantive evil" here involved, the alleged "disorderly and unfair administration of justice" was apparently regarded as sufficiently serious, it was not thought that the published statements seriously endangered the fair and orderly administration of justice. To regard them as having a substantial "influence upon the course of justice," said the Court, "would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise."

Four members of the Court joined in a lengthy and vigorous dissenting opinion by Mr. Justice Frankfurter emphasizing the great importance of properly protecting the judiciary from undue pressure and taking a more serious view of the coercive qualities of the statements under consideration.

In connection with this case might appropriately be mentioned Bridges v. Wixon involving the attempt to deport the same Harry Bridges, in which the Court emphasized that "freedom of speech and of press is accorded to aliens residing in this country" equally with citizens.

A more recent case of much interest and in many respects quite similar to the Bridges v. California case is that of Pennekamp and the Miami Herald Publishing Co. v. Florida involving a contempt of court decree of a Florida court against a newspaper publishing company and its editor for the publication of certain editorials and a cartoon allegedly reflecting upon and imputing partisanship to circuit judges in favor of persons accused of crime.
in such a way as to subject them to coercion and intimidation in the performance of their judicial functions.

The Court's opinion by Mr. Justice Reed began with an assertion that the reviewing court's duty is to "appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

The nature of the publications, which cannot be adequately described in the space here available, by words and by cartoon, depicted the judges as hunting for every possible technicality to favor defendants in criminal cases, "to block, thwart, hinder, embarrass and nullify prosecution," to the extent that law enforcement had broken down and the interests of the law abiding public were being wholly ignored. Particular reference was made to quashed indictments for rape, dismissals of certain named cases, and interminable delays in others.

It was also claimed that these adverse comments and the cartoon were based on "inaccurate, distorted, incomplete and biased" reports on the cases and amounted to "a wanton withholding of the full truth," special reference being made to the fact of reindictments having been made in the rape cases before the editorials were printed but such fact was wholly ignored.

The Florida Court had found that the "object of these publications was . . . to abase and destroy the efficiency of the Court."

The Supreme Court accepted as correct the finding of the Florida Courts that "the full truth in regard to the quashing of the indictments was not published" and that the "Rape cases were pending at the time of the editorials," and that "the editorials did not state objectively the attitude of the judges."

The majority opinion emphasized that "freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," and pointed out that here was "only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings," that such "criticisms of his [the judge's] action could not affect his ability to decide the issues," that the "effect on juries that might eventually try the alleged offender . . . is too remote for discussion," and concluded that "we are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida."

In a concurring opinion Mr. Justice Frankfurter asserted that "a free press is not to be preferred to an independent judiciary, nor an independent
judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society." Then emphasizing that each case must be decided on its own peculiar circumstances and the likelihood that justice would be interfered with in that particular case, he said, "it is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process," and concluded from the facts in this case that the editorials made "no suggestion which could be construed as an attempt to influence the Court's decision in a matter actually pending before it. All the questions discussed in the editorial had been acted on by the trial judges. . . . The decisive consideration is whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight into scales which the court is immediately balancing. . . . In the situation before us the scales had come to rest. The petitioners offended the trial court by criticising what the court had already put in the scales, not by attempting themselves to insert weights."

Justices Rutledge and Murphy also concurred separately.

The result of this case and the Bridges case would clearly seem to be to recognize a very wide scope for criticism of the current judicial process without running the risk of punishment for contempt.

B. Freedom of Speech, Press and Assembly in Labor Controversies

The great majority of the 25 or 30 cases decided by the Supreme Court within the scope of the First Amendment during the period covered by this discussion arose in connection with the activities of two groups—labor and Jehovah's Witnesses.

Turning first to the labor cases, of which there are a goodly number, any consideration should have in the background the doctrine of the case of Thornhill v. Alabama224 that picketing by a labor organization as a means of giving publicity to the facts involved in a labor dispute is within the area of free discussion guaranteed by the freedom of speech and freedom of the

press provisions of the Constitution. "Free discussion concerning the conditions in industry and the causes of labor disputes," said the Court, "appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," and picketing with placards proclaiming the facts or issues was held to be protected as a proper part of that process.

