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In the death of Arlene B. Hadley, for twenty years Registrar of the Yale Law School, the School has lost a loyal officer and the JOURNAL a faithful friend. Counsellor to five deans, she gave integrity, efficiency, and continuity to administration, solving many of the vexing problems of academic life. The School is a better place to work in for her work in it. A warm memory remains.

THE IMAGE IN THE MIRROR: THE FUNCTIONS OF THE SUPREME COURT TODAY AS REFLECTED IN ITS CURRENT OPINIONS

"Of the writings of the Fathers there is no certain matter agreed upon."

Andrew Horne, *The Mirrour of the Justices* (c. 1300).

"Why it's a looking-glass book, of course! And if I hold it up to a glass, the words will all go the right way again."

Lewis Carroll, *Through the Looking Glass*.

It has been little more than ten years since Mr. Justice Roberts expatiated

so bravely on the simplicity of the judicial process.¹ The intervening decade has demonstrated that the simplicity was at least deceptive enough to make the Justice change his mind more than once.² Since then the Court has been more circumspect in its pronouncements.

But other writers have more than made up the deficiency. In the spate of explanations let loose by the judicial revolution of 1937 and its aftermath,³

1. "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." *United States v. Butler*, 297 U.S. 1, 62-3 (1936). *And cf.*: "All, therefore, which we have to do is, first to ascertain, on the ordinary principles of construction, what is the true meaning of any of the Articles [of Religion] alleged to be infringed; next, what is the fair interpretation of the language used by Mr. Heath; and then, finally, to decide whether, by his language so construed, he has or has not put forward doctrine which contradicts the Articles." *Heath v. Burder*, *Brodrick & Fremantle's Ecclesiastical Cases* 212 (1862).

2. *Compare* *Mulford v. Smith*, 307 U.S. 38 (1939), *with* *United States v. Butler*, *supra* note 1. *Compare* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) in which Mr. Justice Roberts cast the deciding vote, *with* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

3. Most of this literature has not survived the decade. Some of the more worthwhile contributions are CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* (1942) (an able presentation, by a political scientist, of judicial review as a non-judicial political function); COHEN, *THE FAITH OF A LIBERAL*, c. 19, *Constitutional and Natural Rights in 1789 and Since* (1946), (an outright attack on the institution of judicial review, discussed in Rostow, *Book Review*, 56 *YALE L. J.* 412, 414 (1947)); CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (8th ed., 1946) (previous editions published in 1924, 1930, 1937, 1938, and 1941 provide a useful historical resumé of constitutional doctrine although the arrangement of the text perhaps lends itself too easily to purely conceptual treatment); CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941); CORWIN, *COURT OVER CONSTITUTION; A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1938); CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947); CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (Storrs Lectures, Yale University, 1934) (As the outstanding judicial historian of the 'thirties, Corwin's natural concern with the constitutional question appears somewhat less justified today than it was ten years ago.); CURTIS, *LIONS UNDER THE THRONE* (1947) (reviewed *infra* pp. 1458-73); FRANKFURTER, *LAW AND POLITICS* (1930) (a collection of essays providing a key—perhaps—to the enigmatic Justice); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) (an interpretative history of the crisis of the 'thirties); KONEFSKY, *CHIEF JUSTICE STONE AND THE SUPREME COURT* (1945) (a scholarly study, couched largely in terms of Hamilton and Braden's "special competence" notion, *infra*); SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES*, c. 9 (Walgreen Lectures, University of Chicago, 1946) (the judicial process as integration and justification of governmental activity).

Braden, *Umpire to the Federal System*, 10 *U. OF CHI. L. REV.* 27 (1942) (a prescient account of the beginnings of a new assertion of judicial power in terms of statutory interpretation, after the constitutional weapon had been effectively blunted); Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 *YALE L.J.* 1319 (1941) (the source of one of the leading current doctrines of judicial review); Kennedy, *Portrait of the New Supreme Court*, 13 *FORD. L. REV.* 1 (1944), 14 *FORD. L. REV.* 8 (1945) (a forthright expression of the desire for certainty at all costs); Pritchett, *The Coming of the New Dissent: The Supreme Court 1942-43*, 11 *U. OF CHI. L. REV.* 49 (1943); Prit-

ideas of judicial self-restraint,⁴ special competence,⁵ and ritual exposition of an ideological pattern in day-to-day governmental action,⁶ among others, have competed to define and justify the scope of the judicial function. The attempt will be made here to analyze the Court's position among the agencies of government, and in society at large, as expressed in the opinions of the 1946 term.

The Court is constantly concerned with the political problems involved in its relations with the other branches of government, state and federal, as well as with individual parties, both corporate and corporeal, at the bar of justice. At the same time it is unavoidably aware of the impact of its opinions on the structure of society itself. It would be short-sighted to distinguish these in-

chett, *Dissent on the Supreme Court, 1943-44*, 39 AM. POL. SCI. REV. 42 (1945); Pritchett, *The Divided Supreme Court, 1944-45*, 44 MICH. L. REV. 427 (1945) (these three articles are written entirely in terms of statistical trends on the Court, not to be over-emphasized, but nevertheless illuminating); Schlesinger, *The Supreme Court: 1947*, 35 FORTUNE 73 (an eager attempt to demonstrate, with pictures, that the Court divides not on substantive issues, but on the wisdom of judicial self-restraint); Sears, *The Supreme Court and the New Deal*, 12 U. OF CHI. L. REV. 140 (1945) (a vigorous reply to the Kennedy argument *supra*).

Some of the early literature has retained more vitality than recent efforts: BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912, reprinted 1938); FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) (with particular emphasis on the historical development of the Court's appellate jurisdiction, and the expansion of its discretionary powers); HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS*, Parts II, III, (Harvard Studies in Jurisprudence IV, 1930) (an exposition of the growth of judicial review against the general philosophical background of jurisprudence and comparative law); POWELL, *THE LOGIC AND RHETORIC OF CONSTITUTIONAL LAW*, 15 J. PHIL. PSYCH. AND SCI. METHOD 645 (1918) (an effective debunking of much of the carefully cultivated mystery surrounding constitutional law). And see BROOKS ADAMS, *THE THEORY OF SOCIAL REVOLUTION* c. 3, *American Courts as Legislative Chambers* (1913).

4. The feeling that the Court should make every effort to avoid substituting its judgment for that of the legislature or the executive developed as a natural reaction to the constitutional intransigence of the pre-Roosevelt Court. ". . . while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." Mr. Justice Stone, dissenting in *United States v. Butler*, 297 U.S. 1, 78-9 (1936). This is perhaps an inevitable philosophy for an authority without the sanctions of an enforcement arm or the sanctity of elective office, CURTIS, *op. cit. supra* note 3, at 324, but it seems of limited usefulness, despite the remarks of Schlesinger, *supra* note 3, in deciding many of the complex issues before the Court today; moreover, it is too easily invoked on both sides of a substantive controversy.

5. Those who acknowledged judicial review as an historical fact, surviving even the Court revolution of 1937, felt the need for a more positive philosophy. That need was satisfied at least for a time by the notion that the scope of the Court's authority was limited by a special competence to deal with certain kinds of problems, notably encroachments on individual freedom, and not with others, notably government regulation of business. This oversimplification of the idea subtly expounded by Hamilton and Braden, *supra* note 3, has already involved its proponents in some of the paradoxes which those authors suggest.

6. SWISHER, *loc. cit. supra* note 3.

terwoven threads of decision as merely "adjective" and "substantive". It would be foolhardy to attempt to unravel them. Yet the warp and woof of the Court's work must be examined separately, in order to trace the pattern of their interaction in the decision-making process.

A limiting condition on any such appraisal is the lack of agreement among the justices themselves. A brief statistical excursion may serve to cast some light on this problem, although the sample is necessarily so small that only quite gross differences are significant.

TABLE I⁷
Non-Unanimous Opinions in Considered Cases

Year	Total Opinions	Non-Unanimous Opinions	
		Number	Per Cent
1900	196	46	23
1910	168	22	13
1920	223	39	17
1930	168	18	11
1935	160	26	16
1936	162	31	19
1937	170	46	27
1938	149	50	34
1940	169	47	28
1942	171	75	44
1944	163	94	58
1946	144	86	60

Table I indicates a definite increase over earlier decades in the percentage of non-unanimous opinions. A corollary of this phenomenon is the growing popularity of the separate concurrence, at least with certain justices.⁸ This non-unanimity is accentuated by the predominance of 6-3 and 5-4 divisions, which comprise more than half the total number of split decisions.⁹

7. Grateful acknowledgment must be made here to Professor H. C. Pritchett for the guidance furnished by his statistical studies of previous terms of the Court, *supra* note 3. In order to make this data consistent with his, the form of his work has been followed almost exactly in this and the following tables. Only cases for which opinions were published are included, and where two or more cases were considered together, they are taken as a unit. The figures in this table for previous years are Professor Pritchett's.

8. The trend has been noted especially in Kennedy, *supra* note 3, and Field, *Unconstitutional Legislation by Congress*, 39 AM. POL. SCI. REV. 54 (1945). Mr. Justice Frankfurter is most often in separate concurrence. See letter from Thomas Jefferson to Justice William Johnson, Oct. 27, 1822, in PADOVER, *THE COMPLETE JEFFERSON*: 318 (1943) (urging continuance of the institution of individual opinions).

9.	Division	No. of Considered Cases
	5-4	26
	6-3	20
	7-2	19
	8-1	12

Cases considered by less than the full Court are not included in this tabulation.

