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Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.

—BRANDEIS, J.‡

THERE ARE MANY FANCIFUL WAYS of suggesting the accomplishment of the impossible, as making bricks without straw, or putting on Hamlet without the melancholy Dane, or making an omelet without any eggs.

The trouble with those phrases is their familiarity; they have become clichés. And so anyone interested in the expansion of the English language may note with pleasure that at the October 1950 term of the Supreme Court, that body gave us another handy phrase to add to this growing lexicon. It had a Civil Liberties term of Court—without any Liberty.

Hyperbole? Perhaps there was one egg in that omelet, a little straw for the bricks. The Prince may at least have been the off-stage noises in the legendary performance. So with Liberty at mid-Century: she was only an off-stage rumble, not a character dominating the scene.

In 1950-51, civil rights cases were by far the most important on the

* This article is the fifth in an annual series. While the general structure of the article has been the same throughout the five year period, experience has led to some modifications of its purposes, and these may now be said to be three: (a) to present a concise summary of the most interesting of the cases; (b) to comment briefly on their apparent general social significance; and (c) to make some record of factors observed concerning the institutional function of the Court. Shot through each purpose is that sense of personal relief which an author gets from expressing his own views as to the proper decision of the cases. The preceding articles are, 1946 Term, 15 *Univ. Chi. L. Rev.* 1 (1947); 1947 Term, 16 *Univ. Chi. L. Rev.* 1 (1948); 1948 Term, 17 *Univ. Chi. L. Rev.* 1 (1949); 1949 Term, 18 *Univ. Chi. L. Rev.* 1 (1950). They will be cited by the date of the Term, as 1946 Term article.

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‡ *Whitney v. California*, 274 U.S. 357, 377 (1927).

docket. Quantitatively it was a small term, with only 88 cases decided by opinion, fewer than in any year for a century.¹ But if the measure be significance of the cases decided, it was a substantial term, with more broadly meaningful decisions than in many years.

I. HIGH SPOTS OF THE YEAR

The civil rights cases were most, but not all, of the major business of the term. Within ten days of the decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, invalidating provisions in state "fair trade" acts binding non-signing dealers to the terms of price-fixing contracts between producers and other distributors, so-called "fair trade" prices began to collapse;² where the Supreme Court had pointed toward lower prices, Macy's and Gimbel's quickly went. "Color TV" should be a reality before the end of the next term of Court under a decision upholding a Federal Communications Commission order, a matter of more general interest than legal significance.³ The practice of seizing industrial plants in emergencies will be materially affected by the first contemporary decision concerning the cost of such seizures to the government.⁴

The civil rights cases were: The *Blau* cases,⁵ precluding questions of Communist affiliation before grand juries on the ground of self-incrimination (although by the slightest misstep, the witness may waive this right);⁶ *Feiner v. New York*,⁷ the first holding in Supreme Court history ever to permit the punishing of a public speaker for the astonishing reason that one member of the audience was annoyed into threats of violence by what the speaker said; and *Collins v. Hardyman*⁸ which so narrowly construed one section of the Civil Rights Act of 1871 as to eliminate it. These were but the curtain raisers for three outstanding holdings: *Joint Anti-Fascist Refugee Committee v. McGrath*,⁹ holding that the Attorney General must make at least some tiny revelation of why he puts organizations on his subversive list; the *Bailey v. Richardson*¹⁰ and *Garner v. Board of Public Works of Los Angeles*¹¹ cases respectively, upheld the national loyalty pro-

¹ The method of counting cases is described in part V infra.

² 341 U.S. 384 (1951).

³ *Radio Corp. of America v. United States*, 341 U.S. 412 (1951). (As of October 1951, it was apparent that war shortages would delay this development.)

⁴ *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

⁵ *Blau (Patricia) v. United States*, 340 U.S. 159 (1950); *Blau (Irving) v. United States*, 340 U.S. 332 (1951).

⁶ But cf. *Rogers v. United States*, 340 U.S. 367 (1951).

⁹ 341 U.S. 123 (1951).

⁷ 340 U.S. 315 (1951).

¹⁰ 341 U.S. 918 (1951).

⁸ 341 U.S. 651 (1951).

¹¹ 341 U.S. 716 (1951).

gram, and a loyalty oath in Los Angeles; and *Dennis v. United States*,¹² the most important "free speech" decision since Holmes and Brandeis began their apparently fruitless task of finding meaning in the First Amendment.

II. REGULATION OF LABOR AND BUSINESS

LABOR

By 1951, the Taft-Hartley Act¹³ had been in operation long enough to have carried a full load of problems to the Supreme Court, and almost every important labor case of the year arose from that Act. To this there was one exception, for the most important labor case of the year seemed, at a glance, neither important nor a labor case; but the consequences of *United States v. Pewee Coal Co.*¹⁴ may well outweigh any of the other decisions of the year.

In the *Pewee* case, the Court for the first time since the post-World War I era took a serious look at some of the economic consequences of plant seizures by the government in periods of emergency. The device of government intervention in labor disputes by "seizure" became familiar to the point of routine in World War II,¹⁵ and almost every case has consisted of a completely nominal government "taking" followed by establishment of government-set labor conditions.¹⁶ Actual management has usually remained exactly where it was before. While in rare instances the "seizure" has been for some purpose other than that of achieving satisfactory labor relations,¹⁷ the seizure sanction has been primarily a device for government settlement of labor disputes.

When the government "seizes" (and the quotes will be abandoned here-

¹² *Dennis v. United States*, 341 U.S. 494 (1951).

¹³ Labor-Management Relations Act of 1947, 61 Stat. 136 (1947), 29 U.S.C.A. § 141 (Supp., 1950).

¹⁴ 341 U.S. 114 (1951).

¹⁵ The general problem of the source and nature of the Government's power to take private property in wartime and the extent of its liability for such takings is discussed in: Expropriation of Property for National Defense, Lands Div., Dep't Justice (1940), particularly pp. 84-94; Marcus, The Taking and Destruction of Property Under a Defense and War Program, 27 *Corn. L.Q.* 317 (1942); American Economic Mobilization, 55 *Harv. L. Rev.* 427, 506 (1942); Executive Commandeering of Strike-Bound Plants, 51 *Yale L.J.* 282, 289-90 (1941).

¹⁶ I was extensively involved in plant seizure cases during World War II. In the second Montgomery Ward seizure, the taking by the War Department was a real military operation, involving an actual possession run with stop-watch precision. But in another taking of the same period, only one government employee ever came within a hundred miles of the seized property.

¹⁷ See, e.g., the episode involved in *Lord Mfg. Co. v. United States*, 84 F. Supp. 748 (Ct. Cl., 1950) cert. denied 339 U.S. 956 (1950), a seizure for excess profit-taking.

after) a plant, it is exercising the eminent domain power¹⁸ and is subject to Fifth Amendment requirements that it make just compensation.¹⁹ Hence one of the most troublesome problems of seizure is, How shall the government be charged for what it has taken? What is just compensation for the temporary taking of a plant, the alteration of some detail of its labor relations, and the eventual return of it?

Two general observations suggest the underlying problems:

1. A decision as to the means of calculating just compensation may enormously affect labor relations: if the compensation is high enough to be attractive to the employer, he will be in no hurry to comply with government "suggestions" as to his labor policy, and the government may pay heavily for the privilege of settling the labor dispute. If the compensation is unattractive to the employer, the government will have a tremendously strong hand with which to compel his acquiescence in its proposals.

2. One possible method of calculating just compensation would be simple quitclaim. The taking would be recognized as nominal, and the government would "release" the property on condition that the owner release the government from all claims. Profits and losses for the period of seizure would be the owner's since, except for the change in his labor policy, usually on a point fairly minor in the whole profit and loss structure, he was unaffected by the seizure. This quitclaim device is obviously not the only way out of the financial situation created by seizure, but it is the only one which gives the owner neither a premium nor a penalty for having been seized. It is the device which, by informal negotiation rather than by court decision, has actually been used for the past ten years.

The *Pewee* case swept the quitclaim system into discard.

There was a considerable range of possible solutions which the Court might have chosen. It might conceivably, though either of these possibilities is unlikely, have held that the taking for this purpose is non-compensable;²⁰ or it might have held it not a "taking" at all, but a form of

¹⁸ The government has argued that the President possesses this power as an aspect of the war power even without authorizing legislation: "There is an executive power to take property in time of emergency. [This is] a power in the nature of eminent domain." Brief for the United States at 33, *United States v. Montgomery Ward & Co.*, 150 F. 2d 369 (C.A. 7th, 1945).

¹⁹ Applications of the compensation requirement as to war-time takings in other areas are *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931); and see dicta in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921), as developed in *United States v. McFarland*, 15 F. 2d 823, 826 (C.A. 4th, 1926).

²⁰ Cf. *United States v. Pacific R.R.*, 120 U.S. 227 (1887), holding the government not liable for destruction of bridges in actual combat, and quoting a veto message of President Grant as to the non-compensability of property "temporarily occupied, or even actually destroyed" in

“regulation.”²¹ It might have held that the seizure is a taking, but that the control is so nominal as to put no liability on the government.²² Or it might have required “just and fair” compensation, but calculated it as the actual operating return.²³ It did none of these things.

The Pewee Coal Co. was one of the concerns whose property was taken and operated by the government in the course of the 1943 coal strike. The lower court found a \$2,241 operating loss attributable to the government’s operation, and gave judgment for that amount to Pewee.²⁴ All nine Justices agreed that this was a “taking” for Fifth Amendment purposes, but they split widely on compensation. Justice Black, for three other Justices, enunciated the following land-mark propositions in the course of affirming the judgment:

Like any private person or corporation, the *United States normally is entitled to the profits from*, and must bear the losses of, business operations which it conducts. . . . Where losses resulting from operation of property taken must be borne by the Government, it makes no difference that the losses are caused in whole or in part by compliance with administrative regulations requiring additional wages to be paid. . . . Whatever might have been Pewee’s losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control. By doing so, *it became the proprietor and, in the absence of contrary arrangements, was entitled to the benefits* and subject to the losses which that status involves.²⁵

Justice Reed, concurring, argued that the government should be liable only for such losses, in these war-time labor takings, as would result from

major emergencies. In similar vein, see *In the Matter of a Petition of Right*, [1915] 3 K.B. 649, but for modification of this view and acceptance of the principle of compensation, see *Att’y Gen. v. DeKeyser’s Royal Hotel*, [1920] A.C. 508.

²¹ Cf. *Morrisdale Coal Co. v. United States*, 259 U.S. 188 (1922) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923). Regulation of the labor conditions which is an object of the taking might have been analogized to rent control, *Block v. Hirch*, 256 U.S. 135, 156 (1921).

²² This is the soundest of the alternatives listed, and is based on direct holdings in *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926); *Nevada-California-Oregon Ry. v. United States*, 65 Ct. Cl. 75 (1928). Those cases held that nominal control was non-compensable, and might have been brought to bear here, as Justice Burton argued in dissent.

²³ A possible analogy is *United States v. Sponenbarger*, 308 U.S. 256 (1939), in which the Court held that a person flooded in a government contrived spillway area resulting from its Mississippi levee program could claim no compensation; for if there had been no levees, he would have been flooded anyway. So here: if there had been no taking, the strike losses would usually far outrun the operating losses.

²⁴ This sum represents the expenditure made in compliance with a War Labor Board directive. Pewee also originally sued for operating losses of \$36,128 which were not the product of government action. This was denied it, and Pewee did not cross appeal.

²⁵ *United States v. Pewee Coal Co.*, 341 U.S. 117, 118 (1951) (emphasis added).

the government's own act, in this case the enforcement of a War Labor Board order; but that it should not be saddled with the operating losses of businesses which were independently operating at long-term losses, such as "certain railroads, coal mines, or television broadcasting stations."²⁶ The dissenters, in a brief opinion by Justice Burton, held that Pewee was not harmed at all by the government's acts, and in effect affirmed a faith in the quitclaim system.

The vital passages of the majority opinion are those tucked in phrases italicized above: "The United States normally is entitled to the profits from" and "was entitled to the benefits" of a taking. In this case, true, the government takes a loss; but normally these emergency war-time takings occur in inflationary periods in which concerns can scarcely avoid making money; and while the government may occasionally take a loss, as on a hopeless railroad, it will usually gain considerably. For an extreme example, if the government had seized General Motors in 1945, it would have had a claim on the 188 millions in profits made by that concern that year. Not all of that profit would have gone to the government, even under the majority view; for under it, the government will have to pay fair compensation for its takings, and "the Government's profit and loss experience may well be one factor involved in computing reasonable compensation for a temporary taking."²⁷ But the government will get some of it.

If this four-man view becomes that of a stable majority, the government has gained enormous new power to compel settlements on its own terms. A prosperous business will be unable to afford the drain on its profits where the government is "entitled to the benefits" of a taking. The position of unions is correspondingly improved; for the new control over employers is not balanced by any new control over labor. Under the old system, if labor were to threaten a strike in an emergency, the employer could be essentially indifferent to the results of government intervention by seizure. Under the new system, the employer should go far to avoid that result.

The Court's other major labor problems of the year turned on its bewildered attempts to find its way through the incoherencies of the Taft-Hartley Act. As to two of those problems, the most rational solution is that Congress had nothing in mind at all; but since courts are not allowed

²⁶ *Ibid.*, at 119.

²⁷ Leading temporary taking cases are *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

to throw in the sponge, they were compelled to construct some path through the maze.

Brave, at least, was the solution to the 8(b)(4)(A) problem.²⁸ That section makes it an unfair labor practice for any union to engage in concerted activities of which "an object" is to force "any employer or other person . . . to cease doing business with any other person." The one point on which the Court unanimously agreed was that these words did not mean what they said, for otherwise substantially all concerted activities would have been made illegal. That is to say, the object of picketing normally is to keep non-striking workers, or customers or suppliers or others, from doing business with an employer, in which case its object is to cause "an employer . . . to cease doing business" with another person.

The legislative history shows that this language was not meant to go as far as it appears to, but instead was intended to eliminate "secondary boycotts" only. The rub here is that the legislators appear to have been against secondary boycotts without having any clear idea of what they were.²⁹

The problem came to a head in the building industry, over which the Board took jurisdiction for the first time after the passage of the Taft-Hartley Act.³⁰ Normally, building is a process of contracting and subcontracting, and most of the work goes to the nineteen building trades unions of the AFL with their two million members. But occasionally a prime contractor may let one small part of a job to a non-union subcontractor, and the unions may then refuse to work further on the building. In a group of such cases, the Court, Justice Burton speaking for the majority, held that such strikes are secondary boycotts, and illegal under this section.

More was never made to hang on less. The Court is apparently agreed that if two crafts, one unionized and the other not, are employed by one contractor, the unionized wing may legitimately strike against work with their non-union brethren; but if the same crafts do the identical work on the same job, but under different subcontractors, there may be no strike.

²⁸ 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(4)(A) (Supp., 1950). The cases are *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); *Int'l Bro. Elec. Workers v. NLRB*, 341 U.S. 694 (1951); *Local 74 v. NLRB*, 341 U.S. 707 (1951); and *NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665 (1951).

²⁹ See *NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665, 673, 674 (1951).

³⁰ The discussion following is influenced by *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 *Yale L.J.* 673 (1951), from which the facts of this paragraph are taken.

Justice Douglas, dissenting, would have given quite a different interpretation to the concept of secondary boycott. As he commonsensically said: "All the union asked was that union men not be compelled to work alongside non-union men on the same job."³¹ This is so palpably different from the traditional objection to the secondary boycott—the objection to attacks on an employer on "a front remote from the immediate dispute"³²—that Douglas thought the Act did not reach it.

The decision may materially alter relations in the building industry, and greatly weaken the unions there. "With employers numerous, employment of short duration, and individual craft units small on any one project, unions have traditionally been forced to rely on the cooperation of all workers on a job in order to bring pressure on any particular employer."³³ In these cases the strike should be regarded realistically as against the prime contractor who brought the subcontractor onto the job, not against the independent subcontractor; and to dispose of the matter as Justice Burton does with the phrase, "[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so"³⁴ overlooks the fact that the language used by Congress is so totally inapposite that Justice Burton is forced entirely to judicial legislation to make any sense of the provision. If judicial legerdemain can turn a seeming prohibition of strikes generally into a limitation on "secondary boycotts" only, it ought to be able to accomplish the next step of giving a rational definition of "secondary boycott."

The solution of the secondary boycott problem is brave at least in the sense that it takes firm hold of the problem and does something with it. The same cannot be said for the (more difficult) question of the scope of judicial review under the Taft-Hartley Act. The disposition of this question can be described only as a meditative contemplation of a hard question, followed by sweeping the whole troublesome matter out of sight.

The Wagner Act had been read to say that Board orders were to be enforced by the Courts of Appeal if supported by "substantial evidence." There has been considerable uncertainty as to what this standard actually was, but whatever it was, Congress was dissatisfied with it because it, in Congressional opinion, unduly limited judicial review. After considering a variety of possibilities, Congress finally wrote into the Taft-Hartley Act a

³¹ *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951).

³² *Douds v. Metropolitan Federation*, 75 F. Supp. 672, 677 (S.D. N.Y., 1948).

³³ Impact of the Taft-Hartley Act, etc., note 30 supra, at 688.

³⁴ *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 690 (1951).

provision that Board orders should be enforced "if supported by substantial evidence on the record considered as a whole."³⁵

A Court of Appeals, puzzled as to its duties under the old language, might well be more puzzled under the new. Exactly what is it supposed to do now that it had not done before? The government contended that the new language made no difference, that this was simply a new way of stating the former practice. But this does injustice to the urgency with which Congress made the change. In an objective and thoughtful opinion, Justice Frankfurter did the best that could be done with this phrase which, by itself, is almost meaningless. He reproved Congress lightly for failing to speak "with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will," but he concluded: "It is fair to say that in all this Congress expressed a mood. . . . As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application."³⁶

And what is the new mood? The courts shall no longer, if they did so before, look only to whether there is some evidence to support a Board order in the record. Instead they should consider the whole record, and make some weighing of the contrary evidence before approving the order. Yet courts are not to hear the matter *de novo*; they should pay due deference to Board expertise. This, says the Court, is concededly imprecise; but it can not be made more definite. "To find the change so elusive that it can not be precisely defined does not mean that it may be ignored." In the last analysis, the Courts of Appeal hereafter should assure "that the Board keeps within reasonable grounds."³⁷

Surely this is a fair attempt to do the best that can be done with the insoluble. Congress, says the Court, wants judges to be a little stricter with the Labor Board. This is imprecise, perhaps necessarily so; but judges must nonetheless now be a little stricter. But the Court did not stop there. Instead, having found complete uncertainty as to the real meaning of the "mood," it washed its hands of the problem and declined to give any decision on concrete facts.

Thus in *Universal Camera Corp. v. NLRB*,³⁸ it remanded to the Court of

³⁵ 61 Stat. 148 (1947), 29 U.S.C.A. § 160(e) (Supp., 1947). The relevant cases and commentators are reviewed in Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233 (1951).

³⁶ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483, 487 (1951).

³⁷ *Ibid.*, at 490. All this is fully analyzed *op. cit. supra* note 35.

³⁸ 340 U.S. 474, 497 (1951).

Appeals "to grant or deny enforcement as it thinks the principles expressed in this opinion dictate." In the companion case of *NLRB v. Pittsburgh S. S. Co.*,³⁹ it made this policy of withdrawal much clearer. There it held that the Sixth Circuit had caught the new mood, and fairly attempted to apply it in refusing enforcement of a Board order. It continued: "Were we called upon to pass on the Board's conclusions in the first instance . . . we might well support the Board's conclusions."⁴⁰ The Court thereupon announced that it would not grant certiorari in Labor Board cases merely because "on a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the Board's order unsubstantiated."⁴¹

What this means as a practical matter is that at the very point when some certainty might be introduced into the new language by Supreme Court interpretation in a few different fact situations, the Court will not give that certainty. This in turn means that the so-called anti-labor circuits, notably the Fifth and to a lesser extent the Sixth, are to be under no effective supervision. Only last year, the Court most pointedly rebuked the Fifth Circuit for flagrantly substituting its views of the facts for those of the Labor Board.⁴² Justice Frankfurter then dissented. As the discerning Professor Jaffe points out, though making a different point: "His view in that respect [i.e. in respect to last year's cases] appears now to have prevailed."⁴³

Last of the major labor cases is the group invalidating the Wisconsin Public Utility Strike Law on the ground that it conflicts with the Taft-Hartley Act.⁴⁴ The Wisconsin Act regulates public utility strikes in detail. A year ago, the Court in *Int'l Union, UAW v. O'Brien*⁴⁵ held that the federal labor act occupies the field of its jurisdiction as to strikes: "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages."⁴⁶ It follows a fortiori that the Wisconsin law is invalid unless the *O'Brien* case is to be reconsidered, and the Chief Justice for the majority so held. Justice Frankfurter's extraordinar-

³⁹ 340 U.S. 498 (1951).