In the first year of the period here under consideration at least three important cases involving application, interpretation, or possibly modification of the Thornhill doctrine were decided. In the case of Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board an order of the State Employment Relations Board restraining picketing was upheld upon the ground that all that was done by the order and the State Employment Peace Act on which the order was based, as interpreted by the State Supreme Court, was to forbid and restrain violence while peaceful picketing was unmolested. Thus there was no interference with constitutional rights of free speech and press safeguarded by the doctrine of the Thornhill case.

In a somewhat similar case decided the same day and involving an order of the same Wisconsin Employment Relations Board, under authorization of the same Wisconsin Employment Peace Act, forbidding a union and its members, in connection with a labor dispute, to engage in mass picketing, picketing employees' homes, threatening employees, and obstructing entrance to employer's factory, the Court held that the state order was not void as in conflict with the National Labor Relations Act and asserted that the federal act did not so far occupy the field as to preclude the states from passing police measures supplementing the federal regulation. This case, Allen-Bradley Local No. 1111, U. E. W. etc. v. Wisconsin Employment Relations Board, did not deal with freedom of speech, but was decided solely on the basis of the commerce power and conflict with a federal statute, but is mentioned here for purposes of comparison. For like reasons perhaps the case of Hill v. Florida might also be mentioned which held invalid, solely as being in conflict with the National Labor Relations Act guaranteeing freedom in the selection of representatives for collective bargaining, a Florida statute requiring business agents of labor unions to pay $1.00 for an annual

license, to be withheld from one who has not been a citizen for ten years, or has been convicted of a felony or is not of good moral character, to be granted or denied by a board, apparently in the exercise of its sound judgment, after a thirty day period in which objections may be filed to the issuance of such a license. Also the statute required the union to pay a like fee and file certain reports.

The case of *Carpenters and Joiners Union of America, Local No. 213 v. Ritter’s Cafe*\(^\text{228}\) attracted wide attention and no small amount of criticism, and has been commonly regarded as restricting the applicable scope of the *Thornhill* doctrine. By a 5 to 4 decision the Supreme Court sustained an injunction, under the Texas anti-trust statute, restraining peaceful picketing of a cafe owned by Ritter due to the employment of non-union carpenters and painters in the erection of a new building which Ritter was having built in the same city but at some distance from the cafe. Admitting that such peaceful picketing, if it had been carried on at the scene of the new building, in connection with the erection of which the dispute arose, would have been fully protected by the doctrine of the *Thornhill* case, Mr. Justice Frankfurter asserted that such protection may properly be restricted to the scene of the dispute and the industry out of which it arose. Since there was no dispute between Ritter and his cafe employees concerning the operation of the cafe, peaceful picketing in that vicinity may properly be restrained. A contrary view, it is asserted, “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.”

Both Justice Black and Justice Reed wrote vigorous dissenting opinions, with Justices Douglas and Murphy joining with the former. The dissents pointed out that the purpose of the injunction was to protect from injury the cafe business of Ritter who was a party to the dispute, and to uphold it was to greatly circumscribe the doctrine of the *Thornhill* case.

In *Bakery and Pastry Drivers, etc. v. Wohl*\(^\text{229}\) decided the same day as *Ritter’s Cafe* case, was involved a case where independent peddlers bought baked products from bakeries and sold to retailers in competition with the distribution of bakery products through the union employees. Said peddlers worked seven days a week and refused to join the union which was attempting by collective bargaining to secure better wages, hours, and conditions.
of labor for the drivers. The Supreme Court unanimously set aside an injunction granted by a state court restraining the drivers from peaceful picketing of the bakeries and retailers with whom the peddlers did business. The Court admitted that "a state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual," but found it was practically impossible for the drivers to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed.

