

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 17

AUTUMN 1949

NUMBER 1

THE UNITED STATES SUPREME COURT: 1948-49*

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IF Supreme Court Justices ever wish they had a more interesting way to make a living, then the thought must have occurred to them frequently during the October, 1948 term; for as terms go, it was rather dull. If a social, an economic, and a political historian were each to write a volume on America in the decade of the 1940's, it is highly possible that, without being careless draftsmen, none of them would include any reference to the work of the Supreme Court at the 1948 term. The sole event certain to be chronicled is the tragic death of Justice Murphy shortly after the close of the term. Termination of his judicial work is of considerably more importance in the history of the Supreme Court as an institution than any other event of the year.‡

I. HIGH SPOTS OF THE YEAR

The year's excitement, by no means intense, was concentrated in the area of labor relations, which provided one-sixth of the year's cases. Perhaps the most important development of the year was labor's discovery that the Constitution would not save it from restrictive legislation. However, this could have been a surprise only to those labor lawyers who had read the decisions of recent years with blind optimism.

Of the five cases of greatest importance, three concerned labor: *Giboney v. Empire Storage & Ice Co.*,¹ *Lincoln Federal Labor Union v. Northwestern*

* This article purports to be as much a social survey as a legal analysis of the work of the Supreme Court at the last term. It is the third in a contemplated annual series and is written in part for the legal, social, and economic historians of the future who may find it useful to have a contemporary view of the last term's work. The preceding articles on the 1946 term, 15 *Univ. Chi. L. Rev.* 1 (1947), and the 1947 term, 16 *Univ. Chi. L. Rev.* 1 (1948), will hereafter be cited as 1946 Term Article and 1947 Term Article.

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‡ The death of Justice Rutledge occurred after this article went to press.

¹ 336 U.S. 490 (1949).

Iron & Metal Co.,² and *International Union, UAW v. WERB*.³ The unanimous decision in the *Giboney* case upheld restrictions on peaceful picketing; the *Lincoln Federal* case upheld a Nebraska anti-closed-shop statute. While both have a quality of inevitability, the *Giboney* case in particular begins a major new chapter in the constitutional law of labor relations. It opens wide for discussion the question of how far governments may go in restraining picketing. However, in terms of immediate results the *UAW* decision, involving the extent to which the right to strike is protected by the Wagner and Taft-Hartley Acts, has proved the most important case of the year; for already three states have found in it an apparently unlimited right to forbid strikes.

The other two cases of most significance are *Wolf v. Colorado*⁴ and *Terminiello v. Chicago*.⁵ The *Wolf* case called for the first determination by the Court of the extent to which the states are limited by the 14th Amendment in making unreasonable searches and seizures. The Court in effect compromised on the issue, holding that the states are forbidden as a matter of due process from permitting unreasonable searches and seizures, but that evidence thus obtained would be admissible. In the *Terminiello* case, an unfrocked priest sponsored by Gerald L. K. Smith made some nasty observations in a Chicago auditorium to a group of adherents. The place was surrounded by a hostile crowd. The speaker was convicted of disorderly conduct, essentially for having incited the mobs within and without. In setting aside his conviction, the Court was faced with the vital problem: Under what circumstances, if any, may speech be suppressed because it incites those who hear to lawless acts against the speaker and his adherents?

II. REGULATION OF LABOR AND BUSINESS

LABOR

Had the general counsels of the two major labor federations sent brief memoranda to their executive committees at the close of the 1948 term of the Supreme Court, those memoranda could well have read something like this:

To the Executive Committee of the AFL (or CIO):

It is now apparent that organized labor cannot rely upon the federal courts to set aside the restrictive labor legislation of recent years. If we are to escape hostile legislation hereafter, we must rely even more heavily than before upon political rather than legal action.

² 335 U.S. 525 (1949). A related case was *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949).

³ 336 U.S. 245 (1949).

⁴ 69 S. Ct. 1359 (1949).

⁵ 69 S. Ct. 894 (1949).

This is the lesson of the *Lincoln Federal* and *Giboney* cases, for they involved fundamental decisions in constitutional law. But there were many minor labor cases as well.⁶ National Labor Relations Board orders were reviewed in three instances. The only case of any novelty held that an employer-owner of a company town could not discriminate against unions by refusing permission to use the company's meeting hall, the only in the town.⁷

The more important cases interpreting the Wagner and Taft-Hartley Acts involved the jurisdictional relationship of state and national labor boards. Three cases arising from orders of the Wisconsin Board, all involving industries in interstate commerce, produced these results: (1) A state board could not determine the appropriate bargaining unit in an interstate telephone company and certify a representative, even though the national board had not acted. Since the two boards might give directly conflicting orders, the situation was "too fraught with potential conflict to permit intrusion of the state agency."⁸ (2) A state board could penalize an employer who enforced a closed-shop agreement which was contrary to state law, since such action under state authority did not conflict with the Wagner or Taft-Hartley Acts.⁹ (3) A state board could declare as an unfair labor practice a series of sporadic work stoppages intended to coerce an employer, but which did not amount to a conventional strike. The latter case, *International Union, UAW v. WERB*,¹⁰ is of such striking importance that it will be discussed at length below.

The *Lincoln Federal* case, one of the two cases categorized above as of outstanding importance to labor, also involved a state statute forbidding

⁶ *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1949), held the Fair Labor Standards Act applicable to workers employed under federal government contracts on a lend-lease base in Bermuda. But *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), held the Federal Eight Hour Law inapplicable to United States citizens employed in Iran. *Urie v. Thompson*, 69 S. Ct. 1018 (1949), held that both the FELA and the Federal Boiler Inspection Act covered occupational diseases.

⁷ *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949). The other two Board cases were *NLRB v. Crompton-Highland Mills, Inc.*, 69 S. Ct. 960 (1949), holding that an employer who by-passed collective bargaining negotiations then in progress to give a wage increase without reference to the negotiators had committed an unfair labor practice; and *NLRB v. Pittsburgh Steamship Co.*, 69 S. Ct. 1283 (1949), considering alleged bias of a trial examiner.

⁸ *LaCrosse Telephone Co. v. WERB*, 336 U.S. 18 (1949). The case called for and received routine application of *Bethlehem Steel Co. v. N.Y. State Lab. Rel. Bd.*, 330 U.S. 767 (1947). On the general subject of the relation of state and national labor laws see *State Labor Laws in the National Field*, 61 *Harv. L. Rev.* 840 (1948). There are numerous industries over which the NLRB does not normally take jurisdiction, with an estimated labor force in 1940 of thirteen million workers. Killingsworth, *State Labor Relations Acts* 3 (1948).