TABLE II
Dissenting Opinions and Separate Concurrences by Each Justice
for the 1946 Term

Justice	Opinions	Dissents		Separate Concurrences
	Participated In	Number	Per Cent	
Rutledge	144	39	27	14
Murphy	141	32	22	3
Frankfurter	144	30	21	16
Black	141	27	19	3
Douglas	139	28	19	4
Jackson	137	27	19	6
Burton	143	21	15	13
Reed	141	16	11	1
Vinson	140	12	8	0

The inclination to dissent seems fairly constant among the justices, as evidenced by Table II, with Mr. Justice Rutledge most frequent, but by a small margin.¹⁰

When the Court is so frequently divided on a fairly even basis and with the division signifying more than individual cantankerousness it is reasonable to assume that further analysis may indicate definite groupings. In the light of the figures contained in Table III, however, the bilateral structure of "liberal" and "conservative" wings, suggested in earlier studies,¹¹ appears to be breaking down.¹² Besides producing strange bedfellows,¹³ this trend makes more difficult both prediction and justification of decisions, in terms of any single philosophy or clash of philosophies.

10. The Chief Justice, as the arbiter of the Court, naturally records a very low number of disagreements.

11. Pritchett, *supra* note 3. Pritchett's admittedly crude division identified the "liberal" justices as those who generally placed government above business and the individual above government, while the conservatives followed the reverse order of priorities. As the reconciliation of the two preferences becomes an increasingly complex problem, the simple distinction falls down almost as badly as Schlesinger's procedural shibboleth, *supra* note 3.

12. The most noticeable departure from the statistical pattern is Mr. Justice Douglas' defection from the Black-Rutledge-Murphy group. Nor are Justices Rutledge and Murphy as much in agreement as they were. On what was once the other wing of the Court, the fairly tight circle of Roberts, Frankfurter, Jackson, and Stone has been replaced by a loose grouping of Frankfurter (well out in front), Jackson, and trailing uncertainly behind, Reed and Burton. Reed has apparently lost his central position, but Burton's wide spread of dissents may indicate that he is assuming the Reed mantle, despite his trend, statistically, towards the Jackson-Frankfurter group.

13. Justices Jackson, Rutledge, Frankfurter, and Burton dissented together in *Everson v. Board of Education of Ewing Township*, 67 Sup. Ct. 504 (1947); Justices Jackson, Murphy, Frankfurter, and Rutledge dissented together in *Harris v. United States*, 67 Sup. Ct. 1098 (1947); Justices Murphy, Black, and Jackson dissented together in *Cleveland v. United States*, 329 U.S. 14 (1946).

TABLE III

Percentages of Agreement Among The Justices in Non-Unanimous Opinions

	Rutledge	Murphy	Black	Douglas	Vinson	Reed	Burton	Frankfurter	Jackson
Rutledge	—	74	74	55	43	50	48	34	31
Murphy	74	—	78	66	47	44	40	31	33
Black	74	78	—	63	52	52	51	35	36
Douglas	55	66	63	—	51	51	50	38	31
Vinson	43	47	52	51	—	66	70	66	60
Reed	50	44	52	51	66	—	73	59	59
Burton	48	40	51	50	70	73	—	62	56
Frankfurter	34	31	35	38	66	59	62	—	66
Jackson	31	33	36	31	60	59	56	66	—

But any examination of non-unanimous opinions, or even of decisions in which an opinion is rendered,¹⁴ necessarily presents a distorted picture of the area of agreement on the Court. Aside from the successful operation of the selective system of granting certiorari,¹⁵ which is itself evidence of a certain fundamental agreement, the present Court has been able to hand down a unanimous opinion, involving the constitutionality of the Public Utility Holding Company Act of 1935,¹⁶ which a decade ago might well have resulted in a 5-4 split. Without a dissenting voice, it has been able to prevent a circuit court of appeals from enlarging the scope of judicial review of NLRB orders,¹⁷ to allow a conscientious objector to plead the invalidity of his classification after he had reported at a civilian public service camp,¹⁸ and to include within the coverage of the Fair Labor Standards Act workers labelled "independent contractors" who nevertheless had many of the incidents of the employer-employee relation.¹⁹ Although the due process and commerce clauses are still occasional if contentious restrictions on the states,²⁰ neither remains a substantial barrier to congressional action.²¹

14. See note 7 *supra*.

15. Judicial Code, § 240, 36 STAT. 1157 (1911), as amended, 28 U.S.C. § 347 (1940).

16. *American Power & Light Co. v. SEC*, 329 U. S. 90 (1946).

17. *NLRB v. Donnelly Garment Co.*, 67 Sup. Ct. 756 (1947).

18. *Gibson v. United States*, 329 U. S. 338 (1946).

19. *Rutherford Food Corp. v. McComb*, 67 Sup. Ct. 1473 (1947).

20. *Freeman v. Hewit*, 329 U.S. 294 (1946) (commerce clause); *see Adamson v. California*, 67 Sup. Ct. 1672 (1947) (due process).

21. Braden, *supra* note 3, at 28; CORWIN, *TOTAL WAR AND THE CONSTITUTION* 176 (1947); SWISHER, *op. cit. supra* note 3, at 210 (since the date of his writing, only one congressional enactment has been held unconstitutional, note 25 *infra*); Stern, *The Com-*

THE COURT IN ITS POLITICAL RELATIONS

Relations With Congress. When dealing with the elected representatives of the people, the Court, composed entirely of post-1937 appointees,²² has understandably maintained at least the appearances of a complete hands-off policy, even where fundamental civil liberties were involved.²³ In one of its only two reversals of congressional action in the last decade, the Court almost found itself in turn reversed, when a House committee recommended²⁴ that no appropriation be made to meet the judgment in *United States v. Lovett*.²⁵ The notion, strange indeed to a student of the Old Court, that the Constitution should serve to check the inroads of a "transient [conservative] majority in Congress" has not again been advanced since it was adumbrated by Mr. Justice Douglas in his *Saratoga Springs* dissent last term.²⁶

The constitutional issue has, in so far as possible, been avoided, and the Court has even chided the lower tribunals for raising it unnecessarily.²⁷ In only seven cases has the constitutionality of a federal statute been settled at this term, in whole or in part, and then always favorably.²⁸

merce Clause and the National Economy, 1933-1946, 59 HARV. L. REV. 645, 883, 946-7 (1946); Ganoë, *The Roosevelt Court and the Commerce Clause*, 24 ORE. L. REV. 71, 137 *et seq.* (1945). For a summary of all the cases up to 1932, see GAVIT, THE COMMERCE CLAUSE (1932) Appendices A-E.

For the present affirmative limits of the commerce power, see *United States v. Yellow Cab Co.*, 67 Sup. Ct. 1560 (1947) (Court rejected argument that monopoly of local cabs is proscribed by Sherman Act simply because, as part of independent local service, passengers are carried to and from interstate trains).

22. With the death of Chief Justice Stone, Mr. Justice Black, who had been appointed by President Roosevelt on August 18, 1937, became the senior member of the Court.

23. *Cf.* *Friedman v. Schwellenbach*, (Mem.) 67 Sup. Ct. 979 (1947) (denying certiorari to review dismissal of government employee for alleged subversive activity); *Korematsu v. United States*, 323 U. S. 214 (1944); *Hirabayashi v. United States*, 320 U. S. 81 (1943); KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW*, c. 11 (1946); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945); Fraenkel, *War, Civil Liberties and the Supreme Court, 1941 to 1946*, 55 YALE L. J. 715 (1946). *But cf.* *Tot v. United States*, 319 U.S. 463 (1943) (statutory presumption in criminal statute invalidated as irrational).

24. 15 U. S. L. WEEK 2545 (April 1, 1947); but the House overrode the Committee recommendation, 15 U. S. L. WEEK 2557 (U.S. April 8, 1947).

25. 328 U. S. 303 (1946).

26. *New York v. United States*, 326 U. S. 572, 590, 594 (1946), 55 YALE L. J. 805. Even while urging that the Court overrule *South Carolina v. United States*, 199 U.S. 437 (1905), Mr. Justice Douglas suggested that a constitutional amendment would be required to change the judicially-fashioned immunities rule. 326 U.S. 572, 592 (1946).

27. *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U. S. 129 (1946).

28. In three of these cases, *Fleming v. Rhodes*, 67 Sup. Ct. 1140 (1947); *American Power & Light Co. v. SEC*, 329 U. S. 90 (1946); and *Champlin Refining Co. v. United States*, 329 U.S. 29 (1946), constitutionality seemed a foregone conclusion: the first one turned on a jurisdictional issue, the second was a unanimous decision, while in the last the four-justice dissent differed only on statutory construction. A fourth case, *United States v. Carmack*, 329 U. S. 230 (1946), involving eminent domain, was decided unanimously without serious constitutional dispute. *Oklahoma v. United States Civil Service*

The fate of the controversial Lea Act,²⁹ outlawing coercion of employers to fill unnecessary jobs, was not settled in its first Court test.³⁰ Indeed, the most controversial aspect of the Act, its application to peaceful picketing in alleged contravention of the First Amendment, was not even reached.³¹ The only real issue in the case as decided was whether the uncertainty of identifying "persons in excess of the number of employees needed"³² infringed due process. The Court, with three justices dissenting and one abstaining, held that it did not, yielding to the obvious intent of Congress, and the difficulty of otherwise effectuating it. "The Constitution," Mr. Justice Black wrote, "does not require impossible standards."³³

The second Hatch Act decision³⁴ clearly involved the only significant constitutional controversy over a federal statute; the opinions on the merits³⁵ represent three attitudes toward the problem, with particular reference to the First and Fifth Amendments. The majority argued that judicial and administrative precedent justify some regulation of "the political conduct of Government employees,"³⁶ and held that Congress could reasonably have determined on this degree of regulation—a conventional "judicial self-restraint" argument.³⁷ Mr. Justice Black maintained that the section was invalid on its face,

Comm'n, 67 Sup. Ct. 544 (1947) (one of a pair of cases dealing with the Hatch Political Activity Act, 53 STAT. 1147 (1939), 18 U.S.C. § 61 (1940)) provided a short answer, citing *United States v. Darby*, 312 U.S. 100 (1941), to the contention that denial of federal funds to state or local agencies whose officers or employees engage in political activity violates the Tenth Amendment.