In Cafeteria Employees Union v. Angelos, petitioners had been enjoined by a New York court from picketing respondents' cafeteria. The alleged purpose of the picketing was to organize the cafeteria, though it was operated by its owner without the aid of employees. Signs carried by the pickets were calculated to give the impression that the pickets had been employees in the cafeteria and that the owner was unfair to organized labor. Also reference was made to patronizing the place being the equivalent of "aiding the cause of Fascism." The Supreme Court, in setting aside the injunction, said "to use loose language ... like 'unfair' or 'fascist' ... is not to falsify facts," and reiterated the doctrine of the famous Swing case to the effect that "a state cannot exclude workingmen in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him'.” Thus the fact that the pickets were not and never had been employees of the owner of the enterprise being picketed was a matter of no consequence.

Commenting on the famous Meadowmoor Dairies case which sustained an injunction against picketing because it was thought to be permeated throughout with violence and coercion, although all alleged acts of violence had occurred sometime earlier, and noting that the right of free speech in the form of future picketing cannot be forfeited because of dissociated and sporadic acts of past violence, the Court said, "still less can the right to picket ... be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.”

Perhaps one of the most important of the cases involving labor and

230. 320 U. S. 293, 64 Sup. Ct. 126 (1943).
the First Amendment is that of *Thomas v. Collins*,\(^2\) involving a statute of Texas regulating labor unions and, among other things, requiring every "labor union organizer" to present his name, union affiliation and credentials to the Secretary of State and secure an "organizer's card" before soliciting members for his organization. "Labor union organizer" is defined by the statute as a person "who for a pecuniary or financial consideration solicits . . . members for a labor union," and, as interpreted by the Secretary of State, "solicitation of memberships as an incident to other duties for which a salary is paid" will bring one within the requirements of the statute. No fee was required and the card was to be issued upon application.

R. J. Thomas, then President of the United Automobile Workers and Vice-President of the C. I. O., was scheduled to go to Texas and make a speech in a drive for union membership in connection with a campaign preceding an election for bargaining representative held under the auspices of the National Labor Relations Board.

An order was issued *ex parte* by a Texas court restraining Thomas, while in Texas, from soliciting members for specified unions and others affiliated with the C. I. O., without first obtaining an organizer's card. Thomas delivered his scheduled address and at the close thereof asked persons present to join the Union and named one individual specially in the invitation. For this he was held in contempt, fined and sentenced to a short jail term.

The Supreme Court by a division of 5 to 4 held that the rights of free speech and free assembly under the First Amendment had been invaded. In doing so it pointed out that Thomas went to Texas for the purpose of making the speech, the whole object of which "was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members," and that these were the "sole objects of the meeting," and that it was not possible to draw a line between the making of such a speech and solicitation of members, since the statute would forbid "any language which conveys, or reasonably could be found to convey, the meaning of invitation." Then, said the Court, "the restriction's effect . . . in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card."

Finally, the Court asserted that "when legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty (since it might be construed as solicitation), freedom of speech for them will be at an end. . . . We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Four Justices in dissent thought the application of the statute was narrowly restricted to working merely as a solicitor for a remuneration, and since the requirement was only one of registration for identification purposes and no discretion to withhold the card rested with the Secretary of State, no invasion of rights under the First Amendment was involved.

One other case probably should be mentioned in this connection though its exact significance is not entirely clear. *National Labor Relations Board v. Virginia Electric and Power Co.* has been frequently cited for the proposition that the Court has recognized that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."

In this case the National Labor Relations Board had found the employer guilty of unfair labor practices in foisting a company union upon its employees, and prominent among the factors resulting in the findings of company domination were certain speeches and posted bulletins. The Company contended that this finding deprived it of rights guaranteed by the First Amendment. Without saying that these utterances were fully protected by the guarantees of the First Amendment, the Supreme Court appeared to intimate as much and concerned itself with the question as to whether the Board finding was based solely on them or whether it was based on a totality of company conduct of which they were merely a part. "In determining whether the Company actually interfered with, restrained, and coerced its employees," said the Court, "the Board had a right to look at what the Company has said as well as what it has done." It was not clear, however, that the finding was not based on the speeches and bulletin alone, nor was it clear that alone they would support such a finding. Thus the case

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was sent back for reconsideration by the Board. When it returned to the Court in 1943\(^{235}\) this issue was not presented.