⁴⁰ *Ibid.*, at 502.

⁴¹ *Ibid.*, at 503.

⁴² *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950); both commented upon in connection with this point in 1949 Term article, 4-5.

⁴³ Jaffe, *op. cit. supra* note 31, at 1249.

⁴⁴ The principal case is *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951).

⁴⁵ 339 U.S. 454 (1950), discussed in 1949 Term article, 5-6.

⁴⁶ 339 U.S. 454, 457 (1950).

ily attenuated dissent argues that since Congress set up a system, under the Taft-Hartley Act, for handling major strike emergencies of a national character in industries of any sort, it is somehow "impl[ie]d that states retain the power to protect the public interest" as to utilities.⁴⁷ To paraphrase in response a comment by that same dissenting Justice in another situation: "The short answer to the suggestion [that Congressional establishment of a national policy for emergencies means that it meant the states to be able to deal with utility strikes] is that it is a strange way of saying it."⁴⁸

MONOPOLY AND FREE ENTERPRISE

The *Schwegmann* case created a sensation. For a time at least it "rolled back" a greater volume of consumer-good prices than all the regulations of the Office of Price Stabilization put together; and while, as a bit of statutory construction, the case was, to put it sedately, novel, no very objective criticism can fairly be expected from any commentator whose principal class association is as a member of the high-price-ridden consuming public. For the first time in many years, an agency of government had done something effective for the poor purchaser, though the period of relief may be short.

The issue was the interpretation of the Miller-Tydings Act, which exempted from the Sherman Act "contracts or agreements prescribing minimum prices for the resale"⁴⁹ of goods where such agreements are lawful under state law. Forty-five states now have such so-called "fair trade" laws which permit a manufacturer to set a minimum price for the resale of his goods by retailers. Without the Miller-Tydings Act, and the supporting state legislation, such resale price maintenance agreements would be illegal under the Sherman Act.

There is no argument as to whether the Miller-Tydings Act legalizes actual agreements between manufacturers and their distributors. But most of the state laws go further, and make binding on all the retailers of the state minimum prices set in an agreement which may have been made between the manufacturer and only one retailer in the state. In other words, the state laws permit minimum price fixing by the manufacturer not only as to *signers* of an agreement, but also as to *non-signers*. The issue

⁴⁷ *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 407 (1951).

⁴⁸ *Adamson v. California*, 332 U.S. 46, 63 (1947). Other labor cases were *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951) on the relation of unemployment compensation to back pay awards; and *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) on non-Communist oaths by labor federations.

⁴⁹ 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1951).

is whether such state laws are in conflict with the Sherman Act as to the non-signers.

On the face of the Act, resale price maintenance should be unenforceable as against non-signers. All that is exempted from the Sherman Act in terms are "contracts and agreements" fixing resale prices, and by definition, the non-signers have no agreements. But the legislative history handicaps this happy literalism. When the Miller-Tydings Act was passed, forty-two states had fair trade laws obligatory as to non-signers on their books. These laws necessarily then only applied to trade so local that the Sherman Act did not reach it, but Sen. Tydings said that the object of his bill was "to back up those acts."⁵⁰ Rep. Dirksen, a member of the Conference Committee, specifically referred to the treatment of non-signers under state acts and said that the object of the federal legislation was to put "the stamp of approval upon price maintenance transactions under State acts." The House Committee report on an early stage of the Act specifically referred to the non-signer provisions of the state laws as part of what it intended to legitimate.

Justice Douglas' majority opinion freed the Act of the incubus of this legislative history by emphasizing that most of the legislative history was on forms of the bill which did not pass, and that the form of the bill which did pass (as a rider on a tax bill) had slightly different wording than the earlier bills, an argument weakened by the fact that the language changes had no perceptible relation to the minimum price clauses here in issue. Once separated from the legislative history, the words were construed simply as applying only to signers.⁵¹

The case was decided on May 21st. On May 28th, Macy's, New York department store, a perennial non-signer, cut prices 6% on 5,978 items, and the rush was on.⁵² Gimbel's met the challenge, and soon prices were tumbling in every major department store in New York. Klein on the Square joined the fight with an enormous reduction in the price of Bulova watches.

These effects must not be exaggerated. A report of the Committee on the Economic Report says:

⁵⁰ All legislative history quoted here is taken from the opinions.

⁵¹ Particularly intriguing is the concurring opinion of Justices Jackson and Minton which fundamentally attacks the use of fragmentary and sometimes obscure bits of legislative history in statutory interpretation.

⁵² N.Y. Times, p. 1, col. 3 (May 29, 1951). For weeks thereafter the price war remained front page news.

An investigation indicates that substantial price cutting on fair-traded goods occurred in only 8 out of the 123 cities surveyed. The principal price cutting was on electrical household goods, cosmetics, and drug sundries. By the end of July the price war had almost abated.

There seems to be little likelihood in the immediate future that the court decision will result in widespread price decreases. Many retailers seem to have taken advantage of the fair trade decisions to stimulate sales and reduce temporarily embarrassing inventories. . . . This decision may later create problems for many retailers and manufacturers should inventories again become excessive and consumer demand sharply decline.⁵³

But this is only to say that the decision is no substitute for an inflation control program. It may still be of considerable consequence, as the Department of Justice has indicated an intent to prosecute manufacturers who refuse to sell to non-signers.

The principal other trade regulation statutory interpretation case, in which the Court analyzed legislative history with an enthusiasm for its details which belied the disbelief some of them were to express in that source in the *Schwegmann* case, is *Standard Oil Co. v. FTC*.⁵⁴

The issue was whether good faith in meeting price competition is an absolute defense to a charge of price discrimination under Section 2 of the Clayton Act as amended by the Robinson-Patman Act.⁵⁵ Standard unquestionably was giving four large Detroit gas jobbers more favorable prices than their competitors received, favors not justified by any factors peculiar to the cost or quantity of the particular sales. The four jobbers either retailed the gas themselves or sold it to customer stations in a fashion clearly prejudicial to those dealers not receiving the favored price. So much was conceded on all sides.

Prior to the Robinson-Patman Act, discriminatory price cuts to meet competition were permitted under the Clayton Act. The Robinson-Patman Act amended this Clayton Act provision to provide that a showing of price discrimination made a "prima facie case" of conduct which would have the proscribed effect, namely to "substantially lessen competition," but that a seller might "rebut" this prima facie case by showing that the lower price was "in good faith to meet an equally low price of a competitor." In other words, only that price discrimination which "lessens competition" is illegal, and a seller may rebut the prima facie case of illegality

⁵³ Sen. Rep. No. 644, 82d Cong. 1st Sess. 13 (1951).

⁵⁴ 340 U.S. 231 (1951). See Price Discrimination in Gasoline Marketing: The Detroit Jobbers Case, 19 Univ. Chi. L. Rev. 58 (1951).

⁵⁵ 49 Stat. 1526 (1936), 15 U.S.C.A. § 15(b) (1951).

which actual discrimination makes by showing that the discrimination was intended to meet existing competition.⁵⁶

The exact question then becomes the effect of rebutting a prima facie case. The majority, through Justice Burton, held that the rebuttal of a prima facie case amounts to a complete defense, so that the law in this respect is left exactly as it was before the Robinson-Patman Act was passed. The minority, in a tightly reasoned and fully documented opinion by Justice Reed, contended that while proof was not overwhelming, it was unlikely that Congress had made the change without meaning to make a difference; and therefore the FTC was free to find, as it did here, that even though the price discriminations were for the purpose of meeting competition, they still had the illegal effect of lessening competition.

There is no basis for speculation on practical economic effects of the decision. The most likely effect is that it will very slightly increase the expansion of those large enterprises which are able to play suppliers off against each other.⁵⁷

But the decision is of consequence only if one assumes that the trade regulatory laws are of consequence in economic life, and this in turn depends on the remedies that attach to those laws. To declare conduct wrong is one thing, to do something about it quite something else again. In recent years, the Supreme Court has been moderately "tough" on substantive trade regulation law, but "soft" on remedies.⁵⁸ So it was again this year.

The big remedy case was *Timken Roller Bearing Co. v. United States*.⁵⁹ A majority of the Court found that American Timken had conspired with British and French Timken, respectively, to eliminate world competition. After dealing with the difficult questions of the merits, the Court reached the remedy. Justices Black, Douglas, and Minton believed that the solu-

⁵⁶ This subject is comprehensively considered in Rowe, *Price Discrimination, Competition, and Confusion*, 60 *Yale L. J.* 929 (1951), drawn heavily upon here. See also Adelman, *Integration and the Antitrust Policy*, 63 *Harv. L. Rev.* 27, 60-74 (1949).

⁵⁷ Mr. Thomas Austern finds that the decision "contributed only new uncertainties." The decision permits discriminatory prices only to meet competition, yet "[i]f one seller inquires too intimately into the pricing operations of another, the shadow of the Sherman Act may soon enshroud both of them." Again, "if the Indiana opinion means what it appears to say, and a lower competitive price may be met only if the seller is assured that it is not in violation of the Act, some doubt may exist as to whether the defense which that decision recognizes is not somewhat hollow." Austern, *Inconsistencies in the Law*, 1951 CCH Antitrust Symposium, 158, 166-68 (1951).

In Rowe, *op. cit. supra* note 52, the belief is stated that the Court would not, as it did, have "sought to accomplish fundamental change" unless it was prepared to stand on what it had done, and continues: "Packing the substantive meeting competition defense with pitfalls for the seller would clearly rob the decision of significance." It develops the theories on which the defense may become of real value to sellers.

⁵⁸ A theme developed briefly in 1947 Term article, 10 *et seq.*

⁵⁹ 341 U.S. 593 (1951).

tion was to require American Timken to divest itself of its interests in the British and French companies: "[T]he most effective way to suppress further Sherman Act violations is to end the intercorporate relationship which has been the core of the conspiracy."⁶⁰

But on this point the views, not of Justice Black who delivered the opinion of the Court, but of the concurring Justice Reed prevailed. Justice Reed chose the occasion to release some general strictures, which will have the most far reaching consequences, against the remedy of divestiture. He spoke of it as a "harsh remedy," and one "not to be used indiscriminately." It should not be used where "other effective remedies, less harsh, are available." What then is the preferred remedy? "The injunction is a far stronger sanction against further violation than the Sherman Act alone," a conclusion evidenced by the "paucity of cases dealing with contempt of Sherman Act injunctions." The injunction "leaves power in the court to enforce divestiture, if the injunction alone fails. Prompt and full compliance with the decree should be anticipated."⁶¹

This general attitude, which will dominate the lower courts hereafter, probably spells an end to frequent attempts to use the divestiture remedy in any case except that of major monopolies. This is an important development, for, with criminal sanctions too small to be consequential, a corporation can commit almost any practices (short of complete monopolization) with confidence that the most it can suffer is to be told by injunction to stop.⁶² Is not such a command too little and too late to make any difference to Timken?

In the related field of patents, two gadget cases attracted a disproportionate amount of attention. In one, the issue was the validity of a patent on a cashier's counter rack used by A. & P. grocery stores to move groceries from the end of a counter to a position in front of the cashier.⁶³ The device consists of a three-sided frame without top or bottom, kept on the counter by guides. When in position at the end of the counter, it permits the customer to unload his groceries into the frame which can then be pulled forward in front of the cashier for checking. That the device is useful is not doubted; that it ranks with the invention of, say, the telegraph, no one believes.

⁶⁰ *Ibid.*, at 600.

⁶¹ *Ibid.*, at 601-605.

⁶² See, e.g., the famous Hartford-Empire memorandum, including the passage: "I . . . do not see much danger of having any of these deals upset. . . . If they are upset, I still believe that by that time, we will be in a better position even with such dissolution than we would be otherwise; and I see no danger whatsoever of any criminal liability. . . ." *Hartford-Empire Co. v. United States*, 323 U.S. 386, 437, 438 (1945).

⁶³ *Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147 (1950).

The Court recognized that the rack is a good idea, "but scores of progressive ideas in business are not patentable," and neither is this one. Justice Douglas, concurring, seized the opportunity to spank the Patent Office for issuing ridiculous patents: "The patent involved in the present case belongs to this list of incredible patents which the Patent Office has spawned. The fact that a patent as flimsy and as spurious as this one has to be brought all the way to this Court to be declared invalid dramatically illustrates how far our patent system frequently departs from the constitutional standards which are supposed to govern."⁶⁴

Later in the term the Court disposed of an even sillier patent by reversing without opinion a Seventh Circuit decision which had upheld a patent on a most deceptive toy pig. The pig, which perched in most unlikely fashion on the edge of a child's breakfast bowl, its tail buried in cereal, could be given each alternate spoonful of cereal ("See, Junior, piggy takes a spoonful, too"), which it then deposited through its tail back in the bowl.⁶⁵

These reversals, and particularly the Douglas concurrence, called forth the wrath of the patent bar faithful. Several writers took the position that gadget patents were affirmatively desirable and that the standard of invention should not be set so high as to preclude them. An historical argument was advanced that as of 1787, gadget patents were the norm, the convenient oddities in Thomas Jefferson's bedroom at Monticello being pointed to as examples.⁶⁶ That the Patent Office would continue to go its Supreme Court-ignoring, gadget-granting way was hinted in a Journal of the Patent Office Society article: "What effect this admonition will have on the Patent Office remains to be seen."⁶⁷

⁶⁴ *Ibid.*, at 153, 158.

⁶⁵ *Trager v. Crest Specialty*, 184 F. 2d 577 (1950), rev'd without opinion, 341 U.S. 912 (1951). The article of the alleged infringer was slightly different—his toy was a puppy instead of a pig.

⁶⁶ As it is put by Gregg, *Some New Patent Cases*, 3 *Stan. L. Rev.* 601, 607 (1951), the A. & P. "case had, for friends of the patent system, somewhat the effect and shock of a cold shower after the warm and relaxing bath" of decisions of the year before. Examples of the historical argument are Siggers, *Comments on Great Atlantic & Pacific Tea Co.*, 33 *J. Pat. Off. Soc.* 83 (1951), giving Jefferson's bed as an example of a sound patent; *Holbrook, Science v. Gadgets*, 33 *J. Pat. Off. Soc.* 87 (1951).

⁶⁷ Brodoer, *Gadget Patents*, 33 *J. Pat. Off. Soc.* 102, 103 (1951). For several pages supporting the conclusion that "the Patent Office takes virtually every possible attitude about their consistent rebukes from the courts except one: nowhere does one find evidence of a resolution to conform to the statutes as interpreted by the judiciary. The attitude, rather, is that the courts, and particularly the Supreme Court, are *The Enemy*, to be thwarted by every ingenuity of which the Office is capable," see 1938 *Term* article, 19-24.

OTHER PROBLEMS OF BUSINESS

a) *Color TV*

The color TV case,⁶⁸ though of no particular legal difficulty or significance, was of major public concern because of the great interest in everything respecting television. At issue was the validity of an order of the Federal Communications Commission setting standards for the transmission of color television. The Commission had selected the CBS system, and rejected the RCA system. Since all conceded the Commission's power to make orders on this subject, the only serious question was whether the particular order was arbitrary and capricious.

Enormous briefs (225 pages for RCA, 150 for the government and CBS) discussed the technicalities of the order and the details of the system, their flicker, brightness, color fidelity, picture texture, and susceptibility to interference. But the mass of details only made more obvious the difficulty of the issues before the FCC, and the impossibility of terming their resolution capricious. Hence Justice Black, in an opinion unanimous but for Justice Frankfurter, in a few words upheld the Commission.

The principal effect of the decision is to give a go-ahead signal to CBS-type color, which in turn requires the viewer to buy an adjusting device. Two small boys in New Jersey immediately announced that they had made one for less than a dollar. By summer's end, industry opposition to the CBS system appeared to be declining, as beginning experimental broadcasts had been made. Attention turned to such wonders of the new medium as the lady who had been pictured eight times a day holding an apple during the experimental process.⁶⁹

b) *Transportation*

A miscellany of cases have very little in common except that they all involve transportation of goods.

Five were cases of state or local regulation challenged under the commerce or import-export clauses. Two opinions by Justice Clark represent conscientious efforts to make as explicit as possible the factors which limit and permit state controls. In *Cities Service Gas Co. v. Peerless Oil & Gas*

⁶⁸ *Radio Corp. of America v. United States*, 341 U.S. 412 (1951). See "Public Interest" and the Market in Color Television Regulation, 18 *Univ. Chi. L. Rev.* 802 (1951).

⁶⁹ "Patty Painter, a twenty-two-year-old, five-foot-one-inch, ninety-five-pound, hazel-eyed, ash-blond young woman whose complexion is pure cream and whose lips are a bright ruby red, is one of the unsung pioneers of C.B.S. color television. To Miss Painter has fallen the historic task of just standing or sitting around—eight hours a day for the past five years—in front of C.B.S. experimental color cameras. . . ." *New Yorker*, p. 20 (Aug. 11, 1951).

*Co.*⁷⁰ the issue was the power of the state to set prices on gas produced within its borders and sold interstate. The validity of such state price regulation, said Clark, depends on three tests: "that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."⁷¹ He then squarely faced each of these questions on the facts of this case, deciding each in favor of the state.

Of particular significance in the *Cities Service* case was the emphasis on the non-discriminatory nature of the price regulation, and the restatement of the 1949 decision of *H. P. Hood & Sons, Inc. v. Du Mond*⁷² solely in terms of discrimination. The weight attached to this factor by Justice Clark was more fully developed in *Dean Milk Co. v. Madison*,⁷³ in which his opinion for the Court held invalid a Madison, Wisconsin milk inspection ordinance which in effect barred all Illinois milk, as well as some Wisconsin milk, from the Madison market. His technique of stating the issue gave great clarity to the problem: "Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them."⁷⁴ He then explained that adequate and non-discriminatory alternatives were available.

Unfortunately for both common sense and clarity, Justice Clark wrote only the dissenting opinions in the other two major negative implication cases. One of them, *Spector Motor Service, Inc. v. O'Connor*⁷⁵ case, is nonetheless a classic example of a different point of view. That weary litigation, challenging 1935-1940 Connecticut corporation taxes, finally was decided after a judicial journey which had taken it to the United States Supreme Court twice and the Connecticut Supreme Court of Errors once.

Spector is a Missouri corporation engaged in interstate trucking. Connecticut attempted to apply to it the state's general corporation tax, figured on the basis of *net income* as traced to that portion of the business done in the state. Justice Burton for the Supreme Court held the tax invalid. He made no objection to the amount of the tax or its method of computation. Rather the tax was invalid for one reason alone: the Connecticut

⁷⁰ 340 U.S. 179 (1950).

⁷¹ *Ibid.*, at 186-87.

⁷² 336 U.S. 525 (1949). In *Cities Service*, the Court said, "The vice in the regulation invalidated by *Hood* was solely that it denied facilities to a company in interstate commerce on the articulated ground that such facilities would divert milk supplies needed by local consumers; in other words, the regulation discriminated against interstate commerce." 340 U.S. 179, 188 (1950).

⁷³ 340 U.S. 349 (1951).

⁷⁴ *Ibid.*, at 354.

⁷⁵ 340 U.S. 602 (1951).

Supreme Court had described the tax as one "on the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state."⁷⁶

It did not matter that the tax was non-discriminatory, applying equally to local corporations doing local business. It did not matter that the identical amount of tax could have been collected, concededly, from the same company, as compensation for use of the highways, or in lieu of a property tax, or as a tax for inspection, or sales, or use.⁷⁷ The vital factor was the label placed on the tax by the state: "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so."⁷⁸

The decision deserves whole-hearted applause for its clarity and candor, and not in satirical or grudging vein. Until now, critics of the decisions in this branch of taxation had been confused as to whether the validity of state taxes of this general sort did depend solely on the form of words with which they were described by the state, or, in the alternative, whether there was some functional principle of policy involved.⁷⁹ But this decision indubitably cuts through substance to form. It is now, for the first time, completely clear that the whole problem is simply a matter of words, and no state need make Connecticut's mistake again. Indeed, Connecticut has already changed the wording of its act, leaving the rate and the incidence exactly as they were before.⁸⁰

But, as Justice Clark pointed out in dissent for Justices Black and Douglas as well, it is an expensive lesson in draftsmanship: "It has taken

⁷⁶ 135 Conn. 37, 56, 61 A. 2d 89, 98 (1948).

⁷⁷ These are the alternatives enumerated in the opinion.

⁷⁸ *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 608 (1951).