29. 60 STAT. 89 (1946), 47 U.S.C. § 506 (1946 Supp.).

30. *United States v. Petrillo*, 67 Sup. Ct. 1538 (1947).

31. Under direct appeal from dismissal of the information, the Court could deal only with the validity of the Act on its face.

32. 60 STAT. 89 (1946), 47 U.S.C. § 506 (a) (1) (1946 Supp.).

33. *United States v. Petrillo*, 67 Sup. Ct. 1538, 1542 (1947).

34. *United Public Workers v. Mitchell*, 67 Sup. Ct. 556 (1947).

35. The first question presented to the Court was whether 11 of the 12 appellants who sought to enjoin enforcement of section 9(a) of the Hatch Political Activity Act, *supra* note 28, and to have the provision declared unconstitutional, had stated in their complaints any justiciable case or controversy. Because none of these 11 had engaged in any of the prohibited activities since the Act had gone into effect, but only alleged their desire to do so, a majority of five, Justices Murphy and Jackson abstaining, concluded that they had not properly challenged the constitutionality of the Act. Mr. Justice Douglas argued, however, with Mr. Justice Black concurring, that it would be unreasonable to ask government employees to jeopardize their jobs to test the statute, when the broad scope of the declaratory judgment was available.

Mr. Justice Reed, speaking for the majority, complained that "such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of the courts. . . ." *Id.* at 564. Mr. Justice Douglas replied that "their proposed conduct is sufficiently specific to show plainly that it will violate the Act. The policy of the Commission and the mandate of the Act leave no lingering doubt as to the consequences." *Id.* at 578. Neither one suggested abandonment or modification of the traditional criteria of judicial competence.

36. *Id.* at 571.

37. See note 4 *supra*.

because of its vague and sweeping prohibitions, and because it invades the specific prohibitions of the First Amendment—a typical “special competence” argument.³⁸ Mr. Justice Douglas dealt only with the application of the Act to industrial workers as a class, and his concern, extensively documented, was apparently with the disenfranchisement that might result under the Act in the event of government ownership. This too is, at least formally, a “special competence” argument, but the tone of the opinion suggests that the government-in-industry problem was its real basis.

In the great bulk of cases involving congressional enactments, however, the Court has leaned heavily on statutory construction, frequently without invoking constitutional support.³⁹ The most debated issue becomes, therefore, the meaning of the silence of Congress.⁴⁰ Although the already weakened doctrine that silence is equivalent to acceptance⁴¹ appeared after the *South-Eastern Underwriters*⁴² case to be as dead in statutory interpretation as it is in the law of contracts, it seems to have received a new lease on life.

The question was raised on the first decision day of the term, when Mr. Justice Rutledge, concurring separately in *Cleveland v. United States*,⁴³ inveighed against the notion that almost 30 years of congressional silence after an early decision⁴⁴ indicated acquiescence in the extension of the Mann Act to cover non-commercial vice. The unusual circumstance of the concurrence was that the majority rested its holding only by implication on the argued point, and only secondarily on the precedent. Mr. Justice Douglas, for the Court, attempted to show that the language of the Act itself, taken in its cultural context, was plainly meant to include polygamy, the offence charged. Yet three dissenting justices, in addition to Mr. Justice Rutledge concurring, centered their attack on the earlier decision.⁴⁵ The revival of the “non-commercial vice” issue gave the dissenters a long-awaited opportunity to attack at the source. On the other hand, the majority had a choice: it could either start

38. See note 5 *supra*.

39. It is perhaps significant that in three of the most controversial cases of the term in this area, neither dissent nor majority opinion argued a constitutional issue. *Cleveland v. United States*, 329 U.S. 14 (1946); *United States v. United Mine Workers*, 67 Sup. Ct. 677 (1947); *Packard Motor Car Co. v. NLRB*, 67 Sup. Ct. 789 (1947).

40. See Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927), for an analysis of the traditional doctrine.

41. “The psychoanalysis of Congress is a perilous venture when that body speaks and a hopeless task when it is silent. It would seem that the only sensible course is to hold that when Congress says nothing it means what it says.” Sholley, *The Negative Implications of the Commerce Clause*, 3 U. OF CHI. L. REV. 556, 588 (1936). See Lyon, *Old Statutes and New Constitution*, 44 COL. L. REV. 599 (1944) (tracing the gradual disappearance of the notion that Congress intends statutes to be interpreted in the light of the constitutional limitations in force at the time of their enactment). Cf. *Girouard v. United States*, 328 U.S. 61 (1946), discussed in Fraenkel, *supra* note 23, at 731.

42. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

43. 67 Sup. Ct. 13, 16 (1946), 56 YALE L. J. 718 (1947).

44. *Caminetti v. United States*, 242 U.S. 470 (1917).

45. Justices Murphy, Black, and Jackson dissented.

fresh by distinguishing away the earlier decision, or it could rely on the precedent, without offering independent reasons. It chose to strengthen its position by doing both. The doctrine of silence as acquiescence was not a necessary tool for the majority, but its obverse was essential for the dissent.

But when the dissent finds itself opposing a change in substantive law, it invokes the silence-acceptance doctrine with considerable vigor, as did Mr. Justice Frankfurter in a pair of patents cases,⁴⁶ suggesting that congressional action should be necessary to disestablish the doctrine that a licensee cannot challenge the validity of a patent. And Mr. Justice Douglas, with the Chief Justice and Mr. Justice Burton concurring, may have stretched the congressional silence doctrine still further, in his dissent to the *Packard*⁴⁷ decision on the inclusion of foremen under the provisions of the National Labor Relations Act.⁴⁸ His first argument can be put in syllogistic form: The implications of such a step as this for our economy are far-reaching. Congress made no mention of foremen in the Act, either to exclude or to include them. Therefore Congress must have intended not to include them. The doctrine thus operates *ex post facto*, since the previous silence of Congress can be taken to indicate approval of the Court's present position. Would it not be simpler to admit ignorance of congressional intent?

No member of the Court has maintained an entirely consistent attitude towards this problem of congressional ambiguity; to take Mr. Justice Frankfurter as an example is not to imply that he is less consistent than his brethren. His strongly worded patents dissent⁴⁹ passed lightly over the fact that the patents doctrine he asserted was in effect reversed four years earlier,⁵⁰ without an audible response from Congress.⁵¹ In *Confederated Band of Ute Indians v. United States*⁵² he was willing, with Justices Murphy and Douglas, to enforce an "informal acknowledgement" by Congress of an expanded reservation grant, while his lone dissent in *Insurance Group Committee v. Denver & R.G.W.R.R.*⁵³ carried deference to congressional intent to an extreme point. The case involved a railroad reorganization which had

46. *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402, 403 (1947); *Katzinger Co. v. Chicago Metallic Manufacturing Co.*, 329 U.S. 394, 403 (1947) (joint dissent). See *infra* p. 1376.

47. *Packard Motor Car Co. v. NLRB*, 67 Sup. Ct. 789, 794 (1947).

48. 49 STAT. 449 (1935), 29 U.S.C. § 151 (1940).

49. *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402, 403 (1947); *Katzinger Co. v. Chicago Metallic Manufacturing Co.*, 329 U.S. 394, 403 (1947) (joint dissent).

50. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173 (1942). Cf. *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 672 (1944) (separate concurrence by Justices Black and Murphy, castigating Mr. Justice Frankfurter's dissent, *id.* at 673, on the ground that it represented only his personal opinion, without precedent or authority).

51. But Mr. Justice Frankfurter did not go as far as Mr. Justice Douglas. See note 26, *supra*. And see *infra* pp. 1376 ff.

52. 67 Sup. Ct. 650 (1947).

53. 329 U. S. 607, 621 (1947).

been once before the Court⁵⁴ and came up again on appeal from the denial of a motion for re-examination of the plan in the light of changed circumstances.⁵⁵ The denial order was affirmed, on the ground that the allegations of changed conditions were not specific enough to warrant upsetting so complex and long-drawn-out an administrative and judicial determination. But Mr. Justice Frankfurter raised an issue nowhere mentioned in the majority opinion. Stressing the public policy issues involved, he pointed to the fact that the Government, which had originally filed an *amicus* brief in favor of the plan, had subsequently withdrawn. And he explained its withdrawal by reference to congressional action to amend Section 77 of the Bankruptcy Act.⁵⁶ The Justice proposed, therefore, that the Court withhold action on the reorganization plan, until the expected congressional action had taken place. In this instance, then, it took judicial audacity to exercise judicial self-restraint; and what might also appear to be restraint on the part of the majority in refusing to anticipate Congress, may be more akin to inflexibility in the face of a clear, if not formal, declaration of congressional intent.