C. Freedom of Religion and the Jehovah's Witnesses Cases

Turning now to the cases arising from the claims of Jehovah's Witnesses that their religious liberties were being violated, the problem of the compulsory flag salute and the distribution of religious literature provoked the most litigation. In 1940 the Court had upheld in the case of *Minersville School District v. Gobitis*\(^{236}\) the compulsory flag salute regulation imposed by a local board of education in Pennsylvania against the contention that freedom of religion was denied to children of Jehovah's Witnesses whose religious teachings would not allow them to indulge in this salute to the flag which to them was a "graven image" within the meaning of certain Biblical commands (Exodus 20, 4 and 5), and the practice a form of idolatry. A very vigorous dissent by Mr. Justice Stone was to become the pattern for a majority opinion three years later in *West Virginia State Board of Education v. Barnette*\(^{237}\) denying validity to a similar flag salute requirement and specifically overruling the *Gobitis* case. The West Virginia regulation provided that refusal to salute the flag was to be regarded as an act of insubordination punishable by expulsion. In addition to that the expelled child was unlawfully absent and to be proceeded against as a delinquent, and the parents or guardians of such child were liable to prosecution for causing delinquency of a minor child and if convicted subject to both fine and imprisonment as provided by statute authorizing the regulation.

In holding this whole compulsory set-up unconstitutional, Mr. Justice Jackson, speaking for six members of the Court, pointed out that the pledge of allegiance to the flag required to accompany the salute amounted to a "form of utterance," an "affirmation of a belief and an attitude of mind." Then, continued the opinion:

"It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more im-

\(^{235}\) 319 U. S. 533, 63 Sup. Ct. 1214 (1943).
\(^{236}\) 310 U. S. 586, Sup. Ct. 1010 (1940). See Note (1941) 6 Mo. L. Rev. 106.
\(^{237}\) 319 U. S. 642, 63 Sup. Ct. 1178 (1943).
mediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort to muzzle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”

Then, referring to the “important, delicate, and highly discretionary functions” of a board of education, the opinion asserts, “that they are educating the young for citizenship is a reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”

Justices Roberts and Reed dissented by a mere statement that they adhered to the views expressed in the *Gobitis* case, while Mr. Justice Frankfurter who wrote the majority opinion in the *Gobitis* case dissented at great length, building upon his earlier opinion and emphasizing that the only issue for the Court was “whether legislators could in reason have enacted such a law. . . . It would require more daring than I possess,” he asserted, “to deny that reasonable legislators could have taken the action which is before us for review.” He emphasized that the state legislature should be left free to formulate its own policy about such matters and intimated that the decision of the majority placed the Court in a position of a superlegislature. He denied that the clear and present danger test had any proper application to this sort of situation and asserted that the function of the Court is the same in all cases of challenge to the constitutionality of legislation, regardless of what particular provision of the “Bill of Rights” may be “invoked.”

It is in this last connection that the majority opinion sets forth a doctrine that is regarded by the present writer as of special interest and importance. For some years the suggestion has been repeated to classes in Constitutional Law in this Law School that there is a substantial difference between the general and indefinite guaranty of due process of law as contained in the Fifth and Fourteenth Amendments and the more specific commands of the First Amendment, and that when the Court reads into the “liberty” provision of the due process clause of the Fourteenth Amendment the guarantees of freedom of speech, freedom of the press, freedom of religion and freedom of assembly contained in the First Amendment, they should be carried into the Fourteenth with all of their specific and definite
meaning that they contain as originally set out in the First. It was therefore of more than ordinary interest to find the Court for the first time clearly embracing this conception through the following assertion by Mr. Justice Jackson:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more specific than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

It is also of interest to note that Justices Douglas, Murphy, and Black, who joined in this majority opinion and who had joined in the earlier Gobitis opinion, had, in the case of Jones v. Opelika (discussed infra) in 1942, done the unusual by calling attention to the fact that they believed a mistake had been made and that the Gobitis case had been wrongly decided.