⁷⁹ The confusion among students of the subject on this point was precipitated anew by *Freeman v. Hewitt*, 329 U.S. 249 (1946) and *Int'l Harvester Co. v. Evatt*, 329 U.S. 416 (1947), in which conflicting results appeared to be reached at the same term of court because of divergent wording but similar incidence in the two tax statutes involved. This puzzlement is reflected, e.g., in *Dunham, Gross Receipts Taxes on Interstate Transactions*, 47 Col. L. Rev. 211, 226 (1947) where he comments on the *Freeman* case: "If the quoted language meant merely to indicate one of the phrases forbidden to state tax draftsmen, it reduces constitutional principle to a formulary riddle; if advanced as a sincere attempt at judicial statement of the constitutional principle, it merely reinstates an ancient stumbling block and foresakes both goals of good terminology: utility and clear purpose."

⁸⁰ Connecticut met words with words. It added to the tax provision involved the following: The tax "shall be paid by such corporations or associations for the benefit and protection of the government and laws of this state, it being the purpose of this section to require the payment of a tax by all corporations or associations carrying on or doing business in this state, but not organized under the laws of this state, as an additional recompense for protection of the activities in this state of such corporations or associations." Conn. Pub. Act. No. 350 (1951).

eight years and eight courts to bring this battered litigation to an end. The taxes involved go back thirteen years. It is therefore no answer to Connecticut and some thirty other states who have similar tax measures that they can now collect the same revenues by enacting laws more felicitously drafted. Because of its failure to use the right tag, Connecticut cannot collect from Spector for the years 1937 to date, and it and other states may well have past collections taken away and turned into taxpayer bonanzas by suits for refund which come within the respective statutes of limitations."⁸¹

Other cases of casual interest in transportation are *Alabama Great Southern R. Co. v. United States*,⁸² a cogent opinion by Justice Minton reviewing the factors which the ICC must take into consideration in setting differentials between rail and barge rates; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*,⁸³ upholding the power of Michigan to regulate interstate gas sales to industrial users; and *United States v. Champlin Refining Co.*,⁸⁴ which is so ungainly a disposition of a precedent as to deserve further comment on its technique alone. In an earlier case involving the same company,⁸⁵ the Court had held that the company was required to file reports under Section 19a of the Interstate Commerce Act.⁸⁶ Justices Reed, Frankfurter, Douglas, and Burton had then dissented. In the instant case, the issue was whether the same company could be required to file further reports under Section 20 of the Act,⁸⁷ and rate schedules under Section 6.⁸⁸ All three of these sections purport to cover "every common carrier subject to the provisions of this chapter." That phrase is defined in Section 1 of the Act to include "all pipe line companies."⁸⁹ In other words, the coverage clause is identical for the section earlier interpreted, and for the two sections now interpreted. In logic, all should stand or fall together.

Justice Clark for the Court achieved the remarkable result of affirming that Section 19, previously held applicable, was still applicable; that Section 20, now in issue, was applicable; and that Section 6, now in issue, was *not* applicable. He conceded that "the literal terms of the statute lend

⁸¹ *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 614 (1951).

⁸² 340 U.S. 216 (1951).

⁸³ 341 U.S. 329 (1951).

⁸⁴ 341 U.S. 290 (1951).

⁸⁵ *Champlin Refining Co. v. United States*, 329 U.S. 29 (1946).

⁸⁶ 37 Stat. 701 (1913), 49 U.S.C.A. § 19a (1951).

⁸⁷ 24 Stat. 386 (1887), 49 U.S.C.A. § 1 (1929).

⁸⁸ 24 Stat. 380 (1887), 49 U.S.C.A. § 6 (1929).

⁸⁹ 24 Stat. 379 (1887), 49 U.S.C.A. § 1 (1929).

some weight" to the view that the three should be interpreted consistently; but "at the same time, we find it hard to conclude, despite the generality of the statutory terms used,"⁹⁰ that Congress meant to make Section 6 applicable to the same pipe lines to which the other sections were applicable. The four Justices who had dissented in the earlier case concurred with Justice Clark—on the more logical ground that the earlier case should be overruled. Justice Black dissented.

Two handsomely turned admiralty cases complete the transportation collection. In *Standard Oil Co. of New Jersey v. United States*,⁹¹ the issue was the interpretation of a war risk insurance clause of ancient English lineage. Justice Black for the Court declined to follow the English decisions automatically ("our practice is no more than to accord respect to established doctrines of English maritime law"),⁹² and approved application of American proximate cause principles. In the more significant *Warren v. United States*,⁹³ Justice Douglas for the Court wrote that a seaman negligently injured while disporting himself on shore leave was nonetheless entitled to maintenance and cure unless his negligence was so gross as to amount to wilful misbehavior. The case seems an inevitable extension of the leading modern case on injuries in service of the ship, *Aguilar v. Standard Oil Co. of New Jersey*.⁹⁴

III. CIVIL RIGHTS

a) *Speech or Politics*

In this space a year ago, I advanced a cyclical theory of American civil liberties history. That theory was that civil liberties history parallels economic history, but with a peculiar belatedness. Every twenty or thirty years, we experience an economic Depression, and every twenty to thirty years we also experience a civil liberties Repression. The Repressions follow about twenty years after the Depressions. The discussion concluded:

Personnel changes in the late forties now reopen the question of whether we are about to abandon the course begun by the coalescence of Hughes and Roberts with Holmes, Brandeis, and Stone. It may well be that we are about to return to the doctrines of the twenties.⁹⁵

⁹⁰ *United States v. Champlin Refining Co.*, 341 U.S. 290, 295, 297 (1951).

⁹¹ 340 U.S. 54 (1950).

⁹² *Ibid.*, at 59.

⁹³ 340 U.S. 523 (1951).

⁹⁴ 318 U.S. 724 (1943). Transportation cases not discussed in the text were *Norton Co. v. Dep't Revenue*, 340 U.S. 534 (1951), invalidating an Illinois retailer's occupation tax insofar as it applied to orders sent to, and filled from, an out-of-state manufacturer's home office; and *Canton R. Co. v. Rogan*, 340 U.S. 511 (1951) holding valid under the Import-Export clause a Maryland gross receipts tax as applied to a railroad engaged in moving goods from trunk railroads to ships in foreign trade.

⁹⁵ 1949 Term article, at 21.

At the October 1950 term, the Supreme Court recaptured and outdid the spirit of 1925. It decided *Dennis v. United States*,⁹⁶ a decision of the broadest social significance of many years. The decision affirmed the conviction of 11 Communists. By mid-summer, 65 more were under indictment as part of the same conspiracy. By official Department of Justice estimate, the decision may result in 12,000 political prisoners within a short time.⁹⁷ The catch will far outstrip any collection of political prisoners in previous American history, and will doubtless far surpass any imprisonments of that sort ever made by a democratic country.⁹⁸ The profound question, of course, is whether upon achievement of that dubious glory we shall still remain a democratic country.

The issue was the validity of the Smith Act⁹⁹ as applied to the principal leaders of the Communist Party. The defendants were charged with conspiring to organize that Party as a society to teach and advocate the overthrow of the government by force and violence, and themselves to have advocated and taught the duty of overthrowing the government. Overt acts other than teaching and advocacy are not alleged: the defendants would initiate a revolution "as speedily as circumstances would permit,"¹⁰⁰ but that time is concededly not now.

With eight Justices participating, there were five opinions. Two were dissents, by Justices Black and Douglas respectively. The main opinion was the Chief Justice's, joined by Justices Reed, Burton, and Minton. Two were concurrences by Justices Frankfurter and Jackson, but concurrences in the judgment of affirmance only, and not in the Vinson opinion.

In the interest of reasonable brevity, the two concurrences may be put aside in a few words. Certainly the most learned of all the opinions is that of Justice Frankfurter. It is approximately as long as all the other opinions put together, and is replete with allusions to a letter by Jefferson to Abigail Adams, the legislation of Virginia on the Alien and Sedition Acts as re-

⁹⁶ 341 U.S. 494 (1951).

⁹⁷ "There is a program" to prosecute "roughly 12,000 members of the Communist Party." Testimony of Acting Ass't Att'y Gen., Hearings Before Subcommittee on Appropriations, H.R., 82d Cong. 1st Sess. 336 (1951).

⁹⁸ The number of persons indicted under the Alien and Sedition Acts was 15, and the number convicted under World War I sedition legislation was 900. Emerson, Essay on Freedom, 11 Lawyers Guild Rev. 1, 4-5 (1951). If the "relocated" Japanese of World War II be counted as political rather than racial prisoners, then the country will probably not reach its former high since the Japanese numbered almost 100,000. There were, of course, some distinctions between relocation and prison.

⁹⁹ 54 Stat. 671 (1940), 18 U.S.C.A. § 11 (1950).

¹⁰⁰ From the charge of the trial judge, as quoted in *Dennis v. United States*, 341 U.S. 494, 510 (1951).

ported in Tucker's Blackstone (1803), The (London) Times, and every case ever decided on the subject at hand. This opinion is the very epitome of intellectual liberalism at its most ineffective. It is in two major parts, the first part setting forth at length that judges are powerless to stop Congresses from behaving this way; and the second regretting that this is so because: "Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved."¹⁰¹ What it all comes to is that intellectual non-restraint has the Frankfurter intellectual sympathy, but not his vote.

There is no such dull edge to the Jackson concurrence. He, too, doubts that the government will do the slightest good by its prosecutions of Communists. ("Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people.")¹⁰² But he has no doubts at all of the government's power. The Holmes-Brandeis clear and present danger approach to freedom of speech Jackson thinks irrelevant to Communism because it antedates Communism as a nationwide conspiracy; that approach is suitable only for "trivialities" such as "a hot-headed speech on a street corner," a parade, a pamphlet distribution, or something equally insignificant. The core of this offense is *conspiracy*, and what one might do by himself (and hence ineffectively) he cannot necessarily do with others. The "clear and present danger" test is totally irrelevant to a conspiracy charge. No overt act is needed because none is ever needed when conspiracy is the offense. The central proposition seems to be that the government can punish *any* conspiracy to do an act where the act itself would be punishable; and it is immaterial that the conspiracy may be political advocacy of an act which may never occur.¹⁰³

The main opinion by the Chief Justice is less circumspect than Frankfurter's, less cavalier than Jackson's. It makes these central points:

¹⁰¹ *Ibid.*, at 556.

¹⁰² *Ibid.*, at 578.

¹⁰³ Mr. John Raeburn Green, distinguished St. Louis attorney, in a petition for rehearing for one of the defendants, says of the Jackson position: "The conspiracy proposal, no matter how much Mr. Justice Jackson himself would attempt to limit it, puts an end to enforcement of any of these freedoms, except for extraordinary cases of individual speech. Few, if any, of the numerous First Amendment cases with which this Court has dealt were cases of an individual speaking for any by himself alone, without prior consultation with anyone. In our modern world, scarcely anything is done without 'conspiracy,' that is, without a planning agreement, or understanding of two or more persons. . . . With deference, it is suggested that this doctrine would make it possible for legislation to avoid the impact of the First Amendment, to destroy the free exercise of religion, freedom of the press, freedom of assembly, and (except in extraordinary cases where an individual speaks without consultation with anyone else) freedom of speech." Separate Petition for Rehearing of John Gates at 21, 22, *Dennis v. United States* (1951).

(1) Congress unquestionably has power to suppress armed rebellion, and it likewise has the power to suppress preparation for such rebellion. "Advocacy" of such a course is different from mere "discussion" of it, and Congress aimed here at advocacy rather than discussion. (2) Upon review of the cases, it is clear that the Holmes and Brandeis views in the leading cases of *Gitlow v. New York*¹⁰⁴ and *Whitney v. California*¹⁰⁵ are sound, those of the majority in those cases unsound.¹⁰⁶ The Court, the Chief Justice implies, adheres to the "clear and present danger" test as those two Justices formulated it. But that test does not require a probability of success of a revolution, or an instantaneous imminence. (3) Enlarging upon this latter point, the issue, as Judge Learned Hand below said, is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." And "[w]e are in accord with . . . the trial court's finding that the requisite danger existed."¹⁰⁷ This (4) is a question of law, for the court rather than the jury to decide.

The dissenting opinions of Justices Black and Douglas are wholly different from each other. Both agree that the Vinson opinion, though in form adhering to the Holmes formula, in fact departs from it. But Black suggests that he would, if necessary, advance a new test. In his view, the First Amendment, "at least as to speech in the realm of public matters" is an absolute. In that area, the "mere 'reasonableness'" of a restraint on speech is no justification for it. Rather, the First Amendment deserves a "high preferred place . . . in a free society."¹⁰⁸

This approach by Justice Black moves toward an absolute protection of political speech. It represents the intensely practical judgment that once judges can tailor that freedom to the demands of the moment, they reduce the Amendment to a high-sounding platitudinous admonition. Where freedom is involved, Black, unlike many liberals, is willing to embrace an absolute. Certainly it is true that 160 years of experience with the Amendment interpreted as subject to qualifications has in fact left it of very little use at times of stress.

The Douglas dissent is a conscientious attempt to apply the clear and present danger test as developed by Holmes and Brandeis in the *Gitlow*

¹⁰⁴ 268 U.S. 652 (1925).

¹⁰⁵ 274 U.S. 357 (1927).

¹⁰⁶ "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." *Dennis v. United States*, 341 U.S. 494, 507 (1951).

¹⁰⁷ *Ibid.*, at 510.

¹⁰⁸ *Ibid.*, at 579-81. The parallel of the Black views to those of Meiklejohn, *Free Speech* (1948), is notable, and may account for Justice Frankfurter's text and extended footnote 5, summarizing and criticizing Meiklejohn's stand. *Ibid.*, at 524.

and *Whitney* cases. Unlike Black, Douglas concedes the power to limit speech, but believes that this is no occasion for it. What these defendants have done is to "teach" certain doctrines. "Not a single seditious act is charged in the indictment." Speech itself can be limited, but only when the utterances are in circumstances in which the resort to reason is no antidote. Mere "advocacy" can never be lawless, except where it would be immediately acted upon. Yet these defendants, though part of a movement powerful elsewhere, are utterly innocuous here: "In America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful."¹⁰⁹ True, though small in number, the Communists might be so powerful by location in strategic areas that we must fear, and suppress them. "But the record is silent on these facts." If we must rely on judicial notice (which we should not do for we should have facts before us), I believe "that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear or panic could think otherwise."

It remains to criticize the main opinions, and to calculate their consequences.

Even the attempted objectivity of summary will not have disguised the sense that, to this reviewer, the Vinson opinion is a disaster in the history of democracy.¹¹⁰

1. The issues at stake in this great controversy outweigh mere precedents, and our college of elders cannot be expected or desired to resolve them solely on the basis of what has gone before. But, as a footnote in the history of ideas, we should at least record that the Vinson opinion claims a

¹⁰⁹ The quotations in this paragraph are from the Douglas dissent, *ibid.*, at 581-92.

¹¹⁰ This is certainly not the common view. It is shared by the *St. Louis Post Dispatch*, which, in an editorial of June 5, 1951, p. 2c, col. 2, described the majority opinions under the heading "Six Men Amend the Constitution": "Never before has such a restriction been placed on the right to hold opinions and to express them in the United States of America." And the *New York Post*, commenting upon the second Communist case begun after the Dennis decision, said, June 21, 1951, "Does anyone seriously believe this republic is too weak to withstand the propaganda of the Communist? Does anyone seriously argue that the mere advocacy of Communist ideas carries the threat of ultimate democratic destruction? Only paranoiacs harbor those terrors. . . . It is easy to imitate the enemy. But in the long run we believe the citizens of this Republic—and free men everywhere—will come to revere Justices Black and Douglas and others like them who refused to join the stampede."

The American Civil Liberties Union, *Civil Liberties v. The Smith Act (1951)* (pamphlet), said: "The ACLU disagrees fundamentally with the Supreme Court's 6-2 decision. The Union, as always, opposes this law because it infringes upon the rights of free speech guaranteed by the First Amendment and because it is dangerously unwise legislation. . . . The ACLU stands ready to help obtain an overruling of the June 4th decision. . . ."

lineage from Holmes and Brandeis which it does not have.¹¹¹ The voice is Jacob's voice, but the hands are the hands of Esau.

But there is no real lack of candor here. The Chief Justice in the final analysis distinguishes Holmes and Brandeis: They "were concerned in *Gitlow*" with "a comparatively isolated event bearing little relation in their minds to any substantial threat to the safety of the community."¹¹² Hence, by implication I suppose, they may be forgiven a little hyperbole.

The fact is that there is nothing in the current situation which Holmes and Brandeis do not seem to have contemplated. In *Gillow*, Holmes would require "[a] present danger of an attempt to overthrow the government by force. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way. . . . An attempt to induce an uprising against the government at once and not at some indefinite time in the future . . . would have presented a different question."¹¹³

In *Whitney*, Brandeis said that speech might be suppressed only if the danger were "serious," "imminent": "In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated."¹¹⁴

To find in these passages the remotest resemblance to the present position of the Court is to deny that the English language is capable of expressing differences. For at the very instant that reason *was* routing this miserable conspiracy, the law has intervened.¹¹⁵

2. At the same time, the opinion is not as restrictive of free speech as the *Gillow* majority holding which it discountenances. This is particularly important because of the very heavy reliance of the government on that case.¹¹⁶

Gillow did hold that any utterances advocating overthrow of the government were punishable without any regard for the likelihood of the words having consequences. The Smith Act was modeled on the *Gillow* statute. In the *Dennis* case, the Vinson opinion tries to split the difference between the *Gillow* majority and the Holmes-Brandeis dissent. It differs

¹¹¹ For clear analysis and support of the Holmes-Brandeis views see Nathanson, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 *Harv. L. Rev.* 1167 (1950).

¹¹² *Dennis v. United States*, 341 U.S. 494, 510 (1951).

¹¹³ *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

¹¹⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927).

¹¹⁵ The thought is suggested by the Douglas dissent, *Dennis v. United States*, 341 U.S. 494, 589 (1951), which describes the factors making for the decline of the Party.

¹¹⁶ A flat reliance on *Gitlow* was a major part of the government brief.

from the *Gillow* majority in two vital respects: (a) In the Vinson opinion, following Judge Hand, the precise issue is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger";¹¹⁷ and (b) the Court, not the legislature, determines that matter.

In other words, the *Gillow* rule made valid *any* statute punishing advocacy of overthrow of the government. The Holmes-Brandeis view would make such a statute valid only if the likelihood of that result were immediate and pressing. The Vinson opinion makes such a statute valid if, on the facts as reviewed by the court, there is some appreciable probability of that result at some remote point in time.

The *Dennis* case is not as bad as it might be in one other respect; it at least leaves the issue of "political guilt" a personal one, to be decided from case to case. It is not a blanket decision which means automatically that every member of the dissenting group must go to jail. It stresses as the central issue of the case the "application of the statute to the particular situation," and emphasizes the leadership position of the particular defendants. By its strong emphasis in note 6, and the accompanying text, on Justice Brandeis' discussion in the *Whitney* case of the defendant's privilege to show, on the facts, a want of clear and present danger, the Court preserves the right to other defendants to make a similar, individualized showing.

3. The Holmes-Brandeis-Douglas position, or in the alternative the Black position, is right. Yet one says so under the inherent handicap that they have said it so much better than anyone else could that to agree is to parrot. Justice Douglas has set out comprehensively the reasons which led him to dissent, and his argument will ring for some with eternal conviction.

Let us face the ultimate question: Why should we tolerate the Communist yammer? Why endure voices of those who would gag us, given the opportunity?

There is the legal answer: "Congress shall make *no* law . . . abridging the freedom of speech, or of the press."

There is the historical answer, well blended with the practical answer: "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning

¹¹⁷ *Dennis v. United States*, 341 U.S. 494, 510 (1951).

them away, to injure the vigour of those yielding the proper fruits."¹¹⁸

Behind that figure of speech lies the greatest wisdom. Mankind has never learned the art of suppressing by littles. The violence of the spirit of suppression too quickly reaches beyond the truly wicked to mere non-conformists. Holmes saw the reason: It is because the distinction between advocacy and incitement, or in this case between education and advocacy, can not in practice be made. "The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."¹¹⁹

Finally, there is the moral answer. "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."¹²⁰

Those answers give the Douglas conclusion: The Russians suppress freedom of speech. We must not. "Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded."¹²¹

They lead to Black's hope "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."¹²²

The most familiar argument of the free speech liberal is that one abuse leads to another, that greater infringements follow lesser, that by "pruning away the noxious branches" the "vigour of those yielding their proper fruits" is lessened.

¹¹⁸ Report on the Virginia Resolutions, IV Letters and Other Writings of James Madison 544 (1867).

¹¹⁹ *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

¹²⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹²¹ *Dennis v. United States*, 341 U.S. 494, 510 (1951).

¹²² *Ibid.*, at 581.