Relations with the Executive. Here, as elsewhere, the Court takes self-restraint as its frequently-expressed rule—at least until it finds grounds to break the rule. Even the affirmance of an administrative order, upon re-examination of the evidence, was criticized by Justices Rutledge and Frankfurter, who chided the Court severely for reviewing the case on any other grounds than “abuse of [administrative] discretion.”⁵⁷ And in a situation where the Court intervened only to break an administrative deadlock, Mr. Justice Frankfurter dissented, declaring simply that “if it be said that thus far deadlock has resulted, it does not follow that it will continue, if the Court keeps hands off.”⁵⁸

But Mr. Justice Frankfurter again dissented⁵⁹ when the Court allowed the SEC to reissue an order previously reversed, on the ground that the new order was based on findings explicitly within administrative experience, while the previous one had been based on an erroneous reading of judicial precedents. And when the Court approved the administrative discretion of the NLRB in certifying as a bargaining unit plant guards serving as auxiliary military police, thereby giving judicial approval to the administrative recom-

54. *RFC v. Denver & R.G.W.R.R.*, 328 U.S. 495 (1946).

55. District and circuit court actions unreported.

56. 49 STAT. 911 (1935), 11 U.S.C. §205 (1940). Congressional action had been temporarily frustrated by Presidential veto, but only because the President had felt that the bill was too weak to accomplish its stated purposes. His veto message had elicited a response from members of both Houses, representing both parties, which indicated that a new measure would promptly be enacted. *Insurance Group Committee v. Denver & R.G.W.R.R.*, 329 U. S. 607, 622 (1947).

57. *Board of Governors v. Agnew*, 329 U. S. 441, 449 (1947).

58. *Order of Ry. Conductors v. Swan*, 329 U. S. 520, 530 (1947).

59. *SEC v. Chenery Corp.*, 67 Sup. Ct. 1575, 1584 (1947). Mr. Justice Jackson joined in this dissent, the Justices withholding their opinions until the next term of Court.

mentations embodied in a War Department circular, Justices Frankfurter and Jackson were joined in dissent by the Chief Justice.⁶⁰

Mr. Justice Jackson was again unwilling to trust the discretion of the NLRB when he alone dissented from a decision approving the Board's policy against post-election challenges.⁶¹ He based his dissent on the fact that the Board had exceeded its discretion because there was no opportunity for anti-union employees to challenge ballots before or during the election, although the employer was able to challenge at those times. But since this action was brought by the employer to contest the result of an election, it should be clear that there is substantial identity of interest between employer and anti-union employees. It could be argued that Mr. Justice Jackson was rather substituting his judgment for that of the Board, on the administrative question of the point at which election results should become final. Whatever the substantive merits of his arguments, they indicate the inutility of the "hands off" doctrine as an index of prediction; its impact is easily avoided.

Only in the ICC cases are the latent complexities and paradoxes of the Court's relations with the executive made plain. Two rate cases are involved, one concerned with regional differentials,⁶² and the other with differentials between means of transportation.⁶³ Both cases raise issues of statutory authority as well as of administrative discretion.

The regional rate case arose over the ICC's attempt to enforce a recent amendment to the Interstate Commerce Act, extending the prohibition against discrimination by adding the words "region, district, territory".⁶⁴ When the Commission, pending further inquiry, ordered an overall regional adjustment, not only lowering rates in the South and West, but also raising them in the North and East, the states themselves sought an injunction.⁶⁵ The opinion of Mr. Justice Douglas affirming the ICC's order for the Court, reads rather like the report of an administrative commission or congressional committee than like the normal work-product of the judiciary. Its graphs, charts, and statistics serve their purpose admirably, but it is a purpose alien to orthodox concepts of the judicial function, and one to which the machinery of the Court is not at present adapted. Yet the form of the opinion follows logically upon its reading of the statutory command. The Court held that regional discrimination could be proved even where actual discrimination against individual shippers could not be shown because "discriminatory rates

60. *NLRB v. E. C. Atkins & Co.*, 67 Sup. Ct. 1265, 1274 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 67 Sup. Ct. 1274, 1282 (1947).

61. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 335 (1946).

62. *New York v. United States*, 67 Sup. Ct. 1207 (1947).

63. *ICC v. Mechling*, 67 Sup. Ct. 894 (1947).

64. *Interstate Commerce Act*, 24 STAT. 379 (1887), as amended, 49 U.S.C. § 3 (1) (1940).

65. *New York v. United States*, 65 F. Supp. 856 (1946).

[might prove] to be such effective trade barriers as to prevent the establishment of industries in those outlying regions."⁶⁶ And any kind of judicial review of administrative action on so broad a scale, even though it give the administrative agency more latitude than usual, must take the Court out of its field of so-called special competence. The dissenting justices' resistance to the Court's construction of the statute is perhaps understandable in view of the extensive economic consequences of that construction, but it is only excusable if procedural difficulties be allowed to govern substantive decisions.

The effect of statutory interpretation on administrative authority is again evident in *ICC v. Mechling*.⁶⁷ The Transportation Act of 1940⁶⁸ authorizes the ICC to "prescribe such reasonable differentials as it may find justified between all-rail rates and the joint rates in connection with . . . [a] common carrier by water."⁶⁹ The Commission prescribed a differential between barge-rail and all-rail rates, which the Court found not sustained by sufficient evidence since it, unlike the Commission, read the statute to require that rate differentials be based on cost differentials.⁷⁰ If the Court were correct in its statutory interpretation, it was not interfering with the discretion of the Commission. If it were incorrect, it was exceeding its self-defined legitimate scope. In either event, unless it were to abdicate completely, it had to deal in detailed fashion with material quite outside the scope of its so-called special competence. To determine whether evidence is sufficient to sustain findings of fact is a traditional appellate function, but when the administrative finding is that a given rate differential will produce "incurable chaos" in a rate structure, the function itself is transformed, and its traditional limitations have, at best, questionable applicability.⁷¹

The Court found itself at another doctrinal crossroads in ruling on the lawfulness of the search and seizure conducted in *Harris v. United States*.⁷² At the previous term, it had approved a narrowed application of the prohibition in the Fourth Amendment⁷³ to exclude "public papers" seized in a place

66. *New York v. United States*, 67 Sup. Ct. 1207, 1219 (1947).

67. 67 Sup. Ct. 894 (1947).

68. 54 STAT. 899, 937 (1940), 49 U.S.C. § 907 (1940).

69. *Id.* at § 907 (d).

70. *ICC v. Mechling*, 67 Sup. Ct. 894, 900 (1947). The issue had come before the Court once before, without a decision on the merits. *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943).

71. One may speculate on the possibility of the Court being forced to reconsider, on a new level, the doctrine of *Smyth v. Ames*, 169 U. S. 466 (1898), abandoned in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Pekelis, *The Case for a Jurisprudence of Welfare*, 6 LAW. GUILD REV. 611, 616 (1946) asks: "But is it true that the courts are left with the choice of being a rubber stamp or a bottleneck?"

72. 67 Sup. Ct. 1098 (1947).

73. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV.

of business.⁷⁴ Now faced with a possible extension of that application to a search of a private home, subsequent to an arrest on a routine criminal charge,⁷⁵ the same majority that had before upheld the action of the executive branch continued to uphold it,⁷⁶ as against the paramount position of civil liberties. Neither majority nor dissent relied particularly on the precedent of the previous year; the opinion of the Court appealed to the equities of the particular fact situation, and attempted to minimize its implications, while the minority opinions looked to history, and attempted to maximize the consequences of the decision. The opinions themselves do not seem to account for the fact that two of the justices popularly believed to be most vehement in defense of civil liberties are in the majority,⁷⁷ while two former Attorneys-General registered dissents.⁷⁸ If, moreover, the alternatives are posed in terms of impeding enforcement agencies in the execution of what they reasonably consider necessary regulatory activities,⁷⁹ or denying individual rights which the Court considers itself peculiarly competent to safeguard, then the paradox of decision becomes more evident.⁸⁰

Relations with the States. Judicial review of state statutes has counted for more, in political as well as statistical significance,⁸¹ than the periodic skirmishes between Court and Congress. Perhaps more importance should be attached, therefore, to this group of cases, than to any other under considera-

74. *Davis v. United States*, 328 U. S. 582 (1946) (seizure of OPA coupons); *Zap v. United States*, 328 U. S. 624 (1946) (seizure of cancelled check by officers authorized to make audit for government under war contract).

75. While searching defendant's home for stolen checks without warrant but incident to lawful arrest, FBI agents found forged draft cards on which conviction was based. The Court did not, however, apply the "public papers" rationale, but rather argued that an arrest warrant authorized a search of the entire premises under defendant's "immediate control", relying largely on dicta, and a few holdings as to searches of automobiles during prohibition.

76. Justices Black, Douglas, Reed, and Burton, and the Chief Justice formed the majority.

77. Justices Black and Douglas concurred together in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Bridges v. California*, 314 U.S. 252 (1941). *But cf.* *Kotch v. Board of River Port Pilot Comm'rs*, 67 Sup. Ct. 910 (1947), and cases and articles cited *supra* note 23.

78. Justices Jackson and Murphy served successively as Attorneys-General under President Roosevelt.

79. Especially when the regulation partakes of the nature of anti-trust prosecutions. See note 11 *supra*.

80. It is of course possible to offer other explanations of individual votes (Mr. Justice Murphy's special concern with any infringement of civil liberties, Mr. Justice Douglas' administrative background), but to account for individual choices is not to resolve the dilemma.

81. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." *Law and the Court*, speech at Harvard Law School Ass'n dinner, Feb. 15, 1913, in HOLMES, COLLECTED LEGAL PAPERS 291, 295-6 (1920). And see GAVIX, *loc. cit. supra* note 21.

tion. Recent developments suggest that special attention here is not unwarranted.

A reluctance to reach the merits has characterized the decisions in this field. The Court has been unwilling to consider even cases involving fundamental civil liberties, when the issues have not been made sufficiently precise in the state court of last appeal;⁸² it rejected a brave but perhaps insufficient offer of sociological evidence on the issue of economic bias in the selection of "blue ribbon" juries;⁸³ and, in determining whether or not a federal regulatory statute had preempted the field, it rested upon the determinations of the appropriate administrative agencies, rather than venture unassisted into the perilous field of congressional intent.⁸⁴ And in decisions on the merits, the pattern of self-restraint and "special competence" was broken, and the Court appeared to be striking down state economic regulation, while it refused to interfere with attacks on civil liberties.⁸⁵ Subsequent discussion should make the slipperiness of these concepts even more apparent.

Full consideration of the three cases in which state tax statutes were struck down⁸⁶ will be deferred for examination in their economic context.⁸⁷ But it should be noted that once the Court has decided, Mr. Justice Black dissenting,⁸⁸ that prevention of the *possibility* of double taxation lies in its province,

82. *Rescue Army v. Municipal Court of Los Angeles*, 67 Sup. Ct. 1409 (1947); *cf. Gospel Army v. Los Angeles*, 67 Sup. Ct. 1428 (1947). *But cf. Clark v. Allen*, 67 Sup. Ct. 1431 (1947), decided the same day, where in a much less controversial situation the Court was willing to hypothesize about the facts. Mr. Justice Rutledge, who wrote the opinion of the Court in the former cases, dissented as to that point.

83. *Fay v. New York*, 67 Sup. Ct. 1613 (1947). The Court rejected evidence that the proportions of social groups in the jury panel did not correspond to the proportions in the community, absent a showing that an equal proportion of each group could meet the reasonable standards set for the panel. Mr. Justice Murphy, dissenting, and speaking for Justices Rutledge, Black, and Douglas as well, claimed "a constitutional right to a jury drawn from a group which represents a cross-section of the community." *But cf. Ballard v. United States*, 329 U.S. 187 (1946) (Court reversed conviction by federal jury drawn from all-male panel in jurisdiction where women eligible for jury service); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (motion to strike federal jury panel should have been granted where wage earners intentionally excluded).

84. *Rice v. Santa Fe Elevator Corp.*, 67 Sup. Ct. 1146 (1947); *Rice v. Board of Trade of Chicago*, 67 Sup. Ct. 1160 (1947).

85. *Compare Freeman v. Hewitt*, 329 U.S. 249 (1946), *with Adamson v. California*, 67 Sup. Ct. 1672 (1947). *Compare Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815 (1947), *with Carter v. Illinois*, 329 U.S. 173 (1946). *But cf. Independent Warehouses, Inc. v. Scheele*, 67 Sup. Ct. 1062 (1947); *Int'l Harvester Co. v. Evatt*, 329 U.S. 416 (1947).

86. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Freeman v. Hewitt*, 329 U.S. 249 (1946); *Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815 (1947), the latter two discussed in 56 YALE L. J. 898 (1947).

87. See *infra* pp. 1379 ff.

88. The Justice has made his position so clear, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 784 (1945); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 301 (1944); *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 316 (1938), that he no longer

then the employment of the majority's purely verbal analysis, in which it presumably has special competence, seems to result in outlawing the possibility of any state taxation of large segments of the economy.

The Court has not chosen to reject these issues, nor the highly controversial determination of the ownership of California offshore oil lands,⁸⁹ although they involved purely economic controversies; but it refused, in a curt *per curiam* sentence, to rule on the constitutionality of the Georgia county electoral system, on the ground that the question was a "political" one.⁹⁰ And yet a legislative solution is possible in the former cases, while there is little likelihood that legislators who have been elected on an inequitable distribution of the franchise can be persuaded to remove the inequities.⁹¹ The dangers to the Court in intervening,⁹² and the duty owed to those disenfranchised are equally clear; to justify abstention as self-restraint is to debase that doctrine to the level of expediency.

Both sides sought the same justification for their stands in the major civil liberties controversy of the term over the inclusion of the Federal Bill of Rights, by implication, in the due process clause of the Fourteenth Amendment.⁹³ Defendant appealed his California conviction for murder, claiming that the California statutory and constitutional provisions permitting the prosecution to comment on the failure of the accused to testify in his own behalf violated the provision against self-incrimination in the Fifth Amend-

writes a dissenting opinion in these cases. Mr. Justice Frankfurter, on the other hand, has come a long way from his dissent, with Mr. Justice Black, in *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 183 (1940) to his majority opinion in the *Freeman* case, while Mr. Justice Jackson is still the strongest opponent of "Balkanization" of interstate commerce. Compare his concurrence in *Duckworth v. Arkansas*, 314 U. S. 390, 400 (1941), with his dissent in *Independent Warehouses, Inc. v. Scheele*, 67 Sup. Ct. 1032, 1074 (1947). And see JACKSON, *op. cit. supra* note 3, at 284.

89. *United States v. California*, 67 Sup. Ct. 1658 (1947). It is interesting to note that the Court, in this somewhat confused opinion, did not consider that congressional silence amounted to acquiescence in the assertion of ownership by the state.

90. *Cook v. Fortson*, 329 U. S. 675 (1946). Under the challenged system each county has an equal voice in the selection of candidates at the party primary, without regard to population.

91. Cf. *Colegrove v. Green*, 328 U.S. 549 (1946), 56 YALE L. J. 127. Mr. Justice Rutledge, dissenting in the *Cook* case, urged that a rehearing be granted in the *Colegrove* case, and that the two be set for argument together. Justices Black and Douglas also dissented.

92. But the Court did survive its intervention into the intensely political problem presented by Southern discrimination against the Negro voter. *Smith v. Allwright*, 321 U. S. 649 (1944); cf. *United States v. Classic*, 313 U. S. 299 (1941).

93. *Adamson v. California*, 67 Sup. Ct. 1672 (1947); cf. *Foster v. Illinois*, 67 Sup. Ct. 1716 (1947) (fact that record does not disclose offer of counsel to defendant, who pleaded guilty, does not necessarily violate Fourteenth Amendment, despite guarantee of counsel in Sixth Amendment); *Carter v. Illinois*, 329 U. S. 173 (1946) (*semble*). But cf. *De Meerleer v. Michigan*, 329 U.S. 663 (1947) and cases cited therein (conviction reversed where absence of counsel held prejudicial).

ment,⁹⁴ incorporated by reference into the Fourteenth. His contention was denied by five justices, and vigorously upheld by four.⁹⁵ The issue was joined by Mr. Justice Frankfurter, concurring, who argued that, on the basis of precedent, due process in the Fourteenth Amendment did not cover all of the rights enumerated in the Bill of Rights, and, rather than depend on "subjective selection", the Court must determine whether "the whole course of the proceedings . . . offend those canons of decency and fairness which express the notions of justice of English speaking peoples. . . ."⁹⁶ Mr. Justice Black replied, for the minority, that "one of the chief objects that the provisions of the [Fourteenth] Amendment's first section . . . were intended to accomplish was to make the Bill of Rights applicable to the states."⁹⁷ And he added a full historical appendix to prove his point, went on to castigate the use of the "natural law due process formula" in the past "to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals . . . ,"⁹⁸ and concluded by asserting that application of 'natural law' deemed to be above and undefined by the Constitution⁹⁹ makes judicial review an instrument for policy decisions unchecked by legislative standards. It is reminiscent of the Old Court to find a Justice on the present Court returning to the intent of the Fathers, after three-quarters of a century of historical development. One might rather expect an appraisal of what the Amendment means today, recognizing it as a malleable instrument of policy, instead of attempting to crystallize its meaning in the hope that a more rigid verbal formula would constitute any real check on the future scope of judicial review.¹⁰⁰

The Court has apparently reversed its stand on the relative viability of state economic regulation, and regulation of individual rights and liberties. What happens when the two problems coincide can be seen in *Kotch v. Board of River Port Pilot Commissioners*.¹⁰¹ A Louisiana statute requiring that certain river pilots be licensed state officers, made a six-months' apprenticeship

94. No person "shall be compelled in any criminal case to be a witness against himself . . ."

95. Mr. Justice Reed wrote the opinion of the Court, in which Justices Vinson, Burton, Frankfurter, and Jackson joined.

96. *Adamson v. California*, 67 Sup. Ct. 1672, 1682, 1683 (1947).

97. *Id.* at 1686.

98. *Id.* at 1695, 1696. See HAINES, *op. cit. supra* note 3.

99. *Ibid.* But cf. *Harris v. United States*, 67 Sup. Ct. 1098 (1947), where Mr. Justice Black joined in exercising considerable discretion in the definition of what is a "reasonable" search and seizure.

100. "When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." Mr. Justice Holmes in *Misouri v. Holland*, 252 U.S. 416, 433 (1920).