On the same day that the Barnette case was decided Mr. Justice Roberts handed down for the Court a unanimous opinion in Taylor v. Mississippi reversing convictions of three persons under a Mississippi statute penalizing as a felony the communicating of views and opinions calculated to encourage disloyalty to the government, advocate the cause of the enemy, or which "reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag." All of the convicted persons were Jehovah's Witnesses and most of their utterances were directed against the compulsory flag salute. There was no charge that the communications had been made with any evil or sinister purpose, or that subversive action had been advo-
cated, or that the effect was to threaten any clear and present danger to our institutions or our government. The *Barnette* case was regarded as largely controlling.

Several cases during this period have involved city ordinances requiring a license for the sale or distribution of books or other literature, the validity of which under the First Amendment was drawn in question on behalf of Jehovah's Witnesses distributing religious literature. The first in point of time among the group was *Jones v. City of Opelika* involving similar ordinances of cities in Alabama, Arkansas, and Arizona requiring the securing of a license and the payment of a substantial license fee for peddling which were applied to members of this religious sect going from house to house offering for sale books and pamphlets as a means both of spreading their religious doctrine and of financing their crusade. Those who would not or could buy the literature, at 25 cents per book or 5 cents per pamphlet, usually received it anyway and any contribution would be accepted. On the ground that commercial methods were being employed, and "the First Amendment does not require a subsidy in the form of a fiscal exemption," five members of the Court sustained the application of the ordinances as valid. The fact that the licenses were subject to revocation at the discretion of city officials was regarded as unimportant since the defendants had not applied for or received licenses. Justices Stone, Black, Douglas and Murphy presented a vigorous dissent.

A year later, on reargument, with Justices Reed, Frankfurter, Jackson and Roberts dissenting, judgment in this case was vacated along with the decision of the Court in *Murdock v. Pennsylvania* holding invalid as applied to similar distributions of religious literature an ordinance of the City of Jeannette, Pennsylvania, prohibiting the sale of goods, wares, or merchandise of any kind by canvassing for, or soliciting without a license. In the latter case the Court emphasized that the Jehovah's Witnesses, who also played phonograph records expounding their religious views, spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature in the way employed in these cases, and in so doing claimed to "follow the example of Paul, teaching 'publickly, and from house to house'," taking literally the mandate of the Scriptures, "Go ye

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into all the world, and preach the gospel to every creature." All was being done in the sincere belief that they were "obeying a commandment of God."

In denying that the solicitation of funds in connection with the distribution turned the religious crusade into a purely commercial distribution which admittedly could be licensed, as had been held in *Valentine v. Chrestensen*, the Court took the position that the lump sum license tax as here imposed was in effect a fee for the privilege of carrying on religious activity —a flat tax imposed on the exercise of a privilege granted by the Bill of Rights—and which might be made so heavy as to compel its complete discontinuance. "A state may not impose a charge for the enjoyment of a right granted by the federal constitution."

On the same day as the *Murdock* decision the Court also held invalid, as applied to Jehovah's Witnesses distributing leaflets advertising a religious meeting, a city ordinance making it unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell or otherwise summon persons to the door of any residence to receive such handbills, et cetera. In the case of *Martin v. City of Struthers* the Court emphasized that the distribution of handbills, leaflets, etc., historically was a well accepted method of communicating both religious and political information and that to prohibit it in this fashion would be violative of both freedom of speech and freedom of the press, at least in the absence of a command by the owner to stay away.

In *Follett v. Town of McCormick* the Court applied the doctrine of the *Murdock* case against imposition of a license fee in the case of a resident preacher whose only source of income was that from sale of the books and pamphlets put out by Jehovah's Witnesses.