⁹ *Algoma Plywood Co. v. WERB*, 336 U.S. 301 (1949).

¹⁰ 336 U.S. 245 (1949).

the closed shop. With the decline and fall of the New Deal, the states began to pass restrictive labor legislation which served as a forerunner for the Taft-Hartley Act. Statutes of North Carolina and Nebraska forbade both the yellow-dog contract and the closed shop, by making it illegal for an employer to discharge his employees because they were or were not union members. In the *Lincoln Federal* case, the Court, speaking through Justice Black, held these statutes valid.¹¹

This closed-shop case had elements in common with the picketing case, *Giboney v. Empire Storage & Ice Co.*,¹² which involved the picketing of an ice company by independent door-to-door peddlers in Kansas City, Missouri. About 80 per cent of the ice peddlers were in a union, and as part of an organizing campaign, they determined to picket those ice companies which sold to nonunion handlers. Empire obtained an injunction in a Missouri state court against the pickets. On appeal the Missouri Supreme Court, upholding the injunction, reasoned that if Empire refused to sell ice to nonunion handlers, it would violate the state restraint-of-trade statute and thus commit a crime. The United States Supreme Court affirmed in a unanimous opinion by Justice Black. In both the *Giboney* and *Lincoln Federal* cases the underlying labor arguments claimed denial of freedom of speech, press and assembly, due process, equal protection, and perhaps freedom from involuntary servitude.

As an attempt to invalidate the anti-closed-shop statute, these arguments are unsubstantial. It is almost impossible to comprehend just how the freedoms of communication protected by the First Amendment can be involved in a restraint on closed shops. In the due process argument the union claimed that the anti-closed-shop statutes deprived it of the right to make any contract it chose with the employer; an attempt, in a sense, to resurrect the now obsolete theory under which laws forbidding yellow-dog contracts were once invalidated.¹³ Today's fixed conviction that the states' power to legislate must not be put into a strait jacket by a broad interpretation of the due process clause leaves no room for the union's argument on this point.¹⁴

¹¹ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, decided together with *Whitaker v. North Carolina*, 335 U.S. 525 (1949). The companion case, *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949), upheld a similar Arizona statute.

¹² 336 U.S. 490 (1949). See *Free Speech and Picketing for "Unlawful Objectives,"* 16 *Univ Chi. L. Rev.* 701 (1949).

¹³ *Coppage v. Kansas*, 236 U.S. 1 (1914); *Adair v. United States*, 208 U.S. 161 (1907).

¹⁴ This now familiar view was expressed again by the Court this year in *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949), in upholding a South Carolina statute requiring separation of the undertaking and insurance businesses: "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute

The equal protection argument is somewhat more tenable. Where an anti-closed-shop statute is accompanied by an anti-yellow-dog contract statute, union and nonunion men, as a matter of form at least, concededly stand on an equal footing. The contention here, however, was that the statute denied equality by discriminating between organized labor and employers. The statute obviously does, as a practical matter, throw the weight of the state to some extent on the side of the employers. The Court declined to consider this contention seriously, since the acts forbade discharges either to encourage or discourage unions. "This circumstance alone," said the Court, answers the equal protection argument.¹⁵

The free speech argument, however, has greater force in the *Giboney* picketing case. "Peaceful picketing is the workingman's means of communication," the Court had said,¹⁶ and had protected it by the free speech concept.¹⁷ The *Giboney* case adds a major limitation to previously stated conceptions of the limits of picket-speech. No one had ever seriously contended that all picketing under all circumstances was beyond restraint. There may be "many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours, or other proper limitations . . . may be required," Justice Reed once summarized.¹⁸ But in this case, none of those conditions was violated. The picketing here was enjoined because it attempted to induce conduct which was itself a violation of a valid state law. This decision, while not in conflict with any previous holding,¹⁹ nonetheless makes sharp

has no relation to the elimination of those evils. There our inquiry must stop." For careful analysis of the status of due process, and of the Daniel case see *Broad Scope of State Regulatory Power Reaffirmed*, 24 *Ind. L.J.* 451 (1949).

¹⁵ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 532 (1949).

¹⁶ *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

¹⁷ *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), begins the line, and *AFL v. Swing*, 312 U.S. 321 (1941), is perhaps its high spot.

¹⁸ *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, 738-39 (1941).

¹⁹ The union relied principally on the *Thornhill* and *Swing* cases, the *Ritter's Cafe* case, the *Meadowmoor* case, and *Bakery & Pastry Drivers Local v. Wohl*, 315 U.S. 769 (1942). The *Thornhill* case is clearly distinguishable, since it involved a total restraint on peaceful picketing which violated no law. The *Swing* case held that freedom of speech in peaceful picketing overrode a common-law policy against stranger picketing, a point not here involved. The *Meadowmoor* and *Wohl* cases are very close because each involved strikes by vendors of the same sort as was involved here. Thus, these two cases and the instant case are equally attempts to restrain trade by keeping producers from selling to nonunion vendors. But the *Meadowmoor* case approved an injunction because of violence in the strike, and the dissent emphasized that there was no state statute aimed at the alleged restraint. 312 U.S. 275, 306 (1941). In the *Wohl* case, the state court had upheld an injunction because such picketing was found not to be a "labor dispute," and the Supreme Court found this an insufficient ground; but both the majority and a concurring opinion in that case reserved the possibility that the picketing might be

and clear something not fully perceived before: the states may properly limit picketing not only because of what the pickets *do* while they are picketing, but also because of the *object* for which they picket. The specific limitations mentioned by Justice Reed above are all directed against the act of picketing itself; in the *Giboney* case, the limitation is directed against the pickets' purpose.

The vital question raised is: What constitutional status is left to picketing? Can the states without restraint now prohibit picketing by systematically illegalizing all the types of employer conduct which pickets might seek to induce? If a state made it illegal (a) to have a closed shop; (b) to give wage increases beyond a certain point; or (c) to bargain collectively, could picketing for these objects then be restrained? If so, then the "workingman's means of communication" may be shut off entirely.

Under the *Giboney* rule, the answers to the foregoing questions may require an examination into the validity of the state law prohibiting the employer's conduct. Because the restraint-of-trade statute in this case was valid, picketing to induce its breach could be restrained. Presumably if anti-closed-shop statutes are valid, as the *Lincoln Federal* case holds them to be, picketing to induce their breach may also be restrained. The Court in the *Giboney* case mentioned no specific limits to this rule, except that the picketing must be "an integral part of conduct in violation of a valid criminal statute," and that the illegal object was the "sole" object of the picketing. The Court also stressed the fact that the restraint-of-trade statute was not aimed merely at a "slight public inconvenience or annoyance."²⁰

These reservations give little aid in determining what are the constitu-
restrained if, aside from violence or disorder, it were aimed at conduct otherwise unlawful.
315 U.S. 769, 775, 776 (1942).