The truth of those fundamentals is never better demonstrated than today. We learn again that political purges catch up the innocuous with the sinister. Since the Smith Act made red hunting a nationally respectable sport, many have become eager to join the pack. Loyalty programs and oath requirements have spread from "sensitive areas" of the national government to all of its branches; the states and municipalities have followed suit; and, encouraged by the Taft-Hartley Act, private industry and labor unions have established political tests not for the right of holding significant posts, but for the privilege of earning a living at all. We shall, if we can, starve the Reds we don't jail; and since we define the offense so casually, many non-Reds are victimized in the process.

That process was encouraged this year by the Court's decisions in the political oath cases. The two cases of *Gerende v. Bd. of Supervisors*¹²³ and *Garner v. Bd. of Public Works*¹²⁴ will vastly increase the oath-taking fad. In *Gerende*, the issue was the validity of a Maryland requirement that candidates for public office in elections take oath that they are not (a) presently engaged in attempting to overthrow the government; or (b) are knowingly members of such an organization. The two ingredients thus are either overt acts, or membership in an organization doing such overt acts, with scienter. This the Court unanimously upheld.

The careful limitations of the *Gerende* oath are not present in *Garner*, involving the Los Angeles oath for municipal employees. The Los Angeles oath required in 1949 has these elements: The employee must swear that he has not (a) for five years past (b) advised, advocated, or taught overthrow of the government; and that he has not (c) been a member of an organization with such purposes in that time, or (d) been "affiliated" with such an organization; and (e) he will not be guilty of such conduct in the future. This oath requirement of 1949 was based on a 1941 amendment to the Los Angeles charter by the California legislature which forbade the enumerated types of conduct, but provided no sanction. The principal challenge was that the oath requirement is a bill of attainder.

The three leading bill of attainder cases are *Cummings v. Missouri*,¹²⁵ *ex parte Garland*,¹²⁶ and *United States v. Lovett*.¹²⁷ "A bill of attainder is . . . a legislative act which inflicts punishment without judicial trial," according to *Cummings*.¹²⁸ Cummings and Garland were, respectively, a priest and a

¹²³ 341 U.S. 56 (1951).

¹²⁵ 4 Wall. (U.S.) 277 (1867).

¹²⁴ 341 U.S. 716 (1951).

¹²⁶ 4 Wall. (U.S.) 383 (1867).

¹²⁷ 328 U.S. 303 (1946). For discussion of these cases in terms of the contemporary situation, see Wormuth, *On Bills of Attainder*, 3 West. Pol. Q. 52 (1950).

¹²⁸ 4 Wall. (U.S.) 277, 287 (1867).

lawyer who would have been precluded from the practice of their professions by state or federal requirements that they take oaths that they had not, in effect, supported the Confederacy. In *Lovett*, three government employees were stricken from the federal payroll by the Congress. In all three cases the oath requirements or the payroll exclusion were held bills of attainder.

Those cases were distinguished by Justice Clark for the Court's majority on the ground that, following the *Cummings* quotation above, "punishment is a prerequisite," and no "punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." The legislation in the instant case was found analagous not to that of the *Cummings* and *Garland* cases, but rather to perfectly permissible legislation such as "a statute elevating standards of qualification to practice medicine." The *Lovett* legislation was distinguished on the ground that it "named individual employees" rather than establishing "general and prospectively operative standards."¹²⁹

Justice Frankfurter, dissenting as to the oath, emphasized the differences between this and *Gerende*. There, present conduct and scienter were required. Here the requirement is retroactive, there was originally no requirement of scienter;¹³⁰ and since "affiliation" is differentiated from "membership" by the terms of the oath, its meaning is particularly misty. Justice Burton dissented flatly on the ground of conflict with the three bill of attainder cases.¹³¹

Justice Douglas, for Justice Black as well, analyzed the bill of attainder cases in some detail and found the Los Angeles oath squarely within them: "Petitioners were disqualified from office not for what they are today, not because of any program they currently espouse, not because of standards related to fitness for the office but for what they once advocated. They are deprived of their livelihood by legislative act, not by judicial process."¹³²

It is indeed astonishing that the majority is unable to see any significant difference between the exclusion from public office of a person who four-and-one-half years earlier was "affiliated with" an undesirable organization, on the one hand, and a statute putting present requirements for the practice of medicine. As Justice Burton said, the ordinance "leaves no room for a change of heart."¹³³

¹²⁹ The quotations in this paragraph are from *Garner v. Bd. of Public Works*, 341 U.S. 716, 722-23 (1951) and the case cited as illustration of the power to raise medical standards is *Dent v. West Virginia*, 129 U.S. 114 (1889).

¹³⁰ The Court modified the ordinance by its own interpretation, and read in a requirement of scienter as well as other limitations. *Garner v. Bd. of Public Works*, 341 U.S. 716, 723 (1951).

¹³¹ *Ibid.*, at 735-36.

¹³² *Ibid.*

¹³³ *Ibid.*, at 729.

Its significance is ominous. In the words of Justice Frankfurter: "If this ordinance is sustained, sanction is given to like oaths for every governmental unit in the United States. Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations."¹³⁴

Against the wind of opinions such as *Dennis* and *Garner* stood one straw. It was *Joint Anti-Fascist Refugee Committee v. McGrath*,¹³⁵ challenging the Attorney General's subversive list.

Three organizations sought declaratory judgments and injunctions for removal of their names from the list. The list itself is prepared by the Department of Justice for the immediate use of the federal loyalty board, and purports to be a listing of "totalitarian, fascist, communist, or subversive" organizations or those which have "adopted a policy of advocating or approving the commission of acts of force or violence."¹³⁶ The list in fact, however, has far wider circulation than to the loyalty board alone, and is used by state and local governments and by private organizations as an enumeration of proscribed organizations.¹³⁷

Inclusion on the list is so deleterious to an organization that Justice Burton, in the only majority opinion joined by two Justices, held that the Attorney General would be required to justify his listings in the courts. The issue, it is vital to note, rose on the government's motion to dismiss the complaints of the organizations. The complaints, which sought removal of each of the three organizations from the list, alleged that the organizations were blameless, and that their inclusion on the list was an arbitrary act. The government, by its motion to dismiss, necessarily conceded the truth of these allegations, contending that the listings were not open to judicial review. The result of the Burton ruling is to send the cases to trial, at which the government will have to make a showing of the grounds for the inclusion of these organizations.

The main point of this holding is that the Attorney General may not make "patently arbitrary" listings. This the Executive Order authorizing the listings did not contemplate, and therefore no constitutional issue is reached. "The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot."¹³⁸ The issue is justifiable because the listing is "defamatory" and most injurious to

¹³⁴ *Ibid.*, at 727-28. ¹³⁵ 341 U.S. 123 (1951). ¹³⁶ 13 Fed. Reg. 1471, 1473 (1948).

¹³⁷ For a recent discussion of use of such lists see Barrett, *The Tenney Committee* (1951); and for a list, see *ibid.*, at 335-60.

¹³⁸ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 138 (1951).

bona fide organizations; and the Attorney General is not immune from suit when he exceeds his powers.

The decision was five to three, Justice Clark not participating. There are five majority opinions, only Justice Douglas concurring with Justice Burton, and Douglas filed a separate opinion as well. The four opinions other than Burton's are based on so much broader grounds that they must be considered separately.

The Frankfurter opinion most closely holds the common ground of the other four majority Justices. After extended consideration of the issue of justiciability, he reaches the question of whether the list itself violates due process, quite apart from any showing which the Attorney General may make in response to this complaint. He concludes that it does. "[D]esignation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent."¹³⁹ After elaborate consideration of the requirements of procedural due process in this situation, he finds "the wholly summary process for the organizations is inadequate."¹⁴⁰

By different roads, the other three majority Justices reach this same result. Indeed, it must be emphasized that the Frankfurter position is the minimal ground held by the others. The Black and Douglas opinions would not rest the liberty of thought and views involved on a merely procedural ground, and particularly on so narrow a base as want of notice and hearing. In the Black view, while the entire procedure is illegal on First Amendment grounds, if this hurdle is overcome, the employees are still entitled to jury trial.¹⁴¹ The holding thus becomes (a) four Justices for the proposition that the very existence and publication of the Attorney General's list is a denial of procedural due process; (b) one Justice for the proposition that the Attorney General must justify his list in open court; and (c) three Justices dissent on the pleading point and, more important,

¹³⁹ *Ibid.*, at 161.

¹⁴⁰ *Ibid.*, at 173.

¹⁴¹ Justice Jackson believes that hearings on the making up of the list must be allowed, not for the sake of the organizations which by themselves might not be heard to complain, but because the list is used in loyalty cases against government employees, who never have an opportunity to challenge it. Justice Black believes that even with hearings, the publication of the list would be "a most evil type of censorship," *ibid.*, at 143; and Justice Douglas believes that the whole "loyalty system" of which these lists are a part is unconstitutional, *ibid.*, at 180-81.

declare that the organizations have no rights of due process as to the list.¹⁴²

The dissent, by Justice Reed for the Chief Justice and Justice Minton, argues that while the list harms the "prestige, reputation, and earning power" of the organizations, it "does not prohibit any business of the organizations, subject them to any punishment or deprive them of liberty of speech or other freedom." "The petitioners are not ordered to do anything and are not punished for anything."¹⁴³ Therefore any judicial inspection of the list interferes with executive prerogative.

The Attorney General's List case must be considered in conjunction with *Bailey v. Richardson*,¹⁴⁴ in which the validity of the entire loyalty program for federal government employees was challenged, basically on due process and first amendment grounds. The Court of Appeals for the District of Columbia had, two to one, upheld the validity of that program. With Justice Clark not participating, the holding below was affirmed by an equally divided Court, "without opinion."

One may put "without opinion" in quotation marks because never have secret ballots been more clearly cast into a gold fish bowl for all to see. Six of the Justices, precluded from expressing their opinion on the loyalty program in the *Bailey* case by the tradition against filing opinions where the Court is equally divided, expressed themselves on the *Bailey* case in the Attorney General's list case. It becomes perfectly obvious that the division on the loyalty program was Justices Reed, Burton, Minton, and the Chief Justice to affirm the Court of Appeals, and Justices Black, Frank-

¹⁴² As to the meaning of the decision, particularly in view of the split among the majority there is a great divergence. McCarran, *The Supreme Court and the Loyalty Program: The Effect of Refugee Committee v. McGrath*, 37 A.B.A.J. 434 (1951), would reduce the majority ruling to a pleading conclusion only, readily rebutted by evidence at trial, and he repels the suggestion that "the President should drastically amend his Executive Order." Mr. Richardson, former chairman of the Loyalty Review Board, construes the opinion as meaning that "suitable preliminary hearings should be granted" to organizations. Richardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546 (1951). See the review of Richardson's work at p. 402 *infra*.

More authoritative is the opinion of the Second Circuit on the issue of whether, in a perjury case, the government may suggest defendant's membership in the Communist Party by referring to the Attorney General's list. The Court said, citing the instant case: "The list is a purely hearsay declaration by the Attorney General and could have no probative value in the trial of this defendant. It has no competency to prove the subversive character of the listed associations and, failing that, it could have no conceivable tendency to prove the defendant's alleged perjury even if it were shown that he belonged to some or all of the organizations listed." *United States v. Remington*, 191 F. 2d 246, 252 (C.A. 2d, 1951).

On the other hand, subsequent to the decision the American Federation of Radio Artists adopted an amendment to its constitution barring persons affiliated with organizations on the list from membership. *Red-Proof Radio*, *Business Week* 40 (Aug. 25, 1951).

¹⁴³ *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 202-203 (1951).

¹⁴⁴ 341 U.S. 918 (1951), lower court opinion 182 F. 2d 46 (App. D.C., 1950).

furter, Douglas, and Jackson to reverse. Justice Reed tied several pages of expression of approval of the loyalty program to the three-Justice dissent in the list case, while Justices Black, Douglas, and Jackson very explicitly showed their disapproval of the *Bailey* affirmance.¹⁴⁵ Thus there could be doubt only as to the positions of Justices Frankfurter and Burton, but the tone of their respective opinions makes fairly clear that their stands were as stated.¹⁴⁶ The Douglas opinion in the list case is the most elaborate dissent to the affirmance of the loyalty program, and reduces to a few concise pages the constitutional vices of a program which would have been held unconstitutional by the switch of one vote on the District of Columbia Court of Appeals.

There were other free speech cases, of which only one can be discussed in the text.¹⁴⁷ In *Feiner v. New York*,¹⁴⁸ the Court returned to the question of the power of a state to suppress speech where the speech itself is legal, but provokes a disorderly response. Two years ago, that question had come up in connection with Father Terminiello, whose rabble rousing had caused him to be found guilty by a Chicago jury under a charge from the bench which declared to be illegal conduct that which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The Court, through Justice Douglas, had held that the principles of free speech precluded conviction on the ground that speech not itself illegal "invites dispute" by others. Justices Frankfurter, Burton, and

¹⁴⁵ Reed: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 206-213 (1951); Black: *ibid.*, at 143-44; Douglas: *ibid.*, at 179-83; Jackson, *ibid.*, at 185.

¹⁴⁶ Justice Frankfurter, in speaking of Loyalty Order procedure, says: "Whether such procedure sufficiently protects the rights of the employee is a different story." *Ibid.*, at 173. The factors which lead him to his result as to the list would very probably give the same result on the Loyalty Order itself.

¹⁴⁷ Not discussed in the text are *Nietmoko v. Maryland*, 340 U.S. 268 (1951), a routine case on refusals to issue a license to Jehovah's Witnesses to use a park; *Kunz v. New York*, 340 U.S. 290 (1951), another routine case, this time on street licensing of an offensive speaker where the city licensing system sets no standards; and *Breard v. Alexandria*, 341 U.S. 622 (1951). In the *Breard* case, the issue is the validity of one of the so-called Green River ordinances forbidding solicitors to approach homes unless invited. The defendant was a magazine salesman. In upholding the ordinance, the Court distinguished *Martin v. Struthers*, 319 U.S. 141 (1943), which had invalidated a restriction on the distribution of religious literature door to door, but which had carefully reserved the problems of "commercial" activity. Chief Justice Vinson dissented on commerce clause grounds, as did Justice Douglas; and Justices Black and Douglas dissented on the ground that the decision overruled *Martin v. Struthers* and other cases. The highly commercial activity involved here is so different from that of *Martin v. Struthers* that it is difficult to see any necessary inconsistency between that case and *Breard*. However, Justices Black and Douglas emphasize that "[t]he constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers." *Breard v. Alexandria*, *supra*, at 650.

¹⁴⁸ 340 U.S. 315 (1951).

Jackson dissented on the merits, and Chief Justice Vinson on other grounds.¹⁴⁹

The *Feiner* case put approximately the same question over again. In *Feiner*, the speaker was making a pro-Wallace speech on a street corner in Syracuse, New York. The speech was offensive to his audience, and "at least one [auditor] threatened violence if the police did not act."¹⁵⁰ On the other hand, some auditors favored the speaker. The police made no effort, of the smallest sort, to control the crowd or to restrain the one onlooker who made a threat. Instead they arrested the speaker, who was convicted of provoking a breach of the peace. The conviction was upheld by the Supreme Court by a majority consisting of the four *Terminiello* dissenters plus Justices Reed and Clark, who was not then on the bench. Justices Black, Douglas, and Minton dissented.

The majority conceded the "possible danger of giving overzealous police officials complete discretion to break up otherwise lawful meetings"; but this, they said, is different because it is "incitement to riot." How one is to know and recognize that fine line where a "speaker passes the bounds of argument or persuasion" is not discussed and will give great difficulty.¹⁵¹ Justice Black, dissenting, feared the creation of a "simple and readily available technique by which cities and states can with impunity subject all speeches" to censorship. Of course the police can prevent breaches of the peace. "But if, in the name of preserving order, they ever can interfere with a lawful speaker, they first must make all reasonable efforts to protect him."¹⁵² Justice Douglas expressed a similar thought: "A speaker may not, of course, incite a riot. . . . But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection."¹⁵³

The *Terminiello* case was not mentioned by the majority or one dissent, and was cited in passing in the other. Its status is doubtful.

One other acute problem has been presented in connection with the large volume of "political cases" now in the courts. That is the problem of obtaining counsel for the allegedly disloyal.

It is now, as I can personally vouch from some observation, almost impossible to obtain "respectable counsel" in the political cases. Public opin-

¹⁴⁹ *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949).

¹⁵⁰ *Feiner v. New York*, 340 U.S. 315, 317 (1951).

¹⁵¹ *Ibid.*, at 320, 321.

¹⁵² *Ibid.*, at 323, 329.

¹⁵³ *Ibid.*, at 331.

ion has risen to such a point that many lawyers believe they will be professionally ruined if they take such cases, even at fair compensation. The number of attorneys like Charles Evans Hughes, who spoke out against the tide in the 20's, or like Wendell Willkie, who on principle represented a Communist in the Supreme Court, has been small. There have been some exceptions. The Washington law firm of Arnold, Fortas, and Porter made the attack on the Loyalty Program in *Bailey v. Richardson*. Mr. John Raeburn Green of St. Louis has filed a petition for rehearing for one defendant in the *Dennis* case. My colleague, Professor Emerson, is arguing one motion in trial court in the now pending second string Communist case. There are doubtless a few others as well.

But these acts have been startlingly rare, and for the most part the parties have been compelled to take counsel from among a very small group of the bar. At the present time, with trial of the second string Communist case in the immediate future, no full staff has been assembled to handle the case despite the fact that District Judge Ryan, seeing the problem, has made substantial efforts to obtain a panel.

This problem was peripherally before the Court in two aspects of the *Dennis* case. Counsel for the Communists pleaded that they could find no one at the American bar, despite requests made to twenty-four lawyers, to handle their case in the Supreme Court.¹⁵⁴ They asked for permission to employ an English barrister. The Court granted that permission, but refused to postpone the date of argument, which in effect nullified the grant.¹⁵⁵ Justice Frankfurter added a note to that order, saying that counsel if needed would be appointed, but that those already in the case were obviously competent.

The trial attorneys in the *Dennis* case were held in contempt by the trial court, an order affirmed by a divided Court of Appeals, and the Supreme Court denied certiorari, Justices Black and Douglas dissenting from the denial.¹⁵⁶ While the trial attorneys probably well deserved to be held in contempt, Judge Clark in the Second Circuit raised serious questions of the legality of the procedure of the trial judge in that respect.¹⁵⁷ In any

¹⁵⁴ Their list is undocumented, and may not be wholly bona fide. In some instances, there is reason to suppose that they refused to accept ordinary conditions of control by counsel.

¹⁵⁵ 340 U.S. 887 (1950).

¹⁵⁶ *Sacher v. United States*, 182 F. 2d 416 (C.A. 2d, 1950), cert. denied, 341 U.S. 952 (1951). Certiorari was granted on a petition for rehearing at the beginning of the October 1951 Term, 20 L.W. 3103 (1951).

¹⁵⁷ The subject is reviewed in Harper and Haber, *Lawyer Troubles in Political Trials*, 60 Yale L.J. 1 (1951).

case, the contempt order, deserved or not, has intensified the difficulties in obtaining counsel in such cases.

So that these cases might be adequately heard in the Supreme Court, the Chicago Bar Association suggested to the American Bar Association that it establish a panel of counsel for the *Dennis* case. The refusal of the Supreme Court to extend the time for argument made it impossible to carry through this plan. True, the Communists have to some extent put themselves into their present position by the tactics of their trial counsel in the *Dennis* case; and they are doubtless maximizing the difficulty of obtaining counsel for propaganda purposes. But there is enough actual difficulty to make something like the Chicago Bar's plan necessary if the great tradition of the Bar is to be maintained.¹⁵⁸

b) *Criminal Procedure*

The difference in interests of the Truman Court from its predecessor has brought a basic change in the nature of the criminal procedure cases before it. As was noted last year, most of the "fair trial" cases are now swept under the rug of certiorari denied. This year most of the criminal procedure cases turned on either self-incrimination or the meaning and application of the federal Civil Rights Acts.¹⁵⁹

The self-incrimination cases make an easy bridge from the political cases, because most of the self-incrimination cases involved questions about Communist affiliation. In the main decision, *Blau (Patricia) v. United States*,¹⁶⁰ the petitioner refused to answer questions before a grand jury on her alleged association with the Communist Party. In a few words

¹⁵⁸ "A second contribution which I think the Bar may make relates to fair administrative and legislative hearings for persons under investigation and fair trials for persons accused of crimes involving security. The Bar has a notable tradition of willingness to protect the rights of the accused. It seems to me that if this tradition is to be meaningful today, it must extend to all defendants, including persons accused of such abhorrent crimes as conspiracy to overthrow the Government by force, espionage, and sabotage. Undoubtedly some uninformed persons will always identify the lawyer with his client. But I believe that most Americans recognize how important it is to our tradition of fair trial that there be adequate representation by competent counsel.