In *Largent v. Texas* the Court unanimously invalidated, again as applied to a Jehovah's Witness, an ordinance requiring a permit to sell books and authorizing the mayor to issue the permit if he "deems it proper or advisable" after investigation. The case, of course, was controlled by such earlier cases as *Lovell v. City of Griffin*, *Schneider v. New Jersey*, and *Cantwell v. Connecticut*.

244. 321 U. S. 573, 64 Sup. Ct. 717 (1944).
246. 303 U. S. 444, 58 Sup. Ct. 666 (1938).
247. 308 U. S. 147, 60 Sup. Ct. 146 (1939).
In *Jamison v. Texas*\(^{249}\) a member of Jehovah’s Witnesses was charged with distributing handbills on the streets of Dallas in violation of an ordinance completely prohibiting such distribution, the enforcement of which was sought to be justified on the basis of *Valentine v. Chrestensen*\(^{250}\) approving such control over the distribution of commercial advertising, since the religious leaflets here contained an invitation to contribute funds. The latter content was held not to bring the situation within the doctrine of the *Valentine* case, and the ordinance as here applied was held invalid.

Very recently the Supreme Court had before it other cases of Jehovah’s Witnesses engaged in religious activity and distributing religious literature being subjected to prosecution in *Tucker v. Texas*\(^{251}\) for violation of a state statute making it an offense for any “peddler or hawker of goods or merchandise” willfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof; and in *Marsh v. Alabama*\(^{252}\) for violation of a similar statute of Alabama. In the first case the activities were being carried on from door to door in the government-owned Hondo Village constructed for defense workers and the individual was ordered to leave by the manager appointed by the Federal Housing Authority. In the second case the activities took place on a company-owned sidewalk of a company town after company warning to the individual to leave. In both cases convictions were reversed as invasions of freedom of press and religion by a divided Court of 5 to 3. In denying that company ownership of the whole town should place the situation on a par with ordinary private property, since the town was open to the public like any other town, the majority said, “When we balance the Constitutional rights of owners of property against those of people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position.”

The dissent referred to the suggestion in *Martin v. Struthers* that a property owner after warning should be protected against being summoned to his door to receive distributions of literature and thought that should apply here since the streets and sidewalks had merely been opened to a “restricted public use” by “licensees and invitees” and not dedicated to the public use.

\(^{249}\) 318 U. S. 413, 63 Sup. Ct. 669 (1943).
\(^{250}\) 316 U. S. 52, 62 Sup. Ct. 920 (1943).
\(^{251}\) 66 Sup. Ct. 274 (1946).
\(^{252}\) 66 Sup. Ct. 276 (1946).
Interestingly enough, the Supreme Court unanimously determined, in *Chaplinsky v. New Hampshire*, that cursing a police officer was not a part of freedom of religion protected by the Constitution to Jehovah’s Witnesses, neither was it covered by the guaranty of freedom of speech.

The remaining Jehovah’s Witness case of interest in this period is *Prince v. Massachusetts*, holding, by a divided Court of 5 to 4, that the Massachusetts child labor statute forbidding boys under 12 and girls under 18 to sell newspapers, magazines, periodicals, etc., on the streets or in public places may be applied to the case of a nine year old girl engaged in selling literature of Jehovah’s Witnesses on the streets of Brocton at night without violating any constitutional guarantee of religious liberty.

For other than a Jehovah’s Witness case raising questions of religious freedom, see *United States v. Ballard* involving an indictment for using the mails to defraud against a representative of the “I Am” religious sect and holding that the jury cannot properly be permitted to pass on the truth or falsity of asserted religious beliefs. The opinion of Mr. Justice Douglas emphasized that “freedom of thought, which embraces freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.” Thus the issue in the case that was to be put to the jury was restricted to whether “the defendants honestly and in good faith believe those things.”