101. 67 Sup. Ct. 910 (1947), 56 YALE L. J. 1276.

one of the prerequisites for appointment. Apprentices are selected by a pilot's association, formed by authority of state law, and in practice admitting only friends and relatives of members. The constitutionality of the pilotage law, thus administered, was before the Court, after the Louisiana Supreme Court had ruled that there was no violation of the equal protection clause.¹⁰² Mr. Justice Black's opinion held that the public benefits resulting from the familial apprenticeship system could be sufficient to justify the nepotic administration of a state law. Although *Yick Wo v. Hopkins*¹⁰³ was distinguished, and the peculiar circumstances of the piloting profession adverted to, the case gives aid and comfort to the proponents of the already widespread state anti-civil rights legislation.¹⁰⁴ And although the statute here must have the effect of excluding Negroes from the profession, no mention is made of this possibility in the majority opinion.¹⁰⁵

The basis of disagreement, however, is not that the majority differentiated discrimination on account of consanguinity from discrimination on account of race; it is rather that the majority refused to strike down the state statute unless its purpose—as distinguished from its effect—was discriminatory, or its provisions not reasonably related to the constitutional purpose of protecting navigation. The dissent insisted that one need go further, and determine whether the statute is constitutional in effect.¹⁰⁶

Without indulging in conjectural emendation of the Constitution, one can fairly say that Mr. Justice Black and the majority are straining its language. The Fourteenth Amendment says: "No state shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws;" not: "which shall be intended to deny." Mr. Justice Black has often but not always acknowledged the preferred position of civil rights and liberties,¹⁰⁷ but apparently here ignored the distinction between regulation of a man's right to do business because of the way the business is done, and regulation because of the color of the man's skin. As a dissenter both in the self-incrim-

102. 209 La. 737, 25 So.2d 527 (1946).

103. 118 U.S. 356 (1886) (reasonable municipal police statute, administered so as to discriminate against Orientals, held unconstitutional). See KONVITZ, *op. cit. supra* note 23, at 172.

104. See KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* c. 8, app. 11 (1947).

105. The dissent admits that the discrimination was not "shown to be consciously racial in character," 67 Sup. Ct. 910, 917, but finds that its effects cannot be distinguished from such discrimination. See Waite, *The Negro in the Supreme Court*, 30 *MICH. L. REV.* 219 (1946) (an historical survey).

106. As Mr. Justice Rutledge puts it:

"Classification based on the purpose to be accomplished may be said abstractly to be sound. But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment." *Kotch v. Board of River Port Pilot Comm'rs*, 67 Sup. Ct. 910, 917 (1947).

107. See note 77 *supra*, and his dissent in *Oklahoma v. U.S. Civil Service Comm'm*, 67 Sup. Ct. 544, 555 (1947), where a federal statute was involved.

ination case¹⁰⁸ and the gross receipts tax cases,¹⁰⁹ his dilemma here is apparent. Although the paradox was sharpest for Mr. Justice Black, the case should serve generally to dispel any suggestion that the Court can be neatly arrayed on a single scale, running from dominance to submission. No one-dimensional analysis can serve to interpret its multi-dimensional activities.¹¹⁰

The Court in Its Own Domain. If in its relations with other branches of government, state and federal, the Court gives at least the appearance of walking softly, in its procedural dealings with the inferior federal courts, and with parties before those courts, it carries a big stick, and shakes it from time to time. At the 1946 Term the stick descended on a national bank receiver who attempted to revive actions on which the Statute of Limitations had run because of defendant's death, of which he had no knowledge.¹¹¹ Mr. Justice Rutledge, dissenting, suggested that the period of the Statute¹¹² was intended to be permissive, not mandatory, citing the recommendations of the Advisory Committee on the Federal Rules. The stick also descended on stockholders seeking to bring derivative actions in a forum convenient for them but not for the defendant corporations.¹¹³ And it descended on defendant Jehovah's Witnesses who had sought to have their draft classification changed, and, despairing of direct appeal under the then state of the law,¹¹⁴ later had brought proceedings in *habeas corpus*.¹¹⁵ The Court held that *habeas corpus* was not available to correct an injustice done by a misreading of the law in the lower courts which did not go to the issue of jurisdiction. Three justices dissented,¹¹⁶ pointing to ample precedent for the use of the writ in much less unfortunate situations, and to the importance of maintaining its flexibility not "confined by rigidities characterizing ordinary jurisdictional doctrines."¹¹⁷

108. *Adamson v. California*, 67 Sup. Ct. 1672 (1947), and cases cited note 93 *supra*.

109. *Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815 (1947); *Freeman v. Hewit*, 329 U.S. 249 (1946).

110. No attempt is made here to deal with those cases where even an overriding concern for civil liberties served as a two-way signpost. See *Craig v. Harney*, 67 Sup. Ct. 1249 (1947) (freedom of the press held to override right to trial, in private controversy, free from outside pressures); *Everson v. Board of Education of Ewing Township*, 67 Sup. Ct. 504 (1947) (appropriation for bus fares of children attending parochial schools held not violative of First Amendment prohibition against establishment of religion, incorporated into Fourteenth Amendment). For a lay discussion of the latter case, suggestive of some of the complexities involved, see 3 COMMENTARY 562 (1947).

111. *Anderson v. Yungkau*, 329 U.S. 482 (1947).

112. Under FED. R. CIV. P., 6(b), 25(a).

113. *Koster v. (American) Lumbermen's Mutual Casualty Co.*, 67 Sup. Ct. 828 (1947); *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839 (1947), both noted in 56 YALE L. J. 1234. And see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

114. The rule of *Falbo v. United States*, 320 U.S. 549 (1944), had not been obviated by *Estep v. United States*, 327 U.S. 114 (1946).

115. *Sunal v. Large*, 67 Sup. Ct. 1588 (1947).

116. Justices Rutledge, Frankfurter, and Murphy.

117. *Sunal v. Large*, 67 Sup. Ct. 1588, 1596 (1947).

On the other hand, the Court at least negatively deferred to Congress, in refusing to create a new cause of action for damages sustained by the United States as a result of the negligent injury of a soldier by defendant's agent.¹¹⁸ Mr. Justice Rutledge's careful opinion begins by pointing to the inapplicability of the *Erie* doctrine and the flexibility of tort law, but he goes on to recognize the issue as one of federal fiscal policy rather than individual fault, and concludes that since the operative facts are not of recent origin, Congress should be left free to determine whether or not they constitute a cause of action, as it had done in many similar situations. His reasoning seems worthy of special note because it is devoid of absolutes, substantive or procedural.

The outstanding recent assertion of judicial power over parties is perhaps to be found in *United States v. United Mine Workers*.¹¹⁹ After arguing that the Norris-La Guardia Act¹²⁰ did not apply to the Government as an employer, the Court went on to say that courts may punish violations of void, but not "frivolous" orders by imposing the sanctions of criminal contempt. The point was necessary only for an adjudication of criminal rather than civil contempt,¹²¹ and it was based on at least questionable precedent;¹²² some significance, then, must attach to it.¹²³ Another aspect of the case, the fusing of civil and criminal contempt sanctions in a single unapportioned fine, merits attention. While it seems inexact to criticize the Court, as Mr. Justice Rutledge did,¹²⁴ for reversing the rule of *Gompers v. Buck's Store and Range Co.*,¹²⁵ that a criminal penalty cannot be imposed in a civil contempt action, yet its failure to separate the sanctions seems a dangerously loose procedure.¹²⁶

Relying as heavily as it does on doctrines of restraint in the face of im-

118. *United States v. Standard Oil Co. of California*, 67 Sup. Ct. 1604 (1947).

119. 67 Sup. Ct. 677 (1947).

120. 47 STAT. 70 (1932), 29 U.S.C. § 101 *et seq.* (1940).

121. Of the five justices who were willing to hold the Norris-La Guardia Act inapplicable, two, Justices Black and Douglas, would have imposed only the civil sanction. Of the five justices who concurred in the judgment, however, two, Justices Frankfurter and Jackson, did not join in the opinion of the Court on the statutory construction issue, and the other three argued the "void order" issue only as dictum. It would seem, therefore, that the actual holding was confined to its peculiar facts.

122. *United States v. Shipp*, 203 U.S. 563, 573 (1906).

123. Some of the broader implications of the holding are traced in Mr. Justice Rutledge's dissent. *United States v. United Mine Workers*, 67 Sup. Ct. 677, 720 (1947). See Comment, 47 YALE L. J. 1136 (1938).

124. Concurring opinion in *Penfield Co. v. SEC*, 67 Sup. Ct. 918, 923 (1947). In this case the Court followed the *Gompers* holding *infra*.

125. 221 U.S. 418 (1911).

126. It seems worthy of note that this assertion of judicial power was dissented from only by justices who have been characterized, with perhaps more vigor than justice, as "judicial activists." The "activist" fallacy has apparently penetrated even beyond our shores. See Laski, Book Review, 59 HARV. L. REV. 816 (1946) (criticizing Justices Black and Douglas for "judicial legislation").

ping governmental action,¹²⁷ the Court perhaps tends to lose perspective when operating unchecked in its own sphere.

THE COURT AS A DETERMINANT OF NATIONAL AFFAIRS

Yet the Court does not hold its political views in an economic vacuum. The same group of decisions that suggests conclusions about the political relations of the Court, also reflects its attitudes on economic problems, and the interplay of effect may account, in part at least, for the inadequacy of explanation exclusively in either terms.