"Lawyers in the past have risked the obloquy of the uninformed to protect the rights of the most degraded. Unless they continue to do so in the future, an important part of our rights will be gone."

Letter, President Truman to Arthur B. Freund, Chairman, Section on Criminal Law, Amer. Bar Ass'n, Sept. 1, 1951, as published in *N.Y. Times* § L, p. 10, col. 2 (Sept. 19, 1951).

¹⁵⁹ Cases not in these areas are *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951), interpreting Rule 17c of the Rules of Criminal Procedure in respect to subpoenas of confidential documents; and *Dowd v. United States ex rel Cook*, 340 U.S. 206 (1951), on the relation of Indiana post-conviction review procedure and the right of habeas corpus in federal court.

¹⁶⁰ 340 U.S. 159 (1950).

Justice Black for the Court held that the questions need not be answered since, with the Smith Act on the books, "she reasonably could fear that criminal charges might be brought against her if she admitted" the association. It was not necessary that the admissions themselves be enough to convict her if they would be "a link in the chain of evidence needed."¹⁶¹

The *Blau* case is simple enough; it takes no remote supposing to see a link between the testimony sought and the Smith Act. *Hoffman v. United States*,¹⁶² on the other hand, is an extreme development. Hoffman, possessor of a police record, was called before a federal grand jury investigating rackets in Philadelphia. He was asked a number of questions, particularly concerning his association with one Weisberg, who was eluding the grand jury. Hoffman declined to answer questions (a) as to his present occupation; (b) as to when he had last seen Weisberg; (c) as to when he had last walked to Weisberg on the phone; and (d) as to whether he knew where Weisberg was. The Court held that he need answer none of these questions.

In view of Hoffman's extensive record, it is reasonable to suppose that responses as to his present occupation might get him into as much trouble with the law as Blau's answers about her politics. Hence Justice Clark for the Court readily found that refusal to answer met the test, "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."¹⁶³

But to find danger of entanglement in the criminal law in the questions as to Weisberg's location (as distinguished from some other readily imaginable dangers) is far-fetched in the extreme. Hoffman has violated no law, no matter what answer he gives to those questions, unless in the Court's words he has been "hiding or helping to hide another person of questionable repute sought as a witness."¹⁶⁴ In this case there is absolutely no reason to suppose that Hoffman was hiding Weisberg except that he had known Weisberg for many years and that they were both suspected as racketeers. Nothing in the record shows any past close collaboration between the two. What such a record does suggest is that Hoffman may well have some information about Weisberg's location.

This makes a sharp difference between the *Blau* and *Hoffman* cases. In

¹⁶¹ *Ibid.*, at 161; and see *Blau (Irving) v. United States*, 340 U.S. 332 (1951). For recent discussion of the privilege, with full citation to the literature, see Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 *Univ. Chi. L. Rev.* 687 (1951).

¹⁶² 341 U.S. 479 (1951).

¹⁶³ *Ibid.*, at 486-87.

¹⁶⁴ *Ibid.*, at 488.

Blau, any answer which gives the government anything worth having may involve petitioner under the Smith Act; and it is highly likely from all the circumstances that the answer will be incriminatory. The possibility that Hoffman is hiding his old acquaintance, in view of the number of places a person might hide in the United States and in view of the fact that the possibility is based solely on long acquaintance and a somewhat common interest, seems negligible.

One trouble with this kind of over-expansion of the right against self-incrimination is that it inevitably leads to technical constructions of the right which may reach into the very zone in which it is supposed to be effective. This is all too well illustrated in the case of *Rogers v. United States*.¹⁶⁵ Rogers, like Blau, was interrogated before the Denver federal grand jury on possible Communist associations. Rogers was apparently unaware of the privilege against self-incrimination. She did admit having been Treasurer of the Denver Communist Party, but refused to identify the party to whom she had later turned over the books and records because of unwillingness to get another person into trouble. This refusal was not based on the privilege. When brought before the district judge, she was given one day to consider the matter and then for the first time retained counsel. On the next day she declined to answer not merely this question, but any questions on her Communist associations, on the ground of the privilege. She seems either to have found out about the privilege from her counsel or in open court on the next day from discussion in other related cases. The Chief Justice for the Court held that the privilege had been waived, that she could not be allowed "to select any stopping place in the testimony." Rather, "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."¹⁶⁶

If the opinion had been rested solely on other available grounds, as that the identification of the other individual was not incriminatory, the results would not be so serious. But this rigid application of the doctrine of waiver does, as Justice Black, dissenting, said for Justices Frankfurter and Douglas as well, "[create] this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."¹⁶⁷

¹⁶⁵ 340 U.S. 367 (1951).

¹⁶⁶ *Ibid.*, at 371, 373.

¹⁶⁷ *Ibid.*, at 378.

That is exactly what has happened subsequent to the opinion. Several persons interrogated by the federal district court in New York concerning their relations with a certain Communist-favoring bail fund have had to face the alternative of contempt or waiver. They have chosen contempt, apparently on the theory that they would prefer the probably lighter penalty for contempt to possible conviction under the Smith Act. One has already been held in contempt twice, for refusing to answer seemingly innocuous questions about the fund. When interrogated for purposes of this article, his counsel explained with apparent sincerity that the waiver hazard was too great.¹⁶⁸

The basic result of this year's self-incrimination cases seems to be reaffirmation of the familiar principle that one may refuse to answer direct questions which might implicate him under the law even though that prospect, as in the *Hoffman* case, is extremely remote. Yet if the questions start from a point sufficiently collateral to the main issue, the witness may be caught in the waiver-contempt dilemma. The possibility that many persons will lose the privilege by waiver, as did Rogers, through sheer ignorance of its existence is greatly lessened by the wide-spread publicity given the Senate Crime Committee, whose televised hearings during the year just passed have made the privilege familiar to millions, and have caused it to be claimed more widely than ever before.

There remain the cases under the federal Civil Rights Acts of 1870 and 1871.¹⁶⁹ Of this group, only *Williams v. United States*¹⁷⁰ directly involves criminal procedure; but *Collins v. Hardyman*¹⁷¹ and *Tenney v. Brandhove*¹⁷² involve such similar issues that all may be considered together.

There were three *Jay G. Williams* cases in Court this year, all arising from one basic fact situation. A Miami, Florida, lumber company suffering from thefts employed a detective agency headed by Williams to find the thieves. Williams was also a "special police officer" in Miami. He, two of his employees, and one regular policeman seized a number of persons, and, using the most savage brutality, including beatings with rubber hose, sash cords, pistols and clubs, obtained "confessions."

Williams and his associates were indicted under Sections 241 and 242 of Title 18 of the United States Code. (1) He was convicted, though his associates were not, under Section 242. The trial court declared a mistrial under Section 241. The Supreme Court affirmed the conviction of Wil-

¹⁶⁸ As this article is written, these cases are pending in the Second Circuit.

¹⁶⁹ 16 Stat. 141 (1870), as amended, 18 U.S.C.A. § 242 (1950); 17 Stat. 13 (1871), as amended, 8 U.S.C.A. § 43 (1942).

¹⁷⁰ See notes 173-75 *infra*.

¹⁷¹ 341 U.S. 651 (1951).

¹⁷² 341 U.S. 367 (1951).

liams under Section 242 in this group of cases.¹⁷³ (2) On retrial, all four were convicted under 241. This the Supreme Court reversed.¹⁷⁴ (3) For their conduct in the cases just mentioned, Williams and the others were convicted of perjury.¹⁷⁵ This was affirmed. The first two cases will be referred to here as the 242 case and the 241 case, respectively.

A. The 242 case. This section provides: "Whoever, under color of any law, statute, ordinance . . . willfully subjects, or causes to be subjected, any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities" shall be fined or imprisoned.¹⁷⁶ It was this provision which had been interpreted in *Screws v. United States*,¹⁷⁷ in which Sheriff Screws had been given a new trial on the issue of intent when charged with similar conduct. Justice Douglas, who had written the main opinion in the *Screws* case, spoke for the majority in this case and added much helpful clarity to the earlier decision. He held first, following *Screws* closely, that Williams had acted "under color of law," rather than as a private person, in that he had at least "a semblance of policeman's power from Florida."¹⁷⁸

This set the stage for the main issue, also raised in *Screws*, whether the statute is void for indefiniteness because a policeman cannot be expected to know what anything so obscure as "rights, privileges or immunities" are. Indeed, the Court has trouble itself in making up its mind. Douglas' rejoinder is a triumph of common sense: The words are uncertain, and some day the Court may be faced with a marginal situation in which a policeman might have trouble in making up his mind. In *that* case, the law may be inapplicable because of its indefiniteness. But in *this* case, no policeman could conceivably have any doubts.

The major new contribution of the *Williams* case is its quotation with approval of the charge of the trial judge on the issue of intent. The *Screws* case stirred the fear that an impossible standard of intent was being required by the Court. In this case the trial judge used a good, simple charge which makes intent ascertainable largely from objective acts and leaves the statute thoroughly workable.¹⁷⁹ Justices Frankfurter, Jackson, and Minton dissented, adhering to the *Screws* case dissent, and Justice Black also dissented.

¹⁷³ *Williams v. United States*, 341 U.S. 97 (1951).

¹⁷⁴ *United States v. Williams*, 341 U.S. 70 (1951).

¹⁷⁵ *United States v. Williams*, 341 U.S. 58 (1951).

¹⁷⁶ 62 Stat. 696 (1948), as amended, 18 U.S.C.A. § 242 (1950).

¹⁷⁷ 325 U.S. 91 (1945).

¹⁷⁸ *Williams v. United States*, 341 U.S. 97, 100 (1951).

¹⁷⁹ *Ibid.*, at 102.

B. The 241 case. The dissenters in the previous case added the Chief Justice to their number in this case and thus became a majority. Section 241 differs from 242 in these principal respects: 241 is directed at conspiracy, 242 at the substantive act; and 241 covers injury to citizens in "any right or privilege secured to him by the Constitution or laws of the United States," without reference to "color of law,"¹⁸⁰ while 242 refers to "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," which are invaded "under color of law."

Analysis of the sections just quoted shows that they are virtually identical. Justice Frankfurter found, however, that they mean quite different things. 241, he said, in part because it does *not* have the "color of law" limitation, is, oddly enough, to be given a narrower construction than the clause which does have the limitation. It is to be construed as applying only to invasions of that small category of rights which the federal government can reach even if they are not invasions "under color of law." That is to say, 241 applies only to (a) invasions by private individuals, not state officers acting under color of law, of (b) those rights which are peculiarly federal such as, principally, the right to vote.

Although the Frankfurter opinion is the prevailing opinion, it can not be called the majority opinion; it represents the views of four Justices, and so does that of Justice Douglas, which is in flat disagreement. The case is thus controlled by the vote of Justice Black, who concurred with the Frankfurter result on wholly independent and unrelated grounds.¹⁸¹ On the interpretation of Section 241, therefore, the Court is evenly divided; and the weight of reason and of history seems overwhelmingly with Douglas. The absence of the "color of law" restriction in Section 241 should make it obvious that its coverage was intended to be slightly broader, rather than narrower, than its companion. It would have been an amazingly bizarre drafting device to *limit* a statute by deleting its words of restriction.

Collins v. Hardyman arose from the Civil Rights Act of 1871, the Ku Klux Act, passed to restrain the activities of that and similar groups during Reconstruction.¹⁸² The core of the provision establishes a remedy in damages for any party injured by any group of persons who, inter alia,

¹⁸⁰ 16 Stat. 141 (1870), as amended, 8 U.S.C.A. § 47(3) (1942).

¹⁸¹ Black thought the case governed by *res judicata*.

¹⁸² 341 U.S. 651 (1951). *Tenney v. Brandhove*, 341 U.S. 367 (1951) also arose under the 1871 Act. In that case, Brandhove sued Tenney for damages on the ground that Tenney and his associate members of the California legislature's Un-American Committee had conspired to violate Brandhove's rights. The Court avoided the kind of issues discussed in the text by the holding, in this case, that the statute was inapplicable to acts of state legislators.

conspire to "go . . . on the premises of another" for the purpose of depriving their victims of "equal protection of the laws, or of equal privileges and immunities under the laws."¹⁸³ In this case a group of Legionaires allegedly broke up a meeting in California of persons gathered together for the purpose of discussing national issues and of petitioning Congress for a redress of grievances. The plaintiffs were those in attendance at the meeting, the defendants were those who allegedly broke it up. The issue was whether the complaint stated a cause of action.

To avoid what it regarded as serious constitutional issues, the majority through Justice Jackson, gave an extremely rigid construction of the Act. He declared that the defendants, while they had unquestionably invaded rights of the plaintiffs, had not deprived them of "equal protection" or of "equal privileges and immunities," since their rights under the laws of California remained quite unaffected by the invasion. The plaintiffs are put to their rights under the laws of California.

The decision is influenced by *United States v. Harris*,¹⁸⁴ the Reconstruction decision holding unconstitutional a similar provision establishing criminal penalties for violation by private persons of Fourteenth Amendment rights. To avoid the force of that decision, the plaintiffs had carefully claimed a right not under the Fourteenth Amendment but under the First, the right to petition Congress. Justice Burton, dissenting for Justices Black and Douglas, thought they should have been successful.

This decision, because of the constitutional reasons given for the narrow statutory construction, is another blow at the power of the federal government to deal with private invasion of the rights of citizens. The insistence on overt "state action" is a renewed affirmation of the powerlessness of the federal government to deal directly with, for example, lynching.¹⁸⁵

What these cases interpretive of Reconstruction legislation have in common is an emotional and moral sense of judicial opposition to the legislation of that era. One need not reduce analysis of the judicial process to speculations about what the judge had for breakfast to agree with the thoroughly familiar maxim that his opinions are largely a product of his conditioning. Today's cases may be decided in terms of the symbols accepted in high school and elementary college work.

No era is more subject to those symbolic associations than Reconstruc-

¹⁸³ 17 Stat. 13 (1871), as amended, 8 U.S.C.A. § 47(3) (1942).

¹⁸⁴ 106 U.S. 629 (1883).

¹⁸⁵ For an analysis of the historical material leading to the conclusion that this view is historically unsound, and that the Harris case was a basic departure from the plan and purpose of the Fourteenth Amendment, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 162-66 (1950).

tion. In the beginning, the radicals wrote the history and deified their heroes. The corruption and cheap politics aspects of Reconstruction were minimized, and Andrew Johnson was made a drunken fool. The counter movement, largely under the profound and useful influence of Professor Dunning of Columbia, led to the Democratic interpretation of the era which is now largely unchallenged. In this view, Sumner and Stevens were fanatical tyrants, Johnson was glorified, and the Reconstruction was nothing but a barbecue for carpetbaggers and scalawags. There is also a very recent modern revisionist school which finds no necessity to take a partisan viewpoint.¹⁸⁶ This view results in a far more complex picture than the others. It concedes that, for example, Sumner may in different aspects of his character have been both an egalitarian and a tyrant; that some Southerners were trying *both* to salvage what they could of the slavery system *and* to protect themselves and their families from outrageous exploitation of thieves and fools. To give another example of the revisionist approach, it is possible that the hated scalawags, or Southern post-war "Collaborationists" were not entirely aspiring job holders without principle, but in some instances were the earnest remnant of the Whig party.¹⁸⁷

Objective interpretation of Reconstruction legislation requires some detachment from the legendary heroes or devils of the era. But as these cases show, revisionism as a school of historical thought has not yet reached the Supreme Court, and the job of interpreting the laws is approached in that corruption of the Dunning tradition to which most Americans of middle age are educated. Justice Frankfurter in the *Williams* group begins his interpretation with general criticism of Reconstruction legislation: The time was "not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues."¹⁸⁸ Justice Jackson in the *Collins* case is more detailed: "The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War." It "was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects

¹⁸⁶ On the comparison of the revisionist view with others, see Hesselstine, *A Quarter Century*, etc., 25 *J. Negro Hist.* 440, 445-48 (1940); Williams, *An Analysis of Some Reconstruction Attitudes*, 12 *J. South. Hist.* 469 (1946).

¹⁸⁷ See, e.g., Donald, *The Scalawags in Mississippi Reconstruction*, 10 *J. South. Hist.* 447 (1944).

¹⁸⁸ *United States v. Williams*, 341 U.S. 70, 74 (1951).

were soon realized when its execution brought about a severe reaction." (The sole citation given to reflect the Justice's source of information on the "background of this Act, the nature of the debates which preceded its passage, and the reaction it produced" is Bowers, *The Tragic Era* (1929), as grossly partisan a work as there is on the subject.) The Court of the 70's, which virtually emasculated the Fourteenth Amendment, is then praised, its members "all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system."¹⁸⁹

My point is this: If the Court approached the Reconstruction legislation, not in the spirit of opposition to the enormities of a band of venomous madmen, but in that spirit of objectivity which guides its approach to, for example, the federal rules, these extremely limiting interpretations would not result. This opposition spirit is doubly unsound. It precludes an objective twentieth-century assessment of the social desirability of some parts of this legislation, and prevents a sifting and winnowing of that which might, for our time, be good, from that which is bad. It is also unsound even at the level of technicality. If the Court really supposes, as does Justice Frankfurter, that this legislation was "inconsidered and incoherent," and filled with "loose and careless phrasing," or that it was, as Justice Jackson believed, purely partisan and abusive, then one could not possibly conclude that it contains the neat, careful, elaborate distinctions which these Justices read into it, and that its coverage is so pin-point small. The Justices insist on having it both ways: this was simultaneously shotgun legislation and the finest legal lace work on the books.

SUMMARY OF CIVIL RIGHTS POSITIONS

A summary of the positions of the Justices in the divided civil rights cases follows. As always, such data must be read with the greatest care, for they may be misleading. Comparisons with previous years must make some incalculable allowance for the fact that the departure of Justices Murphy and Rutledge from the bench during the period for which these figures are compiled broke up the group of four which previously had been able to grant certiorari in many civil rights cases. Denials of certiorari undoubtedly kept some potential cases out of the table which might more fully have highlighted divergences of view between Justices Black and Douglas and some of their colleagues.

When all the necessary qualifications are made, this table nonetheless has substantial residual value. If a given Justice's decisions put him pre-

¹⁸⁹ *Collins v. Hardyman*, 341 U.S. 651, 656-58 (1951).

ponderantly in one column or the other, then the figures contain a clue or hint as to his basic attitudes about civil rights.

There were sixteen divided civil rights cases at the 1950 term.¹⁹⁰ Disqualifications result in some Justices having less than this number.

The same data for the 1949 and 1950 terms only, presented separately to make clearer the relationship of Justices Clark and Minton to the rest of the Court, are shown in Table 2.

TABLE 1
DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL
RIGHTS CASES, 1946-1950

	IN SUPPORT OF CLAIMED RIGHT			IN DENIAL OF CLAIMED RIGHT				
	1950	1946- 49	1946- 50	Per Cent of Total	1950	1946- 49	1946- 50	Per Cent of Total
Vinson.....	3	10	13	15%	12	62	74	85%
Black.....	13	53	66	76	3	18	21	24
Reed.....	4	10	14	16	12	62	74	84
Frankfurter....	9	34	43	49	7	38	45	51
Douglas.....	14	49	63	84	2	10	12	16
Jackson.....	3	20	23	27	13	50	63	73
Burton.....	7	13	20	23	9	59	68	77
Clark.....	3	1	4	22	7	7	14	78
Minton.....	2	3	5	16	14	12	26	84

TABLE 2
DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL
RIGHTS CASES, 1949-1950

	IN SUPPORT OF CLAIMED RIGHT		IN DENIAL OF CLAIMED RIGHT	
	1949-50	Per Cent of Total	1949-50	Per Cent of Total
Vinson.....	5	17%	25	83%
Black.....	27	87	4	13
Reed.....	6	19	25	81
Frankfurter....	20	65	11	35
Douglas.....	16	89	2	11
Jackson.....	9	29	22	71
Burton.....	10	32	22	68
Clark.....	4	22	14	78
Minton.....	5	16	26	84

¹⁹⁰ The divided civil rights cases were: *Ackermann v. United States*, 340 U.S. 193 (1950); *Blau (Irving) v. United States*, 340 U.S. 332 (1951); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Collins v. Hardyman*, 341 U.S. 651 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Feiner v. New York*, 340 U.S. 315 (1951); *Garner v. Bd. Public Welfare*, 341 U.S. 716 (1951); *Hoffman v. United States*, 341 U.S. 479 (1951); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Rogers v. United States*, 340 U.S. 367 (1951); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Williams*, 341 U.S. 58 (1951); *United States v. Williams*, 341 U.S. 70 (1951); *Williams v. United States*, 341 U.S. 97 (1951). Chief Justice Vinson is treated as not participating in the *Breard* case for purposes of this table since his vote is cast upon a point distinct from the civil rights issue which concerned the other eight Justices.