In the *Ritter's Cafe* case, a construction union picketed the business place of a contractor's customer to induce the customer to withdraw his business from the contractor because the contractor was employing nonunion labor. Texas upheld an injunction against such picketing, in part because it violated the state anti-trust laws. The Supreme Court affirmed, not on this ground but on the ground that the place of business being picketed was too far removed from the actual dispute to give constitutional protection to the picketing. In the instant case the union seems to argue that since the majority in the *Ritter's Cafe* case did not rely on the anti-trust argument, it rejected it. Appellant's Brief, at 30, 31. The Court in the *Giboney* case described the Texas anti-trust contention as an afterthought of the Texas court, and in any case it was not seriously considered by the dissenters in the *Ritter's Cafe* case.

The *Giboney* case gains added significance because it was very ably briefed by the union, and thus amounts to a rejection of the best arguments that can be made for its point of view.

As the text states, the *Giboney* case reaffirms the "unlawful purpose" test as the measure of the validity of picketing. For extended analysis of that standard see 49 Col. L. Rev. 711 (1949), noting *Mayer Bros. Poultry Farms v. Meltzer*, 80 N.Y.S. 2d 874, 274 App. Div. 169 (1948).

²⁰ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

tional limitations on a state's power to make illegal ordinary objects of picketing. In this respect, the two concurring opinions in the *Lincoln Federal* case may be helpful. Justice Frankfurter, in his concurrence, reviewed the role of the closed shop in labor history. Dealing with the issue in terms of the classical Holmes approach to due process, he found the objectives of closed-shop prohibition "not so unrelated to the experience and feelings of the community as to render legislation addressing itself to them wilfully destructive of cherished rights."²¹ He did explore the factual issue of whether the legislation was "fatal to the survival of organized labor,"²² and concluded that it was not. Unless we assume that this portion of his opinion was for no purpose, we must conclude that if he had found the legislation "fatal" to labor, he might have found it unconstitutional.

Justice Rutledge, in a concurrence joined by Justice Murphy, made very clear that in passing upon the right to restrain picketing, he was not passing upon the right to restrain strikes. Strikes, he thought, might well have a protected position under the Thirteenth Amendment, whether or not they were for the very same purpose as the picketing in the *Giboney* case.²³ Conceivably the argument may be developed that restraints on labor activities other than a restraint on strikes also compel involuntary servitude.

The *Giboney* case, along with the *Terminiello* case, indicates that the legal protection of free speech may well develop along the lines advocated by Professor Meiklejohn in his recent book, *Free Speech and Its Relation to Self-government*. He calls for a broader conception of free speech as applied to political matters and a narrower conception as applied to economic matters, such as labor disputes.

Since labor must find its basic legal protections not in the Constitution but in the statutes which its political influence helps pass, the case of *International Union, UAW v. WERB* points the direction for future efforts. Section 7 of the Wagner Act and the corresponding provision of the Taft-Hartley Act, provide that employees shall have the right "to engage in concerted activities for the purpose of collective bargaining."²⁴ The

²¹ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 538, 550 (1949).

²² *Ibid.*, at 547.

²³ *Ibid.*, at 557. Compare *Pollock v. Williams*, 322 U.S. 4 (1944). This is not to suggest that there was a neatly chiseled Thirteenth Amendment argument. The union argued generally, "A state may not, to serve its notions of public policy, exempt from the area of economic conflict such issues as satisfactory wages, hours, working conditions, and the bargaining power indispensable to their attainment, or treat the peaceful efforts of working men to attain these objectives as evils within the allowable area of state control." Appellant's Brief, at 32.

²⁴ The text language is from the Wagner Act. Section 7 of that Act as amended by the Taft-Hartley Act is not significantly different for the purposes of this case.

unions contended that these provisions gave federal legal basis to a right to strike, "filling the field," and negating contrary state laws. In the instant case, the Wisconsin Employment Relations Board enjoined a series of recurrent work stoppages engaged in ostensibly for the purpose of holding "union meetings." The work stoppages involved were unquestionably "concerted activity" and were undoubtedly for the statutory purpose. The issue was thus narrowed to whether some kinds of "concerted activity" were outside the general protection of the federal statute because of some implied exception.

Justice Jackson, speaking for a majority of five, held that there were some implied exceptions. Sit-down strikes, mutinies, and strikes against the government, for example, had previously been held not protected by this provision, even though they had the required concert and purpose.²⁵ At this point, unfortunately, the opinion becomes somewhat ambiguous. It is not clear whether recurrent intermittent work stoppages are outside the protection of Section 7 because (a) they are unprotected as a matter of *federal* law, and thus ineligible for the immunity afforded by federal labor legislation, or because (b) they are illegal as a matter of *state* law; i.e., illegal because Wisconsin chose to make them so. If the latter theory is the correct interpretation, then Section 7 has been given a narrow scope: the right to engage in concerted activity as a federal privilege lasts only until a state makes it illegal, and thus a state can remove any concerted union activity from the protection of Section 7 if it chooses.

The point is vital. If labor activities are outside the scope of major constitutional protections, and if such labor activities are now also removed from the protective covering of the Taft-Hartley Act, then states may do as they will with labor's "concerted activities." The showdown may come upon review of recent state laws forbidding strikes in public utilities, which, like any other strikes, are also "concerted activities for the purpose of collective bargaining." New Jersey²⁶ and Wisconsin²⁷ courts have recently held that under the instant decision the states are free to take public utility strikes out of the protection of Section 7 by declaring such activities "illegal." Even more significantly, the Supreme Court of Michi-

²⁵ NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942); and United States v. United Mine Workers, 330 U.S. 258 (1947), respectively.

²⁶ State v. Traffic Telephone Workers, 27 L.R.R.M. 2071 (1949). Chief Justice Vanderbilt quotes the UAW case extensively, and concludes, "Thus the power still resides in the States in a proper case to prohibit strikes notwithstanding federal legislation."