In the extensive regulation of interstate commerce, Congress has had a free hand for a decade, and continues to have one today.¹²⁸ The idea of a national economy,¹²⁹ and of the necessity for regulating a wide variety of businesses affected with the public interest,¹³⁰ has been accepted by the Court. The NLRB,¹³¹ the OPA¹³² and the SEC¹³³ have largely been successful in maintaining and extending the scope of their authority. Only the ICC has been twice rebuffed, on the ground that it was not properly performing its statutory function in that it denied shippers the full advantages of competition between various forms of transportation.¹³⁴ Control of corporate management by private individuals may be somewhat hampered, however, by the Court's rulings in the two *forum non conveniens* cases.¹³⁵

In the anti-trust field, the Court has, however, been split. The political argument that congressional silence signifies assent, on which the four dissenting justices in the invalid patents cases rested their conclusion has been

127. For an extreme example see the dissenting opinion in *Penfield Co. v. SEC*, 67 Sup. Ct. 918, 928 (1947), suggesting that the administrative discretion of the SEC to issue a subpoena should be checkmated by the judicial discretion of the federal district court to refuse to enforce it in a civil contempt proceeding.

128. See note 21 *supra*.

129. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (with all the participating justices in agreement on the power of Congress); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

130. *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *North American Co. v. SEC*, 327 U.S. 686 (1946); *Nebbia v. New York*, 291 U.S. 502 (1934).

131. *NLRB v. E. C. Atkins & Co.*, 67 Sup. Ct. 1265 (1947); *NLRB v. Donnelly Garment Co.*, 67 Sup. Ct. 756 (1947); *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946).

132. *Fleming v. Rhodes*, 67 Sup. Ct. 1140 (1947); *Fleming v. Mohawk Wrecking & Lumber Co.*, 67 Sup. Ct. 1129 (1947); *Testa v. Katt*, 67 Sup. Ct. 810 (1947); *United States v. Bruno*, 329 U.S. 207 (1946). *But cf.* *Parker v. Fleming*, 329 U.S. 531 (1947).

133. *SEC v. Chenery Corp.*, 67 Sup. Ct. 1575 (1947); *Penfield Co. v. SEC*, 67 Sup. Ct. 918 (1947).

134. *ICC v. Mechling*, 67 Sup. Ct. 894 (1947); *United States v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947). *But cf.* *New York v. United States*, 67 Sup. Ct. 1207 (1947). See WIPRUD, *JUSTICE IN TRANSPORTATION* (1945).

135. *Koster v. (American) Lumbermen's Mutual Casualty Co.*, 67 Sup. Ct. 828 (1947); *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839 (1947), both noted in 56 *YALE L. J.*

1234. And see Braucher, *supra* note 113.

indicated above,¹³⁶ and its timeliness questioned. The economic basis for disagreement between majority and minority is perhaps clearer. Under the doctrine approved by the Court,¹³⁷ a patent licensee is encouraged to assist in enforcing the anti-trust statutes; he is permitted to plead the invalidity of the patent when sued for royalties by the patentee under an agreement containing a price-fixing clause, since such a clause would taint the entire agreement with illegality if the patent were invalid.¹³⁸ The dissent was concerned with impairment of contracts,¹³⁹ while the majority was anxious to give the fullest possible scope to the enforcement of anti-trust policy.¹⁴⁰

But a majority of five justices is a particularly unstable quantity on the Court today. When a debtor attempted to plead the invalidity, under the Robinson-Patman Act,¹⁴¹ of the purchase contract on which he was indebted, the Court, by a 5-4 vote, referred him to his administrative remedy, and directed him to pay the debt.¹⁴² And in the *Trans-Wrap* case,¹⁴³ another group of five justices put a severe limitation on the doctrine of *Mercoird Corp. v. Mid-Continent Co.*,¹⁴⁴ and the long line of allied cases, which had held that a patent may not be used to enlarge the scope of its monopoly by conditioning its use on the use of other unpatented articles. In the instant case the Court, by Mr. Justice Douglas, who had written the *Mercoird* opinion, held that a patent may be validly conditioned on the assignment of improvement patents. He argued that for private business to function as its own patent office—employing the figure used in the *Mercoird* case—is in itself a violation of the anti-trust laws, while it is not illegal to assign or to agree to assign a patent.¹⁴⁵ But he avoided the question of whether the illegality in the *Mercoird* line of cases consisted in the *de facto* patenting of unpatentable articles, or simply in the extension of the patent beyond its four corners. Once posed, the question would have answered itself, since the control was condemned in those

136. *Supra* p. 1365.

137. *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402 (1947); *Katzinger Co. v. Chicago Metallic Manufacturing Co.*, 329 U.S. 394 (1947).

138. *Id.* at 401. See Zlinkoff, *Monopoly versus Competition: Significant Trends in Patent, Anti-Trust, Trade-Mark, and Unfair Competition Suits*, 53 YALE L. J. 514, 521 (1944); Steffen, *Invalid Patents and Price Control*, 56 YALE L. J. 1 (1946).

139. *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402, 413-5 (1947); *Katzinger Co. v. Chicago Metallic Manufacturing Co.*, 329 U.S. 394, 413-5 (1947) (joint dissent).

140. *Id.* at 401-2. But the Court refused to pass on the invalidity of the price-fixing agreement in the event that the patent was valid—perhaps in order to secure a majority on the first issue. *Cf. Mercoird Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (discussed *infra*); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. General Electric Co.*, 272 U.S. 476 (1926).

141. 49 STAT. 1526 (1936), 15 U.S.C. §13 (1940).

142. *Bruce's Juices, Inc. v. American Can Co.*, 67 Sup. Ct. 1015 (1947).

143. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947).

144. 320 U.S. 661 (1944), and cases cited therein.

145. 16 STAT. 203 (1870), as amended, 35 U.S.C. §47 (Supp. 1946).

cases not as amounting to a monopoly, a requirement making proof almost impossible,¹⁴⁶ but as tending in that direction. The suggestion, therefore, that proof of actual anti-trust violation would be sufficient to reverse this decision¹⁴⁷ appears to be a disingenuous one, and the decision is clearly a setback to anti-trust enforcement.

Where the anti-trust problem has arisen in an alleged conspiracy between a labor union and a group of employers, the Court resolved a policy conflict in favor of the union.¹⁴⁸ Whereas it had once held that the Norris-La Guardia Act does not protect a labor group when it joins with a non-labor group to violate the Sherman Act,¹⁴⁹ it here decided that Section 6 of the Norris-La Guardia Act,¹⁵⁰ requiring actual authorization or ratification of acts of agents, applied to both parties in the alleged conspiracy.¹⁵¹ Mr. Justice Frankfurter, dissenting with the Chief Justice and Mr. Justice Burton, argued that Section 6 must have been intended only to require clear proof of agency, not to "remove the legal liability of organizations for the conduct of officials who, within the limits of their authority, wield the power of those organizations."¹⁵² The difficulty that he found with the position of the majority was again that it made proof almost impossible.¹⁵³ The Court however, was apparently more anxious to protect labor from possible future attacks, perhaps under an amended labor law, than to facilitate anti-trust prose-

146. Cf. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Aluminum Co. of America*, 148 F.2d 416 (C.C.A. 2d 1945).

147. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 646-8 (1947). Mr. Justice Douglas specifically distinguishes the situation in the instant case from that provided for in the Clayton Act, 38 STAT. 730, 731 (1914), 15 U.S.C. §14 (1940), making it "unlawful to condition the sale or lease of one article on an agreement not to use or buy a competitor's article (whether either or both are patented), where the effect is 'to substantially lessen competition or tend to create a monopoly.'" *Ibid.* But the assignment of improvement patents is equivalent to an agreement not to acquire competitively the articles covered by them. Mr. Justice Douglas has made a distinction without a difference.

148. *United Brotherhood of Carpenters and Joiners v. United States*, 67 Sup. Ct. 775 (1947).

149. *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*, 325 U.S. 797 (1945); *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n*, 155 F.2d 799 (C.C.A. 3d 1946).

150. 47 STAT. 70 (1932), 29 U.S.C. §6 (1940).

151. *United Brotherhood of Carpenters and Joiners v. United States*, 67 Sup. Ct. 775, 781, 784 (1947). Mr. Justice Jackson did not participate in the decision.

152. *Id.* at 788.

153. *Id.* at 789. The problem of construction might have been side-stepped, if the Court had held, as it did in *United States v. United Mine Workers*, 67 Sup. Ct. 677, 684-9 (1947), that the Act did not apply at all, but to do so it would have had to overrule *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*, 325 U.S. 797 (1945).

cutions involving unions.¹⁵⁴ The decision in the *Fay* case¹⁵⁵ suggests that the Court is unsympathetic to the notion that class antagonisms are a factor to be reckoned with in the judicial process, while the *Atkins* opinion¹⁵⁶ would argue a real faith in the possibility of labor-management cooperation. The *Petrillo* decision¹⁵⁷ seems too inconclusive to indicate anything of the Court's substantive views, while the *Lewis* case¹⁵⁸ was perhaps too much the product of political turmoil to justify comment now. To date it has not produced any unruly offspring.

The problem of state taxation of interstate business is not only one of the most vexing political problems of the federal system; it is also an economic problem of some importance in securing to each state a fair share of revenue without overburdening the activities of national businesses. It is a problem of considerable difficulty, because any general rule is likely to favor either the industrialized creditor states of source, or the agricultural debtor states of sale, to the proportionate disadvantage of the other group.¹⁵⁹

Since *United States Glue Company v. Oak Creek*¹⁶⁰ the Court has divided the question into two halves by making a broad distinction between gross and net income taxes, holding that gross taxes alone may be challenged on the ground that they impose an undue burden on interstate commerce.¹⁶¹ Since the line between gross and net taxes is one of legislative grace,¹⁶² the distinction, although of long standing, seems a dubious one. It is particularly unfortunate in view of the contrast between recent decisions based on the due process clause, which require only the absence of discrimination and a rea-

154. There is an apparent inconsistency between this decision and the result in *Harris v. United States*, 67 Sup. Ct. 1098 (1947), where the Court approved an extension of the search and seizure power which should facilitate the enforcement work of regulatory agencies, perhaps at the expense of minority groups.