Unanimous civil rights cases, not included in the table, are *Blau (Patricia) v. United*

IV. LAWYERS' LAW

a) *Federal jurisdiction, procedure, and related subjects*

For intriguing technical questions, the 1950 term was a lawyer's feast, with at least eight cases of distinct interest.¹⁹¹ Major problems were raised under the Federal Tort Claims Act.¹⁹² In one, the issue was whether the government could be impleaded by a defendant as a joint tort-feasor under the Act, and the Court held that it could.¹⁹³ In the second, the Court unanimously decided that the government could not be sued for injuries borne by soldiers incident to military service.¹⁹⁴

The military liability case involved three different situations. In one, the deceased allegedly burned to death as a result of negligent quartering. In a second, deceased allegedly died because of an army doctor's mal-

States, 340 U.S. 159 (1950); *Dowd v. United States ex rel Cook*, 340 U.S. 206 (1951); *Gerende v. Bd. Supervisors*, 341 U.S. 56 (1951); *Gusik v. Schilder*, 340 U.S. 128 (1950); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Shepherd v. Florida*, 341 U.S. 50 (1951).

The table in the 1949 Term article, 37-38, contained an error in the list of cases, called to my attention by Mr. Irving Dilliard of the St. Louis Post Dispatch. In note 142, *Building Service Union v. Gazzam*, 339 U.S. 532 (1950), was erroneously listed as nonunanimous, and *Darr v. Burford*, 339 U.S. 200 (1950), which was a nonunanimous civil rights case, was omitted. However, this error occurred in the footnote only, and not in the Table, so that the figures given remain unchanged.

¹⁹¹ Not otherwise mentioned in the text are *Amer. Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), on the removability of a suit against local and foreign defendants under the provision of 28 U.S.C.A. § 1441(c) (1950) for removal of a "separate or independent claim or cause of action." In this case the original claim was made in a state court against a local defendant, the insurance agent, and two foreign insurance companies. One of the insurance companies removed, and judgment was obtained only against it. It was nonetheless allowed subsequently to raise the issue of the legality of the removal precipitated by itself, and to defeat the removal because the claim against it had not been "separate or independent." *Snyder v. Buck*, 340 U.S. 15 (1950) holds that where an action is against a named government official who retires during its pendency, his successor must be substituted within the statutory time or the action abates. (In the *Finn* case, Justice Douglas, dissenting, expressed the view that petitioner, having removed his case and lost it, "is now estopped from having it remanded." *Amer. Fire & Casualty Co. v. Finn*, *supra*, at 19. In the *Snyder* case, Justice Douglas wrote the opinion of the Court. There the government lost in the trial court, and it wrongfully took the appeal in the name of respondent who had retired. Nonetheless, here, said Justice Douglas, is a "declared policy of Congress not to be altered by . . . some theory of estoppel." *Snyder v. Buck*, *supra*, at 19. If estoppel can keep a defendant from benefiting from his own jurisdictional error under one section of the judicial code, why not another?)

In *Missouri ex rel Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), it was held that a state may apply its own *forum non conveniens* doctrine to bar a Federal Employers Liability Act case from its courts. In *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1951), the Court held that only the Attorney General, and not a subordinate, may be directed by a court to produce papers of the Department in court. As a practical matter, this requires that such suits be brought in the District of Columbia, and renders immeasurably more difficult the requiring of papers in criminal litigation. What good is served by this awkwardness is not disclosed.

¹⁹² 60 Stat. 812, 28 U.S.C.A. § 2674 (1950).

¹⁹³ *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

¹⁹⁴ *Feres v. United States*, 340 U.S. 135 (1950).

practice. In a third, the plaintiff claimed that a towel had negligently been left in his abdomen by an army doctor. Justice Jackson, in an admirable and thoughtful opinion, held the Act inapplicable. He readily distinguished *Brooks v. United States*,¹⁹⁵ which had permitted recovery for a soldier injured by government negligence while on furlough—in that situation, the soldier stands in the same position as the remainder of the public. But the soldier on duty is protected by a cordon of federal regulations and laws quite outside the Tort Claims Act, and there is no apparent great utility in pulling them under that statute.

Of major importance in the field of review of state administrative regulation is *Alabama Public Service Comm'n v. Southern Ry. Co.*¹⁹⁶ The suit was a diversity action brought in federal court to enjoin the operation of a Commission order concerning termination of service on particular lines. The jurisdictional issue was whether such a suit can be brought in federal court.

Eight years ago, in *Burford v. Sun Oil Co.*,¹⁹⁷ the Court had, five to four, held that a somewhat similar suit to enjoin an order of the Texas Railroad Commission could be brought only in a state court. The *Burford* case was open to either of two interpretations: either it was a comprehensive decision as to state administrative agencies generally, or it was a very specialized situation peculiar to the Texas oil problem and to the unusual agency-court relationship in Texas oil law. In this year's *Southern Ry.* case, seven Justices agreed, in an opinion by the Chief Justice, to push *Burford* to its maximum interpretation, and the present suit was ordered dismissed from federal court on its authority. The point here, as in *Burford*, was not one of jurisdictional power; it was whether, as a matter of equitable discretion, a federal court ought to decline to exercise jurisdiction in these administrative agency cases.

Surely if the federal courts have an equitable discretion, they should exercise it here. Every federal issue can be raised in the Supreme Court no matter which route the case follows, and all the considerations of avoidance of needless tension in federal-state relations apply in state administrative order cases generally.¹⁹⁸ The opinion of the Chief Justice marshals many reasons for its result. All this being true, the only real puzzle in the case is the vigor of Justice Frankfurter's argument in disagreement,

¹⁹⁵ 337 U.S. 49 (1949).

¹⁹⁶ 341 U.S. 341 (1951).

¹⁹⁷ 319 U.S. 315 (1943).

¹⁹⁸ The cases are comprehensively reviewed in the *Burford* opinion; and see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). For further discussion see *Contraction of Federal Jurisdiction*, p. 361 *infra*.

in which Justice Jackson joined, that the holding is "in flagrant contradiction with the unbroken course of decisions in this Court for seventy-five years."¹⁹⁹ The ruling, on the contrary, seems to be the inevitable development of a path which Justice Frankfurter himself helped to map.²⁰⁰

It is a prerogative of the critic to be perverse, and as a result, Justice Frankfurter can be belabored for excess of caution in the case just mentioned, and for excess of innovation in the most novel jurisdictional case of the year, *West Virginia v. Sims*.²⁰¹ This is the West Virginia compact case. Eight states entered into a compact concerning pollution of the Ohio. Congress approved the compact. Subsequently, in an action in state court appropriately raising the issue, the West Virginia Supreme Court found its own state's act ratifying the compact invalid under the state constitution, principally on the ground that it violated Art. X, Section 4, limiting the capacity of the state to contract debts.

The Supreme Court reversed this opinion of the West Virginia Supreme Court in an opinion by Justice Frankfurter which substitutes the Supreme Court's own interpretation of Art. X, Section 4, for that of the West Virginia Court. The Supreme Court's opinion concludes: "In view of these provisions, we conclude that the obligation of the State under the Compact is not in conflict with Art. X, sec. 4 of the State Constitution."²⁰²

The Court, in three opinions, offers three possible grounds for reversing West Virginia. The first is Justice Frankfurter's majority opinion, that the Court has the power to reinterpret state holdings on its own constitution in the peculiar area of the compact clause, despite the fact that for virtually all other purposes, the state is the final authority on its own law. The second ground is that of Justice Reed, who flatly disagrees that the Supreme Court may interpret the state constitution for itself "unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule."²⁰³ He seems (for his opinion is not extensive) to accept the argument of the United States, on the side of the petitioner, that the Compact Clause "must be read as an affirmative grant of power to States to enter into interstate compacts, subject only to the necessity of obtaining the consent of Congress; that this provision of the Federal constitution necessarily takes precedence over all State statutes and constitutions; and

¹⁹⁹ *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 362 (1951).

²⁰⁰ *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); and see particularly *R.R. Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), opinion modified, 311 U.S. 614 (1940).

²⁰¹ 341 U.S. 22 (1951).

²⁰² *Ibid.*, at 32.

²⁰³ *Ibid.*, at 33.

that any attempt by a State, by its Constitution or otherwise, to impose further limitations on its power to enter into such compacts must fail because of conflict with the Constitution of the United States."²⁰⁴ As Justice Reed himself puts it: "Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action."²⁰⁵

Finally there is Justice Jackson's solution. This compact was ratified by West Virginia in 1939, by Congress in 1940. This suit involves West Virginia appropriations for a period ten years later, 1949-50. Justice Jackson sees this as a case of estoppel. "Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other States to this Compact were entitled to believe was a fully authorized act."²⁰⁶ Assuming that the West Virginia court is to be reversed, Justice Jackson's method is satisfying. Granted, as he says, that "[e]stoppel is not often to be invoked against the government."²⁰⁷ It is nonetheless sufficiently shocking to one's sense of justice that a state should be able to take itself out of a contract with seven other states ten years after the event that the handy elasticity of estoppel can well make a convenient bar.

The Reed approach, making the state constitution irrelevant to the issue on the theory of an overriding compact power, has the possible vice of proving too much; by this device a state might escape any of its constitutional limitations merely because another state agreed and Congress gave consent. But, on the other hand, this may be a completely fanciful fear for our actual experience with compacts does not support it.²⁰⁸ Moreover, it does have the support of *Hinderlider v. La Plata Co.*,²⁰⁹ which he claims for it. In the *Hinderlider* case, Justice Brandeis overrode an interpretation of Colorado law by the Supreme Court on the ground that there are two methods of settling interstate disputes, the judicial and the legislative, and "[t]he compact—the legislative means—adapts to our Union of sovereign states the age-old treaty-making power of independent sovereign nations."²¹⁰ Brandeis seems (for the opinion is somewhat ambigu-

²⁰⁴ Brief for United States, at 20, *West Virginia v. Sims*, 341 U.S. 22 (1951).

²⁰⁵ *West Virginia v. Sims*, 341 U.S. 22, 34 (1951).

²⁰⁶ *Ibid.*, at 35.

²⁰⁷ *Ibid.*, at 36.

²⁰⁸ For an extremely good general article on compacts, with full reference to the literature, see *Regional Education: A New Use of the Interstate Compact?*, 34 *Va. L. Rev.* 64 (1948), which discusses the approximately one hundred compacts since 1789.

²⁰⁹ 304 U.S. 92 (1938).

²¹⁰ *Ibid.*, at 104.

ous) to be developing a theory that judicial interpretation is, as Reed says, irrelevant to the establishing of binding compacts, and applies only to their interpretation.

The Frankfurter approach gives a different reading to the *Hinderlider* case. But the clincher for the Reed approach is that *Hinderlider* at no point attempted actually to interpret the Colorado law, as Frankfurter does the West Virginia law. Insofar as the Frankfurter opinion departs from the customary rule against federal interpretation of a state constitution, it is undesirable; for it unnecessarily pits the judgment of the federal as against the state judiciary on a point on which the federal judiciary has far less competence than that of the state.

b) *Full faith and credit*

Recent divorce decisions have held that where a husband and wife of state A go to state B to obtain a divorce, and both are present in person or by counsel in state B and have full opportunity to raise the issue of the jurisdiction of state B's courts there, neither will be permitted to raise the issue of B's jurisdiction in subsequent litigation in state A.²¹¹ But the question of the rights of third parties to make that challenge had not been closed.

The difficulties arise because the holding that both parties are bound if they appear is based on *res judicata*. But *res judicata* is not, strictly speaking, available as a bar to a person, as a child, who was not a party to state B's divorce. The issue is raised under the most extreme conditions in this year's *Johnson v. Muelberger*,²¹² in which a child of a *first* marriage challenged her father's divorce from a *second* marriage in a dispute over the father's estate with the wife of his *third* marriage. The divorce from wife No. 2 is thus both challenged and upheld by persons who were not parties to it.

The challenged divorce took place in Florida. This action between child of wife No. 1, and wife No. 3, took place in New York. The Florida jurisdiction for the challenged divorce was in fact spurious. New York held that its courts could review the validity of the Florida divorce. Justice Reed for the Supreme Court reversed, and rounded out the recent developments in this branch of the law with this corollary: The right of the state of the forum to permit a collateral attack upon a divorce depends, not upon its own law of collateral attack, but upon that of the divorcing state.

²¹¹ The most recent case is *Sherrer v. Sherrer*, 334 U.S. 343 (1948), discussed by many, including Paulsen, *Migratory Divorce*, 24 *Ind. L.J.* 25 (1948).

²¹² 340 U.S. 581 (1951).

In this situation, if Florida would have permitted the child to raise the issue of the validity of the Florida divorce, then New York should do so. Otherwise New York may not do so. Upon examination of the (very skimpy) Florida law on the subject, it was held that Florida would not have permitted the attack.

The case is completely consistent with the policy of the recent divorce cases, notably *Sherrer v. Sherrer*.²²³ If the parties to a marriage are to be allowed, as *Sherrer* does allow them, to get a divorce from any state that will not inquire too scrupulously into its jurisdiction, there is very little reason to allow a child to unsettle the situation. As Professor Paulsen, a close student of the subject, says, "it is difficult to see why a child should be permitted to raise doubts, in a collateral proceeding, about the validity of his parents' divorce."²²⁴ The "quickie" divorce states can now, if need be, patch up their own law of collateral attack, and thus render their six week residence requirements immune from attack. The evils of divorce by consent would not be appreciably rectified by leaving a loophole in the law.

V. THE INSTITUTION AND ITS JUSTICES

THE WORK OF THE INSTITUTION

Again this year, the most striking aspect of the work of the Court was its declining quantity. This year the number of cases was 88.²²⁵ For the immediately preceding years, the number has been: 1949—94; 1948—122; 1947—119. Before World War II, the docket usually ran to 200 and more cases a year.

This reduction in the size of the docket is due to two major factors. First is the rigidity with which the writ of certiorari is being granted. Second is the decline in cases worthy of consideration. If certiorari were granted in all the cases in which it might rationally be granted, the num-

²²³ 334 U.S. 343 (1948).

²²⁴ Paulsen, *Divorce Jurisdiction by Consent of the Parties*, 26 Ind. L.J. 380, 383 (1951).

²²⁵ The same method of counting cases has been used uniformly throughout this series of articles. Counted are those cases which were (a) argued, and (b) decided with an opinion which is more than a single word of affirmance or reversal with citations. For example, *Crest Specialty v. Trager*, 341 U.S. 912 (1951), is not counted because, although it was argued, the order of disposition consists entirely of, "Per curiam: The judgment is reversed. *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147."

The greatest compilation difficulty arises in connection with companion cases. Simple companion cases are not included. For example, *Amalgamated Ass'n of St. Ry. Employees v. Wis. Emp. Rel. Bd.*, 340 U.S. 383 (1951) and the companion cases of *St. John v. Wis. Emp. Rel. Bd.*, 340 U.S. 411 (1951), and *Bus Employees v. Wis. Emp. Rel. Bd.*, 340 U.S. 416 (1951), are treated for all tabular purposes as one case. More complex companion cases, which require serious discussion of at least one independent point, are counted separately.

ber of cases would still not reach the pre-War docket figures, but the number would be considerably greater than it now is.²¹⁶

The fact is, as was noted last year, that three Justices as prolific as Hughes, Brandeis or Stone (or Black or Douglas, for that matter) could have written all the majority opinions at the past term with no perceptible strain. The purpose of the Certiorari Act of 1925²¹⁷ was to reduce the docket to a manageable level, not to leave the Court with nothing to do. There is a Knute Rockne legend that one of his players asked to be excused from practice one afternoon because he was to attend a dance in the evening. Rockne excused him without comment. When Saturday came, the boy was not used, and so again the next Saturday, and the next. Finally he asked Rockne when he would play.

Said Rockne, "I'm saving you."

"For what?" asked the boy.

"For the junior prom," was Rockne's answer.

The same question can be asked here: What is the Court saving itself for?

Professor Harper and his collaborators have set themselves the task of discussing the certioraris denied so completely that it is unnecessary to go

TABLE 3

DISTRIBUTION OF MAJORITY OPINIONS

Vinson.....	8	Jackson.....	8
Black.....	11	Burton.....	8
Reed.....	10	Clark.....	9
Frankfurter.....	8	Minton.....	9
Douglas.....	11	Per curiam.....	6

into the details here.²¹⁸ However, appended to this article is a list of some certioraris which might well have been granted.

The distribution of majority opinions²¹⁹ among the Justices is shown in Table 3.

The extent to which the views of particular Justices have prevailed can best be measured by concentrating on the most important of the decisions,

²¹⁶ Harper and Rosenthal, *What the Supreme Court Did Do in the 1949 Term*, 99 U. Pa. L. Rev. 293 (1950), compile a list of all the cases they think might conceivably have been granted at the 1949 term. The list is 65 cases. If all had been granted, the docket would still, by pre-World War II standards, have been light. My own list of possible grants last year, less comprehensively gathered, was 18 cases. 1949 Term article, 53, 54.

²¹⁷ 43 Stat. 938 (1925), as amended, 62 Stat. 928 (1948), 28 U.S.C.A. § 1254 (1949).

²¹⁸ Their article cited in note 216, *supra*, is to be followed by a series.

²¹⁹ This, too, has its complications in the few cases in which there is no opinion of the Court. In those instances, the case is listed for the Justice who announced the judgment of the Court.

and for this purpose I have chosen, as objectively as possible on so subjective a matter, the two groups of cases which seem to me to have the most important consequences to society. The first group consists of the nine cases which seem the most significant of the year.²²⁰ The second group of eighteen cases are definitely less important, but are not routine.²²¹ The data in Tables 4 and 5 are taken from these two groups. Disqualifications or, in one case, an opinion *dubitante*,²²² give some of the Justices fewer than a total of twenty-seven.

TABLE 4
VOTING DISTRIBUTION IN MAJOR AND IMPORTANT CASES²²³

JUSTICE	MAJORITY VOTES			DISSENTING VOTES		
	Major	Important	Total	Major	Important	Total
Vinson	7	16	23	2	2	4
Black	4	10	14	5	7	12
Reed	8	14	22	1	4	5
Frankfurter	6	9	17	2	7	9
Douglas	5	8	13	4	10	14
Jackson	9	15	24	0	3	3
Burton	5	16	21	4	2	6
Clark	5	14	19	1	3	4
Minton	6	12	18	3	3	6

The foregoing data show, as would be expected with the generally conservative trend of the Court, that Justices Black and Douglas are most often in the minority in important cases. For the first time in the last five

²²⁰ *Blau (Patricia) v. United States*, 340 U.S. 159 (1950); *Collins v. Hardyman*, 341 U.S. 651 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Feiner v. New York*, 340 U.S. 315 (1951); *Garner v. Bd. Pub. Works*, 341 U.S. 716 (1951); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *RCA v. United States*, 341 U.S. 412 (1951); *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951).

²²¹ *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951); *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Emich Motors Corp. v. General Motors Corp.*, 341 U.S. 558 (1951); *Hoffman v. United States*, 341 U.S. 479 (1951); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Norton Co. v. Dep't Revenue*, 340 U.S. 534 (1951); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951); *Rogers v. United States*, 340 U.S. 367 (1951); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Williams*, 341 U.S. 70 (1951); *Univ. Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Williams v. United States*, 341 U.S. 97 (1951). *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) is not included because of the uncertainty of which majority (i.e. the majority on which point) to use for tabular purposes.

²²² Justice Frankfurter, in *RCA v. United States*, 341 U.S. 412 (1951).

²²³ Where a Justice dissents on a minor point only, or concurs on a minor point but disagrees on the main point, his vote is counted on the major issue. Thus the concurring votes of Justices Frankfurter and Jackson in *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951) are treated as a dissent because of their disagreement on the main matter.

years, Justice Jackson is the Justice most often in the majority, in part a product of the trend toward his views both in the area of restriction of freedom of speech and in the area of expansion of the commerce clause as a limitation on state power.

Table 6 shows the distribution of agreements among the Justices in the major and important cases.

TABLE 5
PERCENTAGE IN MAJORITY,
MAJOR AND IMPOR-
TANT CASES

Vinson.....	85%
Black.....	54
Reed.....	82
Frankfurter.....	65
Douglas.....	48
Jackson.....	89
Burton.....	78
Clark.....	83
Minton.....	75

TABLE 6
AGREEMENT AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frank- furter	Doug- las	Jack- son	Burton	Clark	Minton
Vinson.....	..	14	22	13	11	20	19	18	20
Black.....	14	..	11	13	19	13	14	12	12
Reed.....	22	11	..	12	12	21	18	17	16
Frankfurter..	13	13	12	..	11	18	17	10	13
Douglas.....	11	19	12	11	..	12	13	13	8
Jackson.....	20	13	21	18	12	..	18	16	17
Burton.....	19	14	18	17	13	18	..	17	16
Clark.....	18	12	17	10	13	16	17	..	13
Minton.....	20	12	16	13	8	17	16	13	..