²⁷ WERB v. Elec. Ry. Employees, 24 L.R.R.M. 2009 (1949), appears to construe the UAW case as giving the states unlimited power to limit the Wagner and Taft-Hartley provision by making illegal any strikes they choose.

gan has interpreted the *UAW* decision to uphold the requirement of Michigan law that strikes be approved by a majority vote of all employees in a bargaining unit.²⁸ But it is extremely doubtful that the *UAW* decision, although ambiguous, meant the Taft-Hartley Act protection to be dependent to this extent upon state predilections.²⁹

MONOPOLY AND FREE ENTERPRISE

Unlike the preceding term, in which a very large portion of the cases arose from the trade regulation laws, the 1948 term presented almost no such disputes. A quarrel over the decree in long standing proceedings against the Ford Motor Company, and a case against clothing makers in Massachusetts are of limited significance beyond their particular facts.³⁰ The most important feature of the latter case was a renewed and unanimous assertion that the Sherman Act reaches not only activities "in commerce," but also those which "affect commerce." This quiet expansion of the Act gives it a reach far greater than some members of the present Court had previously thought it possessed.³¹

The two major anti-trust matters were the *National City Lines* and the *Standard Oil* cases.³² Of the two, the former is probably the more important, since it can affect most anti-trust suits. The *National City Lines* case had been before the Court during the preceding term on contention that the defendant was entitled to a change of venue in the trial stage under the doctrine of *forum non conveniens*, a doctrine which the Court then held inapplicable to anti-trust suits.³³ Almost immediately thereafter, Congress passed the revised judicial code, which permitted the transfer, on a *forum non conveniens* theory, of "any civil action."³⁴ *National City Lines*

²⁸ "It is difficult, if not quite impossible, to read the decision in the Wisconsin case, the U.A.W. case, without coming to the conclusion that in the exercise of its police power a state may, by legislation, regulate the exercise of the right of employees to strike; providing such regulations are not in conflict with, or inconsistent with, federal regulation." *International Union, UAW v. McNally*, 24 L.R.R.M. 2261, 2266 (1949).

²⁹ The dissents by Justices Murphy and Douglas do not interpret the majority as going so far, although Justice Douglas does interpret the majority as giving the states unlimited power to determine "the manner of calling of strikes." 336 U.S. 245, 266 (1949). Justice Rutledge joined both dissents, and Justice Black concurred with Justice Douglas.

³⁰ *Ford Motor Co. v. United States*, 335 U.S. 303 (1948), and *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949), respectively.

³¹ This topic is enlarged upon in connection with *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), in the 1947 Term Article, at 6-7.

³² *United States v. Nat. City Lines, Inc.*, 69 S. Ct. 955 (1949), and *Standard Oil Co. v. United States*, 69 S. Ct. 1051 (1949), respectively.

³³ *United States v. Nat. City Lines, Inc.*, 334 U.S. 573 (1948), discussed in the 1947 Term Article, at 10-11.

³⁴ 28 U.S.C.A. § 1404(a) (1948).

thereupon renewed its motion, and this time was upheld by the Supreme Court in the instant case.

Chief Justice Vinson, author of this year's *forum non conveniens* opinions, considered the effect of the new code on the Clayton Act, together with the Federal Employers' Liability Act, under both of which the applicability of the *forum non conveniens* doctrine had been denied.³⁵ It is quite clear from the legislative history that the experts who drafted the revised Code intended, as the Court held, to permit change of venue under that doctrine in FELA cases,³⁶ but there is no evidence that anyone had any such intention of affecting anti-trust suits. The Chief Justice's observation in the *National City Lines* case that "the change in anti-trust practice seems no more radical than the change in Federal Employers' Liability Act practice"³⁷ overlooks the fundamental difference in defense strategy in the two categories of cases.

Since FELA cases usually involve simple torts, it is not difficult to determine the most sensible place to bring the suit. Anti-trust cases, and particularly treble damage suits brought by private persons, are very different. If they involve conspiracies over large areas, the proper place for suit may be very doubtful. Suppose, for example, that the plaintiff is an independent motion picture theater owner with theaters in two districts, and that he complains of a conspiracy by twelve defendant corporations located in various jurisdictions, the overt acts of which were planned in New York and California and were committed in the districts in which his theaters are located. Where should he sue?

This problem is accentuated because the defense strategy, where the defendant is a large corporation, is frequently to wear out the plaintiff by protracting the suit indefinitely. Modern procedural devices, meant to facilitate litigation, are thus used to obstruct it.³⁸ Experienced anti-trust lawyers estimate that the *National City Lines* case will add some months to the already interminable period of litigation in such matters.

³⁵ The FELA problem was considered in *Ex parte Collett*, 69 S. Ct. 944 (1949), and *Kilpatrick v. Tex. & P.R. Co.*, 69 S. Ct. 953 (1949).

³⁶ There may be doubt as to whether it was generally perceived that a change was being made in the FELA, but the official notes cite *Balt. & O. R. Co. v. Kepner*, 314 U.S. 44 (1947), the case holding *forum non conveniens* inapplicable in FELA cases, as being an example of what was changed by the revision.

³⁷ 69 S. Ct. 955, 957 (1949).

³⁸ Interviews with attorneys in several firms involved in treble damage suits reveal numerous instances in which more than two years have intervened between filing suit and trial. What with the range of motions to strike, to dismiss, for bill of particulars, plus now the change of venue, each of which permits of briefs and arguments, opportunities for delay are large; and interrogatories and depositions, complicated by motions to strike interrogatories, can make the pre-trial period interminable.

Suits have recently been transferred from district courts where they had already been pending for two years. Some district judges are transferring cases to get such clumsy matters off their dockets as much as for any other reason.³⁹ These are extensive consequences to result from interpretation of a Code revision which does not declare any deliberate intention on the point.

The other outstanding anti-trust case was *Standard Oil Co. v. United States*.⁴⁰ Standard sold about 25 per cent of the gasoline in several western states, much of it for industrial purposes. Half the gasoline it sold through service stations was sold through those it owned and the other half through "independents" which had contracts with Standard to sell its products exclusively. Standard's competitors had similar exclusive contracts with their independents. The action was brought by the government to enjoin Standard from utilizing these exclusive contracts.

Section 3 of the Clayton Act specifically forbids exclusive distribution contracts where their effect "may be to substantially lessen competition or tend to create a monopoly." Standard's principal defense was that these contracts did not in fact lessen competition; indeed, it contended that competition was aided by keeping independents in the distribution field, by assuring them a regular flow of gas, and by other means.

The issue was drawn in terms of the quantum of evidence which the defendants were allowed to introduce to substantiate their claims. The District Court in substance held that the government had proved its case when it showed that a "substantial" number of outlets and a "substantial" volume of products were involved. The court thereupon excluded evidence generally directed toward showing that Standard's method was used in good faith and was a generally beneficial method of meeting a difficult marketing problem. The Supreme Court, in a careful opinion by Justice Frankfurter, affirmed, declaring that a requirements contract violates Section 3 when "competition has been foreclosed in a substantial share of the line of commerce affected."⁴¹ The opinion appears to establish a general rule, which may have very wide application to American trade practices: if any producer negotiates exclusive requirement contracts with a substantial number of distributors or controls a substantial portion of the market by such contracts, he violates Section 3 of the Clayton Act. As Justice Frankfurter shows, this appears to be exactly the result contemplated by the framers of the Act.⁴²

³⁹ See, e.g., *Shore Amusements, Inc. v. Paramount Pictures, Inc.*, No. 1120-47 (D.C. D.C., 1949), transferred June 27, 1949, by Judge Holtzoff; *Cinema Amusements, Inc. v. Loews*, 18 U. S. L. Week 2020 (1949).