155. *Fay v. New York*, 67 Sup. Ct. 1613 (1947) (claim of economic prejudice in selection of "blue-ribbon" jury panel rejected).

156. *NLRB v. E. C. Atkins & Co.*, 67 Sup. Ct. 1265 (1947) (certification of bargaining unit approved for militarized plant guards).

157. *United States v. Petrillo*, 67 Sup. Ct. 1538 (1947) (constitutionality of Lea Act approved on the face of the statute only).

158. *United States v. United Mine Workers*, 67 Sup. Ct. 677 (1947). See p. 1375 *supra*.

159. See Rodell, *A Primer of Interstate Taxation*, 44 YALE L. J. 1166, 1175 (1935).

160. 247 U.S. 321 (1918).

161. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113 (1920); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). Compare *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), with *Peck & Co. v. Lowe*, 247 U.S. 165 (1918). After the *Underwood* case, the interstate commerce issue was not raised in net income tax cases.

162. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Helvering v. Independent Life Insurance Co.*, 292 U.S. 371, 381 (1934); *Brushaber v. Union Pacific R.R.*, 240 U.S. 1, 23-4 (1916).

sonable allocation fraction,¹⁶³ and the current decisions¹⁶⁴ under the commerce clause, which seem to follow no recognizable pattern.

After using a profusion of criteria,¹⁶⁵ including transfer of title,¹⁶⁶ locus of physical delivery,¹⁶⁷ and a common sense test of the practical likelihood of double taxation,¹⁶⁸ the Court has taken a new tack. The present majority of five justices,¹⁶⁹ unwilling to follow Mr. Justice Black in leaving the entire problem to Congress, absent the actuality, or even the threat, of double taxation,¹⁷⁰ has invalidated two tax statutes this term on the grounds that one bore "directly" on interstate commerce,¹⁷¹ and, in the second case, that the operation taxed was not "sufficiently disjoined from commerce."¹⁷² Such criteria seem at best unclear, and at worst likely to give unjustifiable exemptions to interstate business at the expense of intrastate business. That it is entirely a verbal standard is evident from Mr. Justice Frankfurter's approving citation of *American Manufacturing Co. v. St. Louis*,¹⁷³ which reaches the opposite result in a similar fact situation, because the tax is labelled "manufacturing". It is perhaps this abandonment of any attempt at a factual solution of the problem which the Court has taken upon itself, that explains Mr. Justice Douglas' remark that "*Freeman v. Hewit* . . . marked the end of one cycle under the Commerce Clause and the beginning of another."¹⁷⁴

But the minority on the Court, except for Mr. Justice Black, is apparently agreed that the problem is within the province of the judiciary, whether or

163. Speaking for a unanimous court in *International Harvester v. Evatt*, 329 U.S. 416, 422-3 (1947), Mr. Justice Black said: "Unless a palpably disproportionate result comes from an apportionment, a result that makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments." Compare *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931), with *Butler Bros. v. McCollgan*, 315 U.S. 501 (1942).

164. *Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815 (1947); *Freeman v. Hewit*, 329 U.S. 249 (1946); both cases noted in 56 YALE L. J. 898 (1947). Cf. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

165. Cf. *Northwest Airlines v. Minnesota*, 322 U.S. 292, 301, 302, 308 (three different rationales for approval of the tax, and a fourth for disapproval).

166. *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940).

167. *International Harvester Co. v. Indiana*, 322 U.S. 340 (1944).

168. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938).

169. Justices Vinson, Reed, Jackson, Frankfurter, and Burton make up the group.

170. But four members are apparently reluctant to take a position as positive as that developed in Mr. Justice Jackson's polemic on "Balkanizing American commerce." *Duckworth v. Arkansas*, 314 U.S. 390, 400-1 (1941). And see note 88 *supra*.

171. *Freeman v. Hewit*, 329 U.S. 249, 253, 256, 257, 258 (1946).

172. *Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815, 819 (1947). But cf. *Independent Warehouses Inc. v. Scheele*, 67 Sup. Ct. 1062 (1947) (franchise tax on warehouse upheld as against commerce clause objections, on property tax rationale).

173. 250 U.S. 459 (1919), cited in *Freeman v. Hewit*, 329 U.S. 249, 258 (1946). And see note 88 *supra*.

174. *Joseph v. Carter & Weekes Stevedoring Co.*, 67 Sup. Ct. 815, 827 (1947).

not it is within its field of so-called special competence.¹⁷⁵ And Mr. Justice Rutledge has had the judicial temerity to suggest a working solution to the double taxation problem, until such time as Congress chooses to act.¹⁷⁶ For that reason he concurred in the *Hewitt* decision, but only because the tax did not fit into the formula he recommended. It may be that the application of his formula should be deferred, as Mr. Justice Black has suggested,¹⁷⁷ at least until there is an actual instance of double taxation, for which Congress makes no provision. The significance of the concurrence lies not in its timing, but in the fact that Mr. Justice Rutledge is willing to make a frank, factual proposal for the kind of interstitial judicial legislation which has always been an essential part of the judicial process.¹⁷⁸

CONCLUSION

A court of law cannot seek out issues to settle. But by the same token it cannot avoid, though it may perhaps defer, handing down a decision in the controversy before it. In that decision it can draw on a code of organic law and statutes, on a body of previously decided controversies, on its knowledge of the social situation in which the controversy takes place, and on its own common sense and feeling for what is "fair" and "just". The present

175. Mr. Justice Douglas wrote the opinion of the Court in *Richfield Oil v. State Board of Equalization*, 329 U.S. 69 (1946), invalidating a California sales tax on foreign exports, under the export-import clause, which he believes should be employed in its field more as the majority of the Court apply the commerce clause. Hence his concurrence, in part, as to the foreign commerce aspect of the *Joseph* case.

176. "As among the various possibilities, I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination." *Freeman v. Hewitt*, 329 U.S. 249, 279 (1946).

177. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 445 (1939).

178. "Whether or not due process under the Fourteenth Amendment forbids state taxation of acts, transactions, events or property is essentially a practical matter and one of degree depending on the existence of sufficient factual connections . . . between the taxing state and the subject of the tax." Mr. Justice Rutledge, dissenting in *Greenough v. Tax Assessors of Newport*, 67 Sup. Ct. 1400, 1408 (1947).

"In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases . . . in which reconciliation of the conflicting claims of state and national power is to be obtained only by some appraisal and accommodation of the competing demands of the state and national interests involved." Mr. Justice Stone in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-9 (1945).

"In the silence of Congress the Court, perforce, must balance the interests according to its view of sound policy, just as a court must decide ordinary causes in the absence of applicable legislation." Sholley, *supra* note 41, at 594. See also Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 19, 20 (1940), *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547 (1947).

Court finds little aid or comfort in most of these traditional guides to judgment.¹⁷⁹

But the Court still sits, and the tradition of judicial review has survived even the lean years of the last decade. All the justices have in fact participated in the assertion of considerable judicial power, although on a somewhat different scale than in the immediate past, and on somewhat different matters. The historical job of the Court as part of the working machinery of American government apparently cannot be evaded, even by those most anxious to avoid judicial "legislation".¹⁸⁰

There is, however, no real evidence as yet that the judicial power which the New Court has inherited is being used consistently, consciously, and with discretion¹⁸¹ to further the broad purposes of American government. The pattern of judicial intervention is spasmodic: now bold, now timid; in one area giving the legislature new freedom, in another imposing puzzling restraints on the individual in his relation to the State. Perhaps one difficulty is that the justices are still debating with each other in terms of the constitutional formulas and controversies of the 'thirties. The dissents of Holmes and Brandeis are no more decisive for current problems than the language of the Constitution was for them. Clearly judicial self-restraint is a caution sign, not a guide-post,¹⁸² and "special competence" is of little avail when the Court acts "not by authority of our competence but by force of our commission."¹⁸³ A franker realization by the Court of the impact of its decisions on the structure of American society might lead to a more sustained and effective exercise of its powers as a component force in the dynamics of American government.

179. The "three-fold *leitmotif*" of contemporary decisions is "awareness of freedom, confession of fallibility, and quest for extra-legal guidance." Pekelis, *supra* note 71, at 613.

180. See Mr. Justice Frankfurter's Cardozo lecture, *Some Reflections on the Reading of Statutes*, reprinted in 47 COL. L. REV. 527 (1947) in which the Justice avoids the real force of the problem by reference to statutory construction as an "art," the answers to which "are in its exercise," and suggests that the ultimate reliance is on the caliber of the Justices—an indisputable, if not a very constructive, conclusion, since he suggests no criteria for distinguishing the good from the bad.

181. "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Mr. Justice Holmes in *Missouri, K. & T. Ry. v. May*, 194 U.S. 267, 270 (1904).

182. Compare "A great part of [self-restraint] is . . . respect for the country's desire to have its own way, and that is an act of faith, not of will." Curtis, *op. cit. supra* note 3, at 325, with "The political equilibrium is threatened today because administrative agencies have seized the weapons offered by social science technology and outdistanced the courts, shackled by their innocence of the methods of modern economics or psychology." Pekelis, *supra* note 71, at 615.

183. Mr. Justice Jackson, for the Court, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640 (1943).