Justices most often in agreement were Chief Justice Vinson and Justice Reed. Justices least often in agreement were Justices Douglas and Minton.

THE WORK OF THE INDIVIDUAL JUSTICES

On this bench, which history will record as the Vinson Court, the Chief Justice remains a surprisingly obscure figure. On the one hand, for the past two years of frequently divided decisions, he has almost invariably been of the majority in the important cases. Yet the cases which he assigns to himself are frequently modest, and in the remainder one seldom gets the sense of a distinct personality.

During his four years, the Chief Justice has consistently upheld restrictions on freedom of speech except in the most obviously precedent-con-

trolled situations.²²⁴ His opinions in the *Feiner* and *Dennis* cases are thus in his personal tradition. But while the *Dennis* case has been severely criticized in this article for its policy, that criticism should not lap over on its technique. Assuming that freedom of speech is to be limited, the Chief Justice's is a workman like way of doing it, as clear as a landmark decision is likely to be, contemplative, and far more moderate than the excessive positions asked by the government and offered by the concurrences of Justices Frankfurter and Jackson. The opinion is a thoroughly fair expression of its point of view. So with his opinion on the Wisconsin public utility strike act,²²⁵ which is direct, succinct, and comprehensive.

One trifling embarrassment for the Chief Justice was a per curiam opinion in *United States v. Alcea Band of Tillamooks*,²²⁶ in which he was compelled to swallow some poorly-thought-through prose of a few years before. Four years ago he wrote an opinion giving the Tillamooks a judgment against the United States for an ancient taking of the Indians' land. That judgment, if it rested on anything, necessarily rested on Fifth Amendment "just compensation" principles, for the earlier opinion excluded every possible other basis on which it might have rested.²²⁷ This year the issue was whether the tribe should have interest on that judgment, to which they were entitled if it was a just compensation award. The per curiam, in denying the interest, declared that the previous judgment had not rested on just compensation, and again discreetly avoided disclosing what its basis was.

The Chief Justice must bear responsibility for what is probably the most artless opinion to emerge from the Court in some years. The case is *Jordan v. DeGeorge*,²²⁸ and the issue is whether an alien who was twice con-

²²⁴ See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); cf. a precedent-controlled situation, this year's *Niemotko v. Maryland*, 340 U.S. 268 (1951), and *Kunz v. New York*, 340 U.S. 290 (1951).

²²⁵ *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951).

²²⁶ 341 U.S. 48 (1951).

²²⁷ *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946). The earlier opinion said that the jurisdictional act under which the case was brought "neither admitted nor denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claim. No new right or cause of action is created. A merely moral claim is not made a legal one. The cases are to be heard on their merits and decided according to legal principles. . . ." *Ibid.*, at 45. Those legal principles, the opinion went on, were to be found in such cases as *United States v. Creek Nations*, 295 U.S. 103, 110 (1935). But the *Creek Nations* case, with its allusion to "pertinent constitutional provisions" and its other citations shows clearly that if there was *any* "legal" and non-moral base for the original claim, it *must* have been the Fifth Amendment. See Cohen, *Handbook of Indian Law* 94, 96 (1945). This year's case thus presents a most mysterious turn-about for the Chief Justice and Justices Frankfurter and Douglas, all that is left of the earlier majority.

²²⁸ 341 U.S. 223 (1951).

victed of liquor tax avoidance had been guilty of "moral turpitude" for deportation purposes. The following quotations are here strung together from six pages of the opinion:

Our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. . . . Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude. In the construction of the specific section of the Statute before us, a court of appeals has stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude. In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude. . . . In the state courts, crimes involving fraud have universally been held to involve moral turpitude. . . . In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiring to defraud the United States is a 'crime involving moral turpitude.' . . . Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct.

One gets the impression that there is some connection between fraud and moral turpitude.

For Justice Black, the term was a consistent series of defeats on everything that is really important to him. No judge in America holds firmer views of constitutional opposition to restrictions on speech. No one is more opposed to loyalty programs. The *Dennis* case,²²⁹ the *Feiner* case,²³⁰ the Los Angeles Oath case,²³¹ the piddling ground gained against the loyalty program in the *Joint Anti-Fascist* case²³²—these are blows at his most fundamental convictions.

Black's main task of the year was recording that opposition. From the structure and brevity of his opinions, it appears that he has given up comprehensive in favor of very pointed opposition. "It should be plain that my disagreement with the majority of the Court as now constituted stems basically from a different concept of the reach of the constitutional liberty of the press rather than from any difference of opinion as to what former cases have held," he says in *Breard v. Alexandria*,²³³ and in *Dennis* he adds to the same thought: "Consequently, it would serve no useful purpose to

²²⁹ 341 U.S. 494 (1951).

²³⁰ 340 U.S. 315 (1951).

²³² 341 U.S. 123 (1951).

²³¹ *Garner v. Board of Public Works*, 341 U.S. 716 (1951). ²³³ 341 U.S. 622, 650 (1951).

state my position at length."²³⁴ Yet that desire to strike with one blow may result in opinions too elliptical; in *Dennis*, there are only two paragraphs on the critical issue, and a little more would have been helpful. There is a hint of disagreement with the "clear and present danger" approach without clear suggestion of what should be substituted.

In other zones, Black's work shows its usual qualities of crisp competence. Outstanding opinions are the self-incrimination cases, *Blau* and *Rogers* (dissent);²³⁵ a war risk insurance case;²³⁶ and a full faith and credit case involving a Wisconsin action on an Illinois wrongful death statute.²³⁷ On the debit side, the dissent in the *Dean Milk* case²³⁸ in which he would uphold the Madison, Wisconsin, prohibition on sales of milk not pasteurized in the neighborhood could only have been written by a Justice who was *very* deeply committed to the proposition that state regulations of commerce can scarcely ever burden it.

If there had been any lingering doubts that Justice Reed is still the Court's middle-of-the-roader, its "swing man," they were erased by the work of the term. It was a successful and productive year for him, one on the road to becoming intellectual leader of the new majority. As was predicted last year, Reed is becoming the Sutherland to Vinson's Taft—i.e., the writer of many of the most important and most serious opinions of the new Court. In technical zones, he was, happily, called upon with frequency, with such good results as *Johnson v. Muelberger*,²³⁹ the case of the "quickie" divorce challenged by a child who was not a party to it; and *Standard Oil Co. v. New Jersey*,²⁴⁰ an extremely good opinion upholding a New Jersey escheat statute.

In basic matters of social policy, Reed continued to exhibit great caution. His opinions in the *United States v. U.S. Gypsum Co.*²⁴¹ and *Timken Roller Bearing Co. v. United States*²⁴² antitrust cases, the first refusing fully to strengthen the decree and the second striking a body blow to divestiture as an antitrust remedy, are typical of his unwillingness to put real bite behind the bark of the Sherman Act. In matters of free speech, Reed is the

²³⁴ 341 U.S. 494, 579 (1951).

²³⁵ *Blau* (Patricia) v. United States, 340 U.S. 332 (1951); *Rogers v. United States*, 340 U.S. 367 (1951).

²³⁶ *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950).

²³⁷ *Hughes v. Fetter*, 341 U.S. 609 (1951).

²³⁸ *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

²⁴⁰ 341 U.S. 428 (1951).

²³⁹ 340 U.S. 581 (1951).

²⁴¹ 340 U.S. 76 (1950).

²⁴² 341 U.S. 593 (1951). The *Timken* case is so much more important than *U.S. Gypsum* that it may be misleading to allude to the two together.

hardest-hitting of the opponents of liberalism. His dissent in the *Joint Anti-Fascist* case²⁴³ is one of the most thorough systematizations of reaction on the books. It is, given its point of view, one of the best opinions of the year. He faces Justice Burton's pleading points head on. He meets the question of right to sue by demonstrations that no rights of the petitioners are abridged, contends that no legal injury is done the organizations by their listing, and manages to turn the discussion off to the safe ground of noninterference with administrative discretion. The listing he analogizes to a grand jury investigation: "These petitioners are not ordered to do anything and are not punished for anything."²⁴⁴ The argument is massively (but not excessively) supported with the paraphernalia of the law library, the orders, the cases, the statutes, the English materials. Everything is considered, except what the listing actually does.

The occupational hazard of judging for Justice Frankfurter is making up his mind and getting things done.²⁴⁵ This is worth comment because it is more than one man's psychological quirk; it is symptomatic of the plight of the intellectual liberal in our times, torn between opposing absolutes. Frankfurter's *Dennis* opinion, as was said earlier, is an epitome of intellectual ineffectiveness; it is many pages of consent to what the legislature has done, followed by many pages of regret that they have done it. One half or the other of that essay is irrelevant to the judge's function.

The one thing the public ought to get from its judges is some kind of decision, one way or the other. In *Canton R. Co. v. Rogan*,²⁴⁶ Justice Frankfurter joins Justice Jackson in "reserving judgment"; as far as they are concerned, the case is not decided at all. And in *RCA v. United States*,²⁴⁷ the color TV case, the Justice's opinion (neither a concurrence nor a dissent) is "dubitante," and consists of a general, and rather interesting, essay on the facts of color television, without any resolution of the issues brought to the Court for decision. As one of the Justice's friends is reported to have said to him, "I agree with everything you say, but will deny to the death your right to say it."

²⁴³ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (1951).

²⁴⁴ *Ibid.*, at 203.

²⁴⁵ No new development: "Justice Frankfurter considers the actual decision of cases by the Supreme Court of less importance than some other Justices, carrying his doctrine of nonaction for that tribunal to the point of systematic philosophy. In a very substantial number of cases, he would either not decide the case as a matter of some general policy or remand it for further proceedings before he would consider it ripe for decision. This year he was either alone or in a small minority in seven cases which he thought not suitable for decision." 1948 Term article, 49.

²⁴⁶ 340 U.S. 511 (1951).

²⁴⁷ 341 U.S. 412 (1951).

When this inconclusive quality spreads to the whole institution, cases are undecided by the Court as a whole. The Justice's opinion in *Universal Camera Corp. v. NLRB*,²⁴⁸ described at length above, is a superb analysis of the intent of Congress as to judicial review of administrative orders; but just when the inconclusiveness and haziness of the Congressional will is laid bare, the whole problem for administrative agencies generally is sent back to the lower courts without any concrete leadership as to what they are to do.

There are major Frankfurter credits to be noted. The *Universal Camera* discussion has been mentioned. The dissent in the *Schwegmann* case²⁴⁹ is as good an example as there can be of working out legislative history, and acquiescing in it. The *Williams* case, interpreting the Civil Rights Act of 1871, may be, as was argued above, unsound; but it is an excellent and ingenious attempt to make its case.²⁵⁰ The opinion in the case on federal court review of state administrative agencies is a concise job of massing all the favorable precedents, and distinguishing away those unfavorable.²⁵¹ A decision on Missouri's right to dismiss FELA cases on forum non conveniens grounds is clear and crisp.²⁵² A concurrence on the right of a district court to subpoena Department of Justice records is considerably more clear than the opinion of the Court which it accompanies.²⁵³

In terms of personal accomplishment, this is very probably Justice Douglas' outstanding year on the Court. In 1950-51, he was the batter who couldn't strike out. His *Dennis* dissent,²⁵⁴ clear, artful, and strong, will stand with the great expressions of Holmes and Brandeis in the free speech cases. His majority opinion in the *Schwegmann* case knocking out state fair trade laws as applied to "non-signing" merchants is, at least, a tour de force. His opinion in the *Joint Anti-Fascist* case²⁵⁵ should appeal even to those who disagree with it as a powerful statement of the case against the loyalty program. His majority opinion in the *Williams* group²⁵⁶ eliminates

²⁴⁸ 340 U.S. 474 (1951). The principal institutional consequences of this philosophy of in-decision is probably felt in the certioraris denied; the declining docket may be in part due to urgings by the Justice that this case, and that, and the other one should not be decided "now."

²⁴⁹ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951).

²⁵⁰ *United States v. Williams*, 341 U.S. 70 (1951).

²⁵¹ *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 351 (1951).

²⁵² *Missouri ex rel Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

²⁵³ *United States ex rel Touhy v. Ragen*, 340 U.S. 462, 470 (1951).

²⁵⁴ *Dennis v. United States*, 341 U.S. 494, 581 (1951).

²⁵⁵ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 174 (1951).

²⁵⁶ The majority opinion in this group is in 341 U.S. 97 (1951), the dissent, *ibid.*, at 87.

many of the uncertainties of the earlier *Screws* case,²⁵⁷ and his dissent in that group is as clear as it is hard-hitting.

There are a few things with which to quibble. Why did the Justice, who has consistently opposed invalidation of state laws under the commerce clause, join in a dissent by Justice Frankfurter which is a most fulsome praise of the very decisions to which he has dissented?²⁵⁸ Why, in one case in which the continuance of one Reiss in the matter at the trial stage is extremely relevant, does the Douglas dissent say that Reiss was "dismissed from the case," while the majority opinion of Justice Reed says: "The request of respondent to dismiss Reiss after judgment was not acted upon by the trial court"?²⁵⁹ Which is right? But the details do not obscure the main line. A year which includes the opinions listed above is a very satisfactory year indeed.

For charm and felicity of expression, Justice Jackson tops the bench. Some of his colleagues can get as much meat into a sentence, but none can garnish it as well. Examples: His dissent in the liquor tax-moral turpitude case (mentioned a few paragraphs above): "I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst."²⁶⁰ Or, concurring in a case which rejected an opinion on the immigration laws which, as Attorney General, Jackson had signed, and which he now regretted: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."²⁶¹ Or, in decrying excess publicity about a criminal case: "The case presents one of the best examples of one of the worst menaces to American justice."²⁶² Or, decrying the comparative results of the *Joint Anti-Fascist* case and *Bailey v. Richardson* in which, as he saw it, an organization was getting rights of due process but the individual government employee was not: "So far as I recall, this is the first time this Court has held rights of individuals subordinate and inferior to those of or-

²⁵⁷ *Screws v. United States*, 325 U.S. 91 (1945).

²⁵⁸ The conclusion is: "It is easy to mock or minimize the significance of 'free trade among the states,' . . . which is the significance given to the Commerce Clause by a century and a half of adjudication in this Court. With all doubts as to what lessons history teaches, few seem clearer than the beneficial consequences which have flowed from this conception of the Commerce Clause." *Panhandle Eastern Pipeline Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 340 (1951). Justice Douglas has disagreed with Justice Frankfurter on almost every one of the "adjudications of this Court" on that subject for the last eleven years.

²⁵⁹ *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (Reed), 21 (Douglas) (1951).

²⁶⁰ *Jordan v. DeGeorge*, 341 U.S. 223, 241 (1951).

²⁶¹ *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950).

²⁶² *Shepherd v. Florida*, 341 U.S. 50, 55 (1951).

ganized groups. I think that is an inverted view of the law—it is justice turned bottom-side up.”²⁶³

In terms of results at least, Jackson's views were, with great frequency, the views of the Court. But this is limited to concurrence in result, for he frequently was in distinctive concurrence, rather than joining the main opinion. The best description of the relationship is that in 1950-51, Justice Jackson and the balance of the majority were walking side by side.

Justice Jackson this year took the most extreme anti-free speech views held by any Justice in at least two decades. His lone dissent in *Kunz v. New York*,²⁶⁴ though most ingenious, is a fundamental attack on the right to speak offensive dogmas, and, as has been more fully developed above, his lone position in the *Dennis* case would reduce the First Amendment to negligible scope except in those rare instances in which speech is solely the product of one man, unrelated to others. The clear and present danger test was first devised by Justice Holmes in *Schenck v. United States*,²⁶⁵ a conspiracy case, and more fully developed by Holmes and Brandeis in *Abrams v. United States*,²⁶⁶ another conspiracy case. Justice Jackson in the *Dennis* case seems to be saying that the test is inapplicable—in conspiracy cases. This, to borrow a phrase, is logic “turned bottom-side up.”

At the 1950 Term Justice Burton added a new and effective weapon to his armory, the succinct dissent. From every standpoint, the dissents are a success. His few paragraphs in *Collins v. Hardyman*²⁶⁷ state his point and his reasons with great clarity, and his opinion in the *Los Angeles Loyalty Oath* case²⁶⁸ is the neatest of the five filed. One of the most admirable Burton opinions of prior years had been a lone dissent,²⁶⁹ and while his general agreement with the Court's majority as presently constituted will preclude his being a frequent dissenter, he may well do some of his best work when he is in lone position, freed of the necessity both of stating the whole case and of accomodating to the rest of the majority.

The least graceful Burton opinion of the year is *United States v. Yellow Cab Co.*,²⁷⁰ on the question of whether the United States may be impleaded as a third party defendant by a joint tort-feasor. The result, an affirma-

²⁶³ Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 186 (1951).

²⁶⁴ 340 U.S. 290, 295 (1951).

²⁶⁵ 249 U.S. 47 (1919).

²⁶⁶ 250 U.S. 616 (1919). This thought is borrowed from my colleague, Professor Donnally, who is developing it in some detail in a forthcoming article in the Yale Law Journal.

²⁶⁷ 341 U.S. 651, 663 (1951).

²⁶⁸ *Garner v. Board of Public Works*, 341 U.S. 716, 729 (1951).

²⁶⁹ *Morgan v. Virginia*, 328 U.S. 373, 389 (1946).

²⁷⁰ 340 U.S. 543 (1951).

tive, seems correct and desirable. Note 4, at page 547, sets out the relevant statute to the extent of half a page. The text, on the very next page, sets out a large part of the same section over again—another half page. Some of the most impressive legislative history in support of the conclusion reached is buried in the middle of footnote 8, which covers a page and a third of the official reports and begins with a different and less interesting subject. Note 10, to the extent of a third of a page, sets out Rule 14 of the Rules of Civil Procedure, although no point of interpretation of that rule is raised and its only relevance is its existence. On the other hand, the opinion very neatly dispatches the government quibble that, even though it can be sued for contribution, it may not be impleaded in an original case by a joint tort-feasor because of fancied difficulties arising from the mixture of jury and non-jury issues in the same litigation.

The four main Burton opinions of the year are, to my own taste, distinctly over-conceptual.²⁷¹ As we said above in discussion of the *Spector Motor* case,²⁷² the opinion goes straight through substance to form. If, as all concede, the Taft-Hartley Act had to be rewritten in the secondary boycott cases, there was no reason to draw back at the very point where a little more rewriting would have made sense.²⁷³ But the merits of conceptual as against functional jurisprudence raise issues aside from the point here under discussion, for the relative weight to be given in law to words as against things is in constant dispute. For examples of a particular kind of jurisprudence, the *Spector* opinion and the *Joint Anti-Fascist* opinion are very fine.

No one can fairly complain that Justice Clark is overly conceptual. As was developed above, his several opinions on the commerce clause as a limitation of state power both ask the relevant questions and search in the facts for the relevant answers with a clarity which that difficult subject greatly needs.²⁷⁴ No reader will have any difficulty in knowing exactly what circumstances in the actual life of the community making the regulation and what balancing interest of the nation cause him either to uphold or to invalidate a law. On the merits, his focus on the presence or absence of actual discrimination in these cases strikes at the most vital point.

²⁷¹ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *NLRB v. Denver Building & Trades Council*, 341 U.S. 675 (1951), and related cases; *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

²⁷² See p. 182 *supra*.

²⁷³ *NLRB v. Denver Building & Trades Council*, 341 U.S. 675 (1951).

²⁷⁴ *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *Norton Co. v. Dep't Revenue*, 340 U.S. 534, 541 (1951), dissent; *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951).

Disqualifications in the leading free speech cases do not obscure the fact that as the new cases come up, Clark will be standing squarely with Vinson and Reed. Where he could participate in such cases, he was with them.²⁷⁵

The *Champlin* case,²⁷⁶ with its remarkable conclusion that one definition clause in a statute means wholly different things for the purposes of different sections, is Clark's most eccentric bit of statutory interpretation for the year. His opinion in *Emich Motors*²⁷⁷ is unsatisfactory for the fundamental reason that it does not tell the reader what is decided. The suit was a treble damage action under the Clayton Act, and one issue was the weight to be given to a criminal verdict previously obtained against the same defendant. The Court of Appeals had reversed the trial court. The concluding sentence of the Supreme Court's misty opinion was: "The judgments below must therefore be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion."²⁷⁸ But what was the District Court supposed to do? Should it now enter judgment for plaintiff, as it had originally? Should it give a new trial, based on the discussion in the Supreme Court opinion, and ignore what the Court of Appeals had said on other, distinct, points? Mystified counsel asked for a clarification, and the remand was then changed to a remand to the Court of Appeals, with instructions "to modify its judgment to conform with this opinion."²⁷⁹ But if any reader of the reports wants to know the answer to the simple question—does or does not the Emich Company win its law suit?—he will not find it in the Supreme Court reports even as modified.