**D. Miscellaneous**

A case that was of substantial interest and importance at the time it was decided and which may be worthy of some reconsideration since the decision of *Girouard v. United States* discussed above, is *In re Summer*. in which the state of Illinois was sustained in excluding from admission to the practice of law a conscientious objector against a claim that such action was contrary to due process of law and constituted a violation of religious

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255. 322 U. S. 78, 64 Sup. Ct. 882 (1944).
256. Supra, note 202.
257. 325 U. S. 561, 65 Sup. Ct. 1307 (1945). It may be noted that a petition for a rehearing of this case was denied on October 22, 1945 (66 Sup. Ct. 94), but this was prior to the decision in the Girouard case. See Note (1945) 10 Mo. L. Rev. 316.
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liberty. Summers had complied with all requirements for admission to the bar of Illinois except that he had not secured the necessary certificate from the Committee on Character and Fitness. This certificate was denied on the ground that being a conscientious objector he could not, in good faith, take the oath to support the Illinois Constitution which provides for service in the state militia of all men of Summers' age, though with an exception for persons exempted by the laws of the United States or of the state. The federal statutes do exempt such conscientious objectors from active military service and the state constitution contained a similar exemption in time of peace. The majority of the Supreme Court disposed of this by saying that the federal exemption statute "may be repealed." In this case, however, Summers offered to take the oath but was not permitted to do so.

The majority opinion, written by Mr. Justice Reed, referred to the cases of United States v. Schwimmer258 and United States v. Macintosh259 sustaining the denial of United States citizenship to an alien who refused to pledge military service because of religious beliefs, and found in those decisions justification for the conclusion that the action of Illinois in no way violated "the principles of religious freedom which the Fourteenth Amendment secures against state action. . . ."

No point was made of the fact that those cases dealt only with matters of statutory construction and that an alien seeking citizenship cannot complain of any qualification that may be set up in the discretion of congress, while here is involved a citizen being denied admission to one of the ordinary professions and he has a standing to complain both under the due process clause of the Fourteenth Amendment in its general application and under the guarantees of the First Amendment read into it by the Court.

The majority opinion also sought to find support for its holding in the case of Hamilton v. Regents of University of California260 upholding the State of California in denying admission to a state supported university to applicants who refused, on religious grounds, to enroll in compulsory courses in military training. That the two situations are utterly different should be entirely clear in spite of the majority opinion in the Summers case which appears to approach the problem as it would if Summers had

258. 279 U. S. 644, 49 Sup. Ct. 448 (1929).
refused to take the oath and nevertheless had insisted on practicing law. While the two cases would still not be on a par, that would present a situation a bit more nearly on the same basis as were the students who wanted the benefits of a free state provided education but refused to meet the conditions set up as a prerequisite. Here instead of asking for something in the nature of a partial gratuity, the right to enter a profession as a means of earning a livelihood is at stake and due process considerations are different. Also it is to be noted that Summers offered to take the oath and there was no showing that he would take it with reservations as to military service.

Mr. Justice Black, joined by Justices Douglas, Murphy, and Rutledge, dissented in an opinion asserting that Summers was denied a license on the ground that his "religious beliefs disqualify him for membership in the legal profession," and called attention to the fact that under this requirement all Quakers would be excluded. He also emphasized that under existing laws men of Summers' belief would be excluded from any call to militia service, that Illinois had not drafted men into the militia since 1864 and might never do so again, and if it should do so it well may exempt men of such beliefs. Then, said Mr. Justice Black, "I cannot agree that a state can lawfully bar from a semi-public position, a well qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted."

The very strong reliance of the majority upon the Schwimmer and Macintosh cases as justification for their conclusions in the Summers case prompts some speculation as to probable future adherence to the doctrine announced in this case in view of the more recent decision in the Girouard case expressly repudiating those earlier cases.

In this final miscellaneous category may also properly be listed such cases as Oklahoma Press Publishing Company v. Walling and Mabee v. White Plains Publishing Company holding that application of the Fair Labor Standards Act to the business of publishing and distributing newspapers does not violate freedom of the press as guaranteed by the First Amendment.

262. 66 Sup. Ct. 511 (1946).