⁴⁰ 69 S. Ct. 1051 (1949).

⁴¹ *Ibid.*, at 1062.

⁴² *Ibid.*, at 1061 n. 15.

The significance of the opinion is limited because a producer can so easily obtain the same benefits by other devices. To list only three: perhaps the oil companies will buy up the retailers, a course which the Court's opinions leave open to them;⁴³ or perhaps agency contracts will be used;⁴⁴ or—and informal conversations with persons acquainted with the problem indicate that this is a most likely possibility—the distributors will, as a matter of practice, continue to buy exclusively from one company whether or not they have contracts.

Justice Douglas, dissenting, protested that the opinion would compel vertical integration, thus forcing the independents out of the field. His fear was that other decisions of the Court had so weakened the operation of the anti-trust laws⁴⁵ that this practice (which he seemed to consider a violation of the Clayton Act, but an unimportant one) would be replaced by what he would consider more extreme violations of the Sherman Act. The independent would be supplanted, he feared, by the clerk.

One may doubt that the fate of the independent gas retailer is dependent to this extent on the life or death of the requirements contract; and one may also doubt that his status *now* is truly distinct from that of a clerk. As the Supreme Court itself has pointed out, the resort to small independent distributors by large concerns may be motivated by the handy insulation thus afforded from social security legislation, workmen's compensation, and other employer discomforts.⁴⁶ In short, the large concerns continue the independent status of some of their retailers for many reasons, and there is no way to know with assurance that the existence or nonexistence of requirements contracts controls its continuance. But it is true that other decisions to which Justice Douglas dissented have accelerated the growth of monopoly and make easy the avoidance of the *Standard Oil* rule.

TAXATION

There were two cases at the 1948 term involving the power of the states to tax exports. In one, the taxpayer was exporting a cement plant piecemeal. The California county in which he had purchased it assessed a prop-

⁴³ *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), is a recent case in point.

⁴⁴ *FTC v. Curtis Pub. Co.*, 260 U.S. 568 (1923).

⁴⁵ He listed *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918); *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920); *United States v. Int. Harvester Co.*, 274 U.S. 693 (1927); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); and his own opinion in *United States v. Paramount Pictures*, 334 U.S. 131, 173-74 (1948), insofar as he was unable to muster a majority for an immediate divestiture order. It was argued in the 1947 Term Article, at 12, that in anti-trust law, "much of modern doctrine is merely a series of fleabites to the elephant of 'unification.'"

⁴⁶ *Bakery & Pastry Drivers Local v. Wohl*, 315 U.S. 769, 771 (1942).

erty tax on segments of the property dismantled and crated for shipping, but not yet shipped on the tax assessment day. Justice Douglas for the Court held that until "the entrance of the articles into the export stream," there is no tax immunity.⁴⁷ The second case arose when the taxpayer, planning to ship oil to Canada, gathered a large quantity at Dearborn, Michigan, where it stayed 15 months because of wartime shipping restrictions. Dearborn claimed a property tax. Justice Frankfurter, for the Court, held that so long a storage broke the shipment and subjected the oil to tax, reducing the shipper's plan to the mere "intent" which had been insufficient in the cement plant case.⁴⁸ The result moves the export cases toward accord in this respect with the cases arising over state taxes on goods in interstate commerce.⁴⁹ Two decisions interpreting the Internal Revenue Code, *Comm'r v. Estate of Church*⁵⁰ and *Estate of Spiegel v. Comm'r*,⁵¹ attracted widespread attention, but as in the past an extended discussion of this subject is outside the scope of the article.⁵²

OTHER PROBLEMS OF BUSINESS

a) *Power and Eminent Domain*

Closely related to the public interest, the future development of government power projects may be dependent upon a question in eminent domain and constitutional law touched on by the Court in its 1948 term. This year, in *Grand River Dam Authority v. Grand-Hydro*,⁵³ as in many terms before, the Supreme Court came close to dealing with the ultimate question, but did not decide it.

The background law in the field can be analyzed in part by dealing with only two of the many distinguishable areas—the obligation of the government to pay for power rights and for irrigation rights.

Under well established principles, no one can own rights in the flowing water of navigable streams except by acquiescence or grant of the federal government. In the leading case, *United States v. Chandler-Dunbar Water Co.*,

⁴⁷ *Empress Siderugica, S.A. v. Merced County*, 69 S. Ct. 995 (1949).

⁴⁸ *Joy Oil Co. v. State Tax Comm'n*, 69 S. Ct. 1075 (1949).

⁴⁹ *Minnesota v. Blasius*, 290 U.S. 1 (1933), is the leading case in respect to the relation of delays and taxation of shipments under the commerce clause.

⁵⁰ 335 U.S. 632 (1949).

⁵¹ 335 U.S. 701 (1949).

⁵² The cases have already received thorough analysis in the legal periodicals. See Bittker, *The Church and Spiegel Cases*, 58 *Yale L.J.* 825, 838 (1949); Conway, *I.R.C. § 811(c)—The Church and Spiegel Interpretation*, 34 *Corn. L.Q.* 376 (1949); Looker, *Estate Taxation of Living Trusts: The Church and Spiegel Decisions*, 49 *Col. L. Rev.* 437 (1949); Schrenk and Wellman, *The Church and Spiegel Cases*, 47 *Mich. L. Rev.* 655 (1949); Church and Spiegel in Perspective, 16 *Univ. Chi. L. Rev.* 711 (1949).

⁵³ 335 U.S. 359 (1948).

the Court said, "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."⁵⁴ On the other hand, in *United States v. Cress*⁵⁵ the Court recognized private ownership of the running water in a non-navigable stream.

The result of the *Chandler-Dunbar* rule is that there are at least two situations in which, when the government adversely affects private power holdings on navigable streams, it incurs no liability for compensation under the Fifth Amendment. First, if the government condemns land which others had thought might one day be used for a power project, it need not pay the so-called "power value" of the land, for the power value is an attribute of the flowing water, which already belongs to the government.⁵⁶ This means that normally the government must pay only the so-called "farm value" of the land. Second, if the government, by down-stream activities on a navigable stream, raises the water level of the whole stream within the high-water boundaries, thus depriving an up-stream private power project of its fall of water, the government is not required as a matter of constitutional law to pay for that loss.⁵⁷

On non-navigable streams, however, opposite results will be obtained when the *Cress* rule is applied. Thus under the *Cress* rule the government would be required to pay the power value of land it condemns along non-navigable streams and also would have to pay for the loss of water power resulting from raising the level of a non-navigable stream.⁵⁸

The same problems arise as to irrigation rights. If the irrigator has a vested interest in the use of the water, then the government must pay extra if it condemns his land, or must compensate him if, without condemning his land, it reduces the quantity of his irrigation water by altering the flow of the stream.

The same constitutional principles apply both to power rights and irri-

⁵⁴ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913). See also *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 427 (1940).

⁵⁵ 243 U.S. 316 (1917). See note 58 *infra*.

⁵⁶ *United States v. Chandler-Dunbar Water Co.*, 229 U.S. 53, 69 (1913). Indeed, if developments have been made by private persons in a navigable stream without a federal license, they may be destroyed by the Government without cost to it. *Ibid.*, and see *United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 599 (1941).

⁵⁷ *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), is the most recent such case.

⁵⁸ The latter is the *Cress* situation. The government raised the water level on a navigable stream, incidentally raising the level on a non-navigable stream and depriving *Cress* of a fall of water. The government was required to pay for this power loss.

gation rights.⁵⁹ Nor is the *Chandler-Dunbar* rule qualified in the western states by the fact that those states have the "appropriation" rather than the "riparian" system of water rights.⁶⁰ However, there may be a very important statutory difference between the law applicable to power rights and the law applicable to irrigation rights. A whole series of federal statutes dealing with water systems in the west, from the early Acts of 1866 and 1877 to the recent Flood Control Act of 1944, may well have established legal rights in the users of irrigation water which were never granted to power companies.⁶¹

In the past seven years, the government has twice asked the Court to extend the *Chandler-Dunbar* rule to non-navigable streams in power-right controversies.⁶² While the *Chandler-Dunbar* case was carefully considered, and has been repeatedly followed, the *Cress* opinion on this point was brief and almost offhand, and subsequent decisions have held that it "must be confined to the facts there disclosed." Whether the Court will extend the *Chandler-Dunbar* rule remains a mystery. If it does so, the extension may follow markedly different courses as to the rights of users of water for power and the rights of users of water for irrigation by virtue of the statutory history in the latter field.

If the *Chandler-Dunbar* rule were extended to non-navigable streams, the right to compensation for both power claimants and irrigation claimants could be left to statutory control. Congress could regulate the compensation to be made for losses with an eye to realities which are not fully recognized by the broad constitutional principle of just compensation. If the *Chandler-Dunbar* rule were not extended, and power companies had to be paid for the loss of the flowing water as a matter of constitutional law, existing principles of the law of eminent domain would probably give them

⁵⁹ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706 (1899).

⁶⁰ On the distinctions between the two systems see generally Hutchins, *Selected Problems in the Law of Water Rights in the West*, U.S. Dept. Ag. Misc. Pub. No. 418 (1942). The "appropriation" doctrines apply equally to navigable and non-navigable streams, *ibid.*, at 35 et seq., and are the product of state law. The *Chandler-Dunbar* rule, on the other hand, is a product of national constitutional law, and the plenary power of the federal government as to navigable streams at least is not qualified by the state law. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703-9 (1899); *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534-35 (1941).

⁶¹ The basic early statutes are the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. § 661 (1928); Act of July 9, 1870, 16 Stat. 218, 43 U.S.C.A. § 661 (1928); and the Desert Land Act of Mar. 3, 1877, 19 Stat. 377, 43 U.S.C.A. § 321 (1928). See also the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C.A. § 391 (1928). The most recent basic statute is the Flood Control Act of 1946, 60 Stat. 641. Arguably, e.g., Section 8 of the Reclamation Act, 32 Stat. 390 (1902), 43 U.S.C.A. § 383 (1928), yielded the federal plenary power as to irrigation interests.

⁶² *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943); *United States v. Willow River Co.*, 324 U.S. 499 (1945). Both times the Supreme Court avoided the problem.

grossly excessive compensation. For example, under current principles of market value as the basis of constitutional just compensation, power value might be appraised on the basis of rates charged by power companies, which might in turn, perhaps due to defective state regulation, have been beyond all reason.⁶³

In the *Grand River* case this year the Court once again put aside unanswered the question of whether it would overrule the *Cress* case. An Oklahoma state development authority condemned land for a hydro-electric project on a stream which was non-navigable but affected navigation on other streams. The state was licensed by the Federal Power Commission to proceed with its project, and it claimed by virtue of the federal license the right to stand in the same position as would the United States. The farm value of the land in question was \$281,000 and the power value was \$800,000. The Oklahoma Supreme Court awarded the latter figure.

The sole question before the Supreme Court was whether anything in federal law should affect the condemnation price of a state project operating under state law solely because of the federal license. The majority was thus able to avoid the *Chandler-Dunbar* and *Cress* alternatives by holding that since the federal license did not carry with it federal eminent domain principles, the valuation was left to Oklahoma law. Justice Burton for the Court specifically reserved the question as to the valuation if the United States had been the taker: "The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce."⁶⁴ Justice Douglas, for Justices Black, Murphy, and Rutledge, dissented, arguing that the license required that

⁶³ Valuation of utility property for condemnation purposes is complicated to such an extent that at least one state has held that ordinary condemnation proceedings may not be used for the purpose. *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W. 2d 799 (1936). While valuation for eminent domain purposes is never simply a capitalization of utility earnings, those earnings are considered highly relevant. See Orgel, *Valuation Under Eminent Domain*, cc. xvii-xvix, and especially cases p. 708 n. 223. For a briefer statement see 18 Am. Jur. § 293. For an example of a claim that a "power right" on a non-navigable stream should be paid for on a basis of a hypothetical sales rate, see *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 275 (1943). In a letter to the author, dated August 22, 1949, Joseph C. Swidler, General Counsel for TVA, stated: "Two problems need to be distinguished. If a court should allow power-site value as reflected in the market value of the land, that might, of course, result in substantially higher awards than would be made if power-site value were excluded altogether. If the courts were to go a step further and permit proof of power value by a showing of the capitalized earnings from a project which might be constructed on the site, as the land-owners urged in the *Powelson* case, the results would be much more serious. To determine power value by the capitalization method requires making assumptions as to all the contingencies which would be involved in constructing and operating a project which does not exist and never will exist. The trial becomes a field day for expert witnesses and the result is pure speculation."

⁶⁴ 335 U.S. 359, 373 (1948).

federal valuation rules be applied and, more important, that therefore the *Chandler-Dunbar* rule should be invoked.

There are of course possible solutions to the valuation problem other than the basic approaches suggested above. The Court might undercut the whole difficulty by a progressively broader definition of "navigable," thus pulling more and more rivers under the *Chandler-Dunbar* rule.⁶⁵ It might avoid much of the problem by rigid adherence to the rule that power value need not be paid for land taken unless the power project for which the private owner claims compensation is either actually in existence or absolutely certain of completion, thus avoiding payment for power value which is at best a speculator's dream.⁶⁶ The latter method, of course, can apply only to valuation of land taken, and not to the situation in which private projects lose the fall of water by alteration of stream levels.

TABLE 1

	Land Amount	Total Amount	% Land to Total
Norris Project.	\$8,740,000	\$32,269,000	27.1
Appalachia Project. . . .	467,000	23,762,000	2.0
Ocoee No. 3 Project. . . .	125,000	8,793,000	1.4
Nottely Project.	441,000	5,384,000	8.2
Chatuge Project.	1,151,000	7,036,000	16.4

The relation of land costs to other costs in project construction varies because different amounts of land are required for reservoir purposes at different projects, and because land values themselves vary. A few comparisons from the TVA showing the wide range in proportion of land costs are made in Table 1.⁶⁷

The range in these five projects of from 1.4 per cent to 27.1 per cent for land costs is attributable to many factors. The Norris land was not only great in quantity but was, compared to the other four, rich and settled. Appalachia and Ocoee are in deep gorges forming natural reservoirs and requiring comparatively little land. Chatuge is in a comparatively flat area, requiring a much larger reservoir.⁶⁸ And yet the most important factor causing variation in land cost proportions may be compensable

⁶⁵ *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

⁶⁶ *McGovern v. City of New York*, 229 U.S. 363, 372 (1913); *TVA v. Powelson*, 319 U.S. 266 (1943).

⁶⁷ These data are taken from two reports of the Tennessee Valley Authority. The Norris Project, Tech. Rep. No. 1, at 612 (1939); and the Appalachia, Ocoee No. 3, Nottely, and Chatuge Projects, Tech. Rep. No. 5, vol. 2, 579, 598, 614, 626 (1948).

⁶⁸ *Ibid.*, passim.

power value. The four projects other than Norris are all in what is generally called the Hiwassee Valley project of the TVA. They are part of the project considered in *TVA v. Powelson*,⁶⁹ the 1943 Supreme Court decision which held that, since Powelson's project was incomplete, TVA need not pay the power value of the land. Had the *Powelson* case been decided the other way, the land cost in each of these Hiwassee projects might have run to about four times what was actually paid.⁷⁰ Under such a result the ratio of land cost to total project cost would have remained comparatively low at Appalachia and Ocoee No. 3, but at Nottely and Chatuge it would have been extremely high.

This problem is most acute in the Missouri Valley, where over 100 projects are now in various stages of authorization or of dream. Hardly any has yet been started. It is obvious that a very large proportion of the tributaries of the Missouri are not navigable in any real sense. Many of them are completely dry for large parts of each year. Many of the projects are in flat lands, where large reservoirs will be required. Many are in little populated areas, where total power sales will be much smaller than in the populous Tennessee area.⁷¹

At the present time, costs must be figured so closely on Missouri Valley projects that a cost variation of one-hundredth of a cent for the production of each kilowatt-hour of electric power may make the difference between approval or disapproval of the project.⁷² If land costs can range as high as a quarter of the entire cost of a project, then obviously the difference between the *Chandler-Dunbar* and *Cress* rules may be the difference between having irrigation, flood control, and power in some areas of the northern plains states or doing without them. In some areas, the demand for these services may be so great that the amount of land cost can do no more than make the services more expensive without prohibiting a project; but certainly in many instances, land cost will be conclusive.

At the 1949 Term, the Court may finally confront the issue so long postponed and either reapprove, overrule, or undercut the *Cress* decision. It has laid over to the 1949 term for reargument two cases which squarely raise the issue.⁷³

⁶⁹ Note 67 supra.

⁷⁰ This was the approximate difference involved in the *Powelson* case.

⁷¹ The foregoing information is acquired from informal interviews with engineers familiar with Missouri Valley projects.

⁷² Information generally acquired from Bureau of Reclamation, U.S. Dept. of Interior.

⁷³ *United States v. Kansas City Life Ins. Co.*, 74 F. Supp. 653 (Ct. Cl., 1947); *United States v. Gerlach Livestock Co.*, 76 F. Supp. 87 (Ct. Cl., 1948).

b) Patents

While there were few patent cases at the 1948 term, those few did raise one issue important to the business community and to a survey of the function of the Supreme Court as an institution of government. That issue is: Will the Supreme Court ever make effective its repeated commands to the Patent Office to raise the standard of invention?

The three patent cases this year, except for the discussion they evoke of this question, were insignificant. An improved anti-perspirant was held not patentable; the interesting element of the case was the Court's adoption of the Second Circuit's proposition that "skillful experiments in a laboratory, in cases where the principles of the investigations are well known, and the achievement of the desired end requires routine work rather than imagination, do not involve invention."⁷⁴ A case involving a patent in the electric welding field is noteworthy primarily because the Court was unanimous in holding the patent valid.⁷⁵ This is probably the first time both Justices Black and Douglas have considered a claimed invention patentable since they have been on the Court. But the patent case of most general interest was *Jungersen v. Ostby & Barton Co.*⁷⁶

In the *Jungersen* case, Justice Reed for the Court held invalid a patent for making molds for the reproduction of intricate types of jewelry. The majority was unimpressed by the process, in which a first copy was filled with wax by centrifugal force so that a model might eventually be made from the wax. Justices Frankfurter and Burton dissented, adopting the opinion of Judge Learned Hand in the court below, and Justice Jackson dissented separately. Justice Jackson posed the problem thus:

It would not be difficult to cite many instances of patents that have been granted, improperly I think, and without adequate tests of invention by the Patent Office. But I doubt that the remedy for such Patent Office passion for granting patents is an equally strong passion in this Court for striking them down so that the only patent that is valid is one which this Court has not been able to get its hands on."⁷⁷

Clever posing of a problem does not always answer it, and Justice Jackson suggests no judicial solution to terminate the Patent Office practice of consistently flooding the country with patents which could not possibly stand judicial scrutiny. From 1927 to 1940, the number of patent applications ranged from 60,000 to 96,000 a year, and the number granted ranged

⁷⁴ *Mandel Bros. v. Wallace*, 335 U.S. 291, 295 (1948).

⁷⁵ *Graver Tank & Mfg. Co. v. Linde Air Prod.*, 336 U.S. 271 (1949). However, a petition for rehearing has been granted. The case is No. 2 on the 1949 Term docket.

⁷⁶ 335 U.S. 560 (1949).

⁷⁷ *Ibid.*, at 572.

from 42,000 to 56,000 a year.⁷⁸ It is doubtful that even the thoughtful friends of the patent system would deny the invalidity of an enormous number of the hundreds of thousands of patents granted in that period.⁷⁹

The existence of an administrative agency grinding out patents far faster than the courts can possibly invalidate them, results in a perpetual and head-on conflict between that agency and the courts which Professor Currie has described thus: "The two institutions charged with the application of the patent law . . . are, for reasons which are both ideological and institutional, poles apart in their positions on this fundamental issue."⁸⁰

The warfare of the courts against the Patent Office has been intensified by the attitude of the New Deal court, but in no sense began with it. The

TABLE 2
SUPREME COURT TREATMENT OF PATENTS, 1900-1940

Date	No. of Cases	No. Valid Patents	No. Invalid Patents	No. Not Infringed	% Invalid or Not Infringed
1900-1905.....	9	2	3	4	78
1906-10.....	7	3	1	3	57
1911-15.....	4	4	0	0	0
1916-20.....	16	5	9	2	69
1921-25.....	14	3	8	3	79
1926-30.....	12	3	5	4	75
1931-35.....	14	3	11	0	79
1936-40.....	15	0	13	2	100

data in Table 2 are taken from a statistical study prepared by Judge Evans.⁸¹

Shifts in the standard of invention are difficult to perceive since each case is factual, each is unique, and hence ungovernable by a verbal formu-

⁷⁸ Patent Office Report for 1946, 29 J. Pat. Off. Soc. 83, 88-89 (1947). The number of patents granted fell off from 47,924 in 1940 to 27,587 in 1946, a decline attributed by the report to lack of personnel.

⁷⁹ One estimate placed the number at 50 per cent. Evans, *Some Stray Thoughts of a Federal Judge on Our Patent System and Its Operation*, 27 J. Pat. Off. Soc. 293, 307 (1945). Mr. William H. Davis has said, "[A] basic deficiency in the operation of the Patent Office, which is all the more deplorable because if it were remedied the Patent Office would do a service to American industry of really tremendous value, is that the Office grants too many invalid patents." Davis, *Proposed Modifications in the Patent System*, 12 Law & Contemp. Prob. 796, 801 (1947). Professor Stedman observes that "the number of spurious patents . . . has been so large as to arouse much discussion and serious concern," and attributes the situation mainly to "the difference between the standards of invention applied by the Patent Office and those applied by the courts." Stedman, *Invention and Public Policy*, 12 Law & Contemp. Prob. 649, 657 (1947).

⁸⁰ Currie, *Introduction [to the Patent System]*, 12 Law & Contemp. Prob. 645, 646 (1947).

⁸¹ Evans, *Disposition of Patent Cases by the Courts*, 24 J. Pat. Off. Soc. 19, 23 (1942).

la. For this reason it is also difficult for the Court to control the Patent Office. It is hard to conceive of any set of words which could effectively govern this year's three cases alone, for what is there in common among an anti-perspirant, an electric welding process, and a new method of making jewelry? Hence the Supreme Court has offered little by way of formula in the past ten years which was new, beyond the "flash of genius" test in *Cuno Engineering Corp. v. Automatic Devices Corp.*⁸² Certainly the modern attitude, whether or not there is any formula to express it in terms of a standard of invention, has come to require that patent monopolies be granted only when they are most clearly deserved. With the strengthening of the attitudes against all monopolies, there has been a stiffening of attitude as to the patent monopoly.⁸³

Dominant in the continuance of the flood of invalid patents, more responsible than the bizarre administrative system of the Patent Office itself,⁸⁴ is the refusal of the Patent Office staff to change its attitude to conform to the judicial attitude. Of course administrative agencies are supposed to obey the law as the courts declare it, but there is no wilfulness like that of the government employee who violates the law for what he fancies is the public good. Judicial mandates are easily evaded, and everyone in the Patent Office knows that America's welfare requires "a strong patent system"⁸⁵—a euphemism for plentiful patents. The result is insubordination in good faith.

A recent reading of a ten year file of the *Journal of the Patent Office So-*

⁸² 314 U.S. 84 (1941). Mr. Jo Baily Brown, a distinguished patent lawyer, in an extended and penetrating statement analyzes the shift of judicial attitude toward patentability as a shift from willingness to accept the trivial as inventions to a requirement that inventions, to deserve patents, must be "revolutionary or pioneer mental creations." He concludes, "The lower courts, under the influence of the Supreme Court, have shown a growing tendency in the past ten years to touch lightly on cases like *Loom Co. v. Higgins*, 105 U.S. 580, and the *Eibel Process* case, 261 U.S. 45, and to emphasize the law of cases like *Atlantic v. Brady*, 107 U.S. 192." Brown, *Developments in the Patent Laws as Affected by Adjudications*, 22 J. Pat. Off. Soc. 587 (1940).

⁸³ *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1943), is a recent example. For brief notes on the most recent cases on this topic see the 1946 Term Article, at 15-16; 1947 Term Article, at 11.

⁸⁴ The administrative system of the Patent Office is described in Hamilton, *Patents and Free Enterprise* (1941).

⁸⁵ The First Report of the National Patent Planning Commission, quoted in Dodds and Crotty, *The New Doctrinal Trend*, 30 J. Pat. Off. Soc. 83, 84 (1948), says of the patent system, "It is the . . . basis upon which our entire industrial civilization rests." Thomas Edison had a somewhat different view of the results of the operation of the patent system: "The long delays and enormous costs incident to the procedure of the courts have been seized upon by capitalists to enable them to acquire inventions for nominal sums that are entirely inadequate to encourage really valuable inventions. The inventor is now a dependent, a hired person to the corporation. The administration of the law is the cause." Statement from 1912 Cong. Hearing, quoted in Stedman, *op. cit. supra* note 79, at 660.

ciety, a semi-official publication, reveals 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. The whole temper of the place is that decisions which might be thought to raise the standard of invention are explained away as insignificant; while decisions which seem to lower the standard are glorified.⁸⁶ The *Journal* carries enthusiastic admonitions to its readers to "check the torrent of baleful judicial action."⁸⁷

Two excerpts will perhaps convey the tone. An editorial in 1943, headed "Flash of