Good Clark opinions were *Elder v. Brannan*,²⁸⁰ a veterans' preference problem; the *Cities Service Gas* case²⁸¹ (despite an over-leisurely statement of the facts); the *Madison Milk* case,²⁸² and the *Spector Motor Co.* dissent.²⁸³

Justice Minton might deny that wisdom begins where research ends.

²⁷⁵ *Feiner v. New York*, 340 U.S. 315 (1951); *Breard v. Alexandria*, 341 U.S. 622 (1951) (Reed opinion, Chief Justice Vinson dissenting on a point unrelated to freedom of speech).

²⁷⁶ *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951).

²⁷⁷ *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

²⁷⁸ The language is thus reported at 71 Sup. Ct. advance sheets 408, 416. It had been altered before the official reports appeared.

²⁷⁹ *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 945 (1951).

²⁸⁰ 341 U.S. 277 (1951).

²⁸¹ *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950).

²⁸² *Dean Milk Co. v. Madison*, 340 U.S. 602, 610 (1951).

²⁸³ *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951).

He is captivated by the case in point. An illustration is *Ackermann v. United States*.²⁸⁴ Ackermann was an immigrant about to be deported. He belatedly raised some defenses. Rule 60(b) of the Rules of Civil Procedure permits late defenses to be raised in cases of "(1) . . . excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment." The last immigrant, prior to Ackermann, to come to the Supreme Court with a belated defense was Klapprott, and his lateness was excused.²⁸⁵ In facing Ackermann's case, Justice Minton turned to *Klapprott*. The process of distinction began. It was sound, workmanlike, thorough. Upon seeing it, no reader will doubt that Ackermann's case is not Klapprott's case. That should raise the real question at hand: Does it matter that Ackermann's case is not Klapprott's case? Is it sound social policy to treat a deportation order with the rigidity of an ordinary civil judgment? If one exception should be made for Klapprott, should a new and different exception be made for Ackermann? But these are not questions for Justice Minton; Ackermann's case is not Klapprott's case, and therefore let Ackermann be deported. Q.E.D.²⁸⁶

The implied criticism goes to the jurisprudence, not to the skill involved. Where close analysis is required, Minton's skill is very great. These opinions were particularly good: *Fogarty v. United States*,²⁸⁷ on relief to government contractors under the Lucas Act; *Moore v. Chesapeake & Ohio Ry. Co.*,²⁸⁸ an FELA case, a model of tort law clarity; and *Moser v. United States*,²⁸⁹ holding that a Swiss had not waived his rights to become an American citizen by applying for a military exemption, an opinion making neat dispatch of several points. His best opinion of the year is *Alabama Great Southern Ry. Co. v. United States*,²⁹⁰ a comprehensive discussion of the factors which the Interstate Commerce Commission must consider in determining barge rates in relation to rail rates.

²⁸⁴ 340 U.S. 193 (1950).

²⁸⁵ *Klapprott v. United States*, 335 U.S. 601 (1949).

²⁸⁶ The two cases are contrasted in *Ackermann v. United States*, 340 U.S. 193, 199-202 (1950), concluding: "From a comparison of the situations shown by the allegations of Klapprott and Ackermann, it is readily apparent that the situations of the parties bore only the slightest resemblance to each other. . . . Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6)."

Justice Black, dissenting for Justices Frankfurter and Douglas concluded: "The result of the Court's illiberal construction of 60(b) is that these foreign-born people dependent on our laws for their safety and protection, are denied the right to appeal to the very court that held (on the Government's admission) that the judgment against their co-defendant was unsupported by adequate evidence." *Ibid.*, at 205. M

²⁸⁷ 340 U.S. 8 (1950).

²⁸⁹ 341 U.S. 41 (1951).

²⁸⁸ 340 U.S. 573 (1951).

²⁹⁰ 340 U.S. 216 (1951).

Last year the point was made that Justice Minton sometimes assumed the point in issue, so stating the question that the real matter in dispute was never resolved.²⁹¹ That mannerism was not evident at all this year. In the *Panhandle Eastern* case the issue was whether Michigan could preclude an interstate natural gas seller from making all its sales to the cream of the local market, leaving only the less desirable business to a local utility. It is no surprise to learn that Michigan has this power, so far as the Natural Gas Act and the Commerce Clause are concerned. Minton speaks of this as "regulation, not absolute prohibition," and Justice Frankfurter chides him with a statement that the "problem does not disappear by invoking a solving phrase."²⁹² The point is not well taken, for Minton had fully considered the factors that made the Michigan control legitimate.

But just as the great difficulties of a high-policy Court can not be met by a solving phrase, neither can they always be met by a solving precedent.

CONCLUSION

In the months from October 1950, to January 1951, war was the pre-occupation of the American people. During that time they engaged in a small war, and prepared for a large one. In a narrow sense, the issue in both those wars—against a common enemy—is whether the giant of the Western Hemisphere or the titan of Eurasia shall rule the world. But this is indeed a narrow statement of the issue. In a larger sense, the issue is human freedom, the right of men to pray, to write, and to speak as they will. Both our power and our freedom have enemies foreign and domestic. In the year past, every American institution was called upon to lend what strength it could to the battle on every front. The Justices of the Supreme Court in this year faced almost exclusively the perils to freedom at home. Each one brought his best to the struggle—his knowledge of American traditions, his wisdom, his love of the Republic. Were these enough? Did we lose the skirmishes against the domestic enemies of freedom? Did we, striking in rage against our domestic enemies, wound ourselves?

²⁹¹ 1949 Term article, 51.

²⁹² *Panhandle Eastern Pipeline Co. v. Public Service Comm'n*, 341 U.S. 329, 336 (Minton quotation), 339 (Frankfurter quotation) (1951).

APPENDIX

The following list enumerates some of the certiorari denied, and appeals dismissed, including but not restricted to most of those cases in which some Justice dissented from the denial. The condensations are taken largely from Law Week.

A word as to the appeals dismissed. Certiorari is a matter of the Supreme Court's discretion, while appeal is a matter of right to the party insofar as it is specifically authorized by Congress; cf. 62 Stat. 928 (1948), 28 U.S.C.A. § 1257 (1949). True, the Supreme Court may dismiss an appeal if it is "insubstantial," *Zucht v. King*, 260 U.S. 174 (1922), and the test of insubstantiality is extremely subjective. If the Court treats truly arguable questions as "insubstantial," or if it summarily affirms appeals, it has for all practical purposes obliterated the very difference between certiorari and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certiorari, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review. Cases No. 114, 293, 488, and 504, listed below, illustrate this trend.

The whole subject of certiorari denied is comprehensively reviewed in Harper and Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, to be published in a forthcoming number of the *Pennsylvania Law Review*. One may disagree with their recommended solutions without disagreeing in any way with their conclusion that present experience raises grave doubts about the value of the Certiorari Act of 1925.

CIVIL RIGHTS CASES

(a) No. 69, *Shotkin v. Colorado*, 212 P. 2d 1007 (Colo., 1949), Black and Douglas, JJ., dissenting. Issue is scope of power to punish petitioner for contempt for bringing a suit in violation of order of Colorado Supreme Court.

(b) No. 111, *Taylor v. Birmingham*, 253 Ala. 369, 45 So. 2d 53, 60 (1950), Black and Douglas, JJ., dissenting. Issue is whether Senator Taylor was denied equal protection and freedom of speech by conviction for disorderly conduct for entering church through door marked "Negro entrance."

(c) No. 149, *Ohio ex rel. Greisiger v. Bd. Education*, 153 Ohio St. 474, 92 N.E. 2d 393 (1950). Issue is whether Jehovah's Witnesses may be barred from using a public school auditorium used by other denominations for religious purposes, the basis of exclusion being a ruling by the local school board that the Witnesses were not a "responsible organization."

(d) No. 225, *Johnson v. Matthews*, 182 F. 2d 677 (App. D.C., 1950). Issue is whether fugitive from Georgia prison can raise by habeas corpus in District

of Columbia, from which he is being extradited by Georgia, the allegation that he was being held interminably without trial and was subjected to cruel and inhuman treatment in Georgia.

(e) No. 256, *RD-DR Corp. v. Smith*, 183 F. 2d 562 (C.A. 5th, 1950), Douglas, J. dissenting. The issue is whether the freedom of the press extends to movies, the Fifth Circuit holding that it did not and that therefore movies could be censored without limit on political grounds. [This, to me, is the most utterly incredible denial of the year.]

(f) No. 372, *Shub v. Simpson*, 75 A. 2d 842 (Md., 1950). This was no certiorari denied, but a refusal to expedite hearing. The Chief Justice and Black and Douglas, JJ., dissented. Since Shub's interest was as the Progressive Party's candidate for Governor of Maryland in the November, 1950, election, and the point to be decided was the validity of an oath required of him as a candidate, the case became moot upon the refusal to advance its hearing to October.

(g) No. 574, *Westinghouse Radio Stations, Inc., v. Felix*, 186 F. 2d 1 (C.A. 3d, 1950), Black, J., dissenting. Issue is liability of radio station for libel by candidate for public office using its facilities in view of the non-censorship provisions of the Federal Communications Act.

(h) No. 597, *Goo v. United States*, 187 F. 2d 62 (C.A. 9th, 1951), Black, J., dissenting. Issue is whether accused may withdraw plea of guilty before imposition of sentence.

(i) No. 627, *Lyon v. Zook* (Cal., 1950, unrep.), appeal dismissed, Reed and Burton, JJ., dissenting. Issue is whether Jehovah's Witnesses were properly precluded from using school buildings.

(j) No. 643, *Pohl v. Acheson* (App. D.C., 1951, unrep.), Black and Douglas, JJ., dissenting. The case involves a number of problems arising from petitions of habeas corpus by German prisoners of the American military establishment in Germany.

(k) No. 713, *Buller v. Thompson*, 184 F. 2d 526 (C.A. 4th, 1950), appeal dismissed, Douglas, J., dissenting. Issue is whether the poll tax, as administered in Virginia, discriminates against Negroes in violation of the Fourteenth and Fifteenth Amendments, and violates the Act of 1870 re-admitting Virginia to the Congress.

In addition, the Court denied certiorari in No. 201, *Sacher v. United States*, 182 E. 2d 416 (C.A. 2d, 1950), and No. 300, *Hallinan v. United States*, 182 F. 2d 880 (C.A. 9th, 1950), Black and Douglas, JJ., dissenting in both cases, involving contempt by counsel in the New York Communist case and the California Bridges case.

The foregoing cases are taken from the Appellate Docket. Many of the cases of alleged denial of due process in criminal proceedings are on the Miscellaneous Docket. Some of the denials in those cases in which dissents were noted were: No. 174, *Dowdy v. Louisiana*, 47 So. 2d 496 (La., 1950), Black and Douglas, JJ., dissenting; No. 303, *James v. Washington*, 221 P. 2d 482 (Wash., 1950), Black,

Reed, and Douglas, JJ., dissenting; No. 334, *Pennsylvania ex rel Johnson v. Dye* (Pa., 1951, unrep.), Douglas, J., dissenting; No. 341, *Marelia v. Burke*, 336 Pa. 124, 75 A. 2d 593 (1950), Black and Douglas, JJ., dissenting; No. 997, *Brown v. North Carolina*, 233 N.C. 202, 63 S.E. 2d 99 (1951), Black and Douglas, JJ., dissenting.

NON-CIVIL RIGHTS CASES

(a) No. 52, *Prudence-Bonds Corp. v. Silbiger*, 180 F. 2d 917 (C.A. 2d, 1950), Douglas, J., dissenting. The Court of Appeals held, inter alia, that Section 249 of Bankruptcy Act, which prohibits any "committee or attorney" from trading in securities of corporations in process of reorganization does not authorize disallowance of fees earned by attorneys whose clients traded in such securities.

(b) No. 114, *Hendricks v. Smith*, 153 Ohio St. 500, 92 N.E. 2d 393 (1950), appeal dismissed, Douglas, J., dissenting. The issue is whether an Ohio property tax as applied to land leased in perpetuity from the University violates the contract clause in view of an 1809 Ohio statute exempting university property from all taxes.

(c) No. 131, *FTC v. Albery*, 182 F. 2d 36 (App. D.C., 1950), FTC required drug seller of medicine for lassitude due to pernicious anemia resulting from iron deficiency to make clear that lassitude results less from iron deficiency than other causes. The Court of Appeals reversed as to this, holding that Commission lacks power to compel advertiser to tell public that his product is more frequently valueless than it is valuable.

(d) No. 164, *Roberts v. Missouri-Kansas-Texas R. Co.*, 225 S.W. 2d 198 (Tex. Civ. App., 1949), Black and Douglas, JJ., dissenting. Issue is whether FELA case evidence was sufficient to go to jury, in suit by baggage man injured by sand kicked up by motion of train.

(e) No. 232, *Turner v. Alton Banking & Trust Co.*, 181 F. 2d 899 (C.A. 8th, 1950), Black and Douglas, JJ., dissenting. Diversity suit in Missouri federal court on judgment obtained in Illinois state court. The judgment was secured on a cognovit note which authorizes any attorney to confess judgment against obligor. Obligor unsuccessfully contended in Missouri suit that Illinois judgment, obtained with no notice, denies due process and is not entitled to full faith and credit.

(f) No. 293, *Wenning v. Peoples Bank*, 153 Ohio St. 583, 92 N.E. 2d 689 (1950), appeal dismissed, Black, Reed, and Douglas, JJ., dissenting. A state mortgage foreclosure proceeding was filed a month before mortgagor filed farmed-debtor petition in federal district court under Section 75 of the Bankruptcy Act. Thereafter the property was foreclosed by the state court. A variety of issues as to the validity of the state procedure in the light of Section 75 is raised.

(g) No. 416, *Commissioner v. Swiren*, 183 F. 2d 656 (C.A. 7th, 1951), seeming

conflict of circuits on question of whether sale of interest in law partnership is a capital gain.

(h) No. 427, *Healy v. Pennsylvania R. Co.*, 181 F. 2d 934 (C.A. 3d, 1950); 184 F. 2d 209 (C.A. 3d, 1950), Black and Douglas, JJ., dissenting. Issue is whether in FELA case there was sufficient evidence to go to the jury on question of proximate cause, the precise point involving the relation of the failure to blow a whistle and the death of the employee.

(i) No. 451, 2, *Koons v. Kaiser, Koons v. Kaufman*, 187 F. 2d 1023 (C.A. 2d, 1950), one of several cases which has raised the puzzling question of how and where, if at all, transfers of cases from one district to another under the new transfer provisions of the judicial code are to be reviewed.

(j) No. 488, *Kemp v. South Dakota*, 44 N.W. 2d 214 (S.D., 1950), appeal dismissed, Douglas, J., dissenting. The issue is whether a South Dakota statute precluding certain hunting licenses for nonresidents violates certain treaties and the privileges and immunities clause of Art. IV, Section 2.

(k) No. 504, *Rosecrans v. West Edmond Salt Water Ass'n*, 226 P. 2d 965 (Okla., 1950), appeal dismissed, Black and Douglas, JJ., dissenting. Issue is whether order of state commission permitting injection of salt water into defendant's well is a denial of due process as to plaintiff, under whose land the salt water will percolate, where the percolation will come into a stratum of land on which plaintiff already has salt water.

(l) No. 528, *Moffett v. Arabian Amer. Oil Co.*, 184 F. 2d 859 (C.A. 2d, 1950), Black, J., dissenting. Plaintiff allegedly performed services under contract with defendant, whereby the United States government made certain requirements of British government which were of benefit to the defendant. The jury found that the plaintiff had, by his services, procured the desired result, but the District Court dismissed for want of evidence and on public policy. The Court of Appeals affirmed on the evidence point, and Black's dissent is probably on the question of the relative responsibilities of judge and jury on the question of fact.

(m) No. 532, *Ottley v. St. Louis-San F. Ry. Co.*, 232 S.W. 2d 966 (Mo., 1950), Black and Douglas, JJ., dissenting. This is an FELA case in which a jury verdict was set aside, and the issue is the extent of the power to set aside jury verdicts in these cases.

(n) No. 561, *Williams v. Hughes Tool Co.*, 186 F. 2d 278 (C.A. 10th, 1950). The larger issue is whether plaintiff was using patents on rotary drilling bits, combined with a leasing system and a multiplicity of law suits, to prevent the sharpening of dulled tools and to restrain trade in resharpener.

(o) No. 798, *Dority v. New Mexico ex rel Bliss*, 55 N.M. 12, 225 P. 2d 1007 (1950), appeal dismissed, Reed and Douglas, JJ., dissenting. Issue is validity of New Mexico statute making subsurface waters public property, statute challenged on ground it denies due process and takes property without just compensation.

THE DOLLAR MIX-UP

Seldom, if ever, has certiorari procedure looked worse as an instrument of justice than in *Land v. Dollar*. In 1945, the Dollar steamship interests brought suit in the District of Columbia against the Maritime Commissioners to recover the stock of the Company. On the eventual outcome of the litigation depends the question of who owns this large line. The nature of the substantive dispute is immaterial here except to note that the matter is highly arguable. The Supreme Court, 330 U.S. 731 (1947) held that the suit was not against the United States but against the Commissioners in their individual capacities, and therefore did not infringe upon sovereign immunity. The Court of Appeals in due course gave judgment on the substantive issues for the Dollars. At the 1950 Term, in case No. 353, the Court denied certiorari, 340 U.S. 884, Black and Clark, JJ., not participating in this or the later stages of the matter. Later in the term the Court denied a petition for rehearing, 340 U.S. 948, and also denied certiorari in the related case No. 552.

The normal grounds for granting certiorari are (a) public importance of the issue, or (b) conflict of decision. By its denial of certiorari, the Court necessarily implied either that the question of whether the government or the Dollars own the steamship company is not of importance, or that the legal issues involved were not of importance. The Government, very properly bewildered by that somewhat remarkable conclusion, thereupon set out to achieve a conflict. The earlier Supreme Court opinion cited above had held that the United States was not a party to the litigation, but that only the Commissioners were involved. The Government thereupon instituted a new suit in a federal District Court in California in the name of the United States against the Dollars to preclude relinquishing the stock and thereby giving up the interests of the United States in that stock to the Dollars. The Government secured a temporary injunction in that California suit. This is the most absurd kind of legal fiction, since it assumes a difference between the interests of the United States and the Commissioners; but the certiorari system as thus administered requires this ingenuity.

Meanwhile the Court of Appeals was becoming outraged at the failure of the Commissioners to turn over the stock to the Dollars. With a great fanfare of publicity, it threatened the Secretary of Commerce, successor to the Maritime Commission, and other public officials with contempt. At the end of Term what had originally been merely case No. 353 was back with the Court again, on motion to reconsider the denial of the petition for rehearing of the original refusal to grant the writ. Along with it came Nos. 697 and 702, which were respectively petitions to review an order requiring the Secretary of Commerce to endorse over the stock, and a temporary restraining order of the Court of Appeals enjoining the parties from proceeding in the suit instituted in California, and enjoining them from paying any attention to the California temporary injunction.

Chief Justice Vinson issued a stay, and finally, on the last day of the term, 341 U.S. 912 (1951), the Court granted the petitions in Nos. 697 and 702, and continued the motion to reconsider the denial of No. 353 until the next term of Court. But this left the matter in chaos over the summer, and Justice Jackson, dissenting alone on this point, thought that the Court should stay in session to get the business settled once and for all.

To sum up the consequences of the original denial of No. 353, because the Court felt that the ownership of this line did not raise questions worthy of being decided by it, the time of the Court of Appeals of the District of Columbia, and its District Court, and of the California federal District Court and, eventually, the Court of Appeals for the Ninth Circuit, are extensively occupied. The Secretary of Commerce, the Undersecretary of Commerce, the Solicitor General, the Deputy Attorney General, and a number of other federal officials have been brought into most unseemly conflict with the courts of the District of Columbia, and the newspapers have been filled with speculations as to whether those officers would go to jail for contempt. The time of countless attorneys, with great expense to all concerned and serious loss of efficiency for the government agencies whose staffs have been involved in the litigation, has been extensively used, if not wasted. The "return" of the Government on the contempt citation of the Court of Appeals, for example, is a document weighing over a pound. The question of title to the line is left in doubt for at least an additional year.

And the Supreme Court will now have to deal with the situation anyway. Is it possible even to conceive of a reason why it would not have been better practice to have granted certiorari to No. 353 in the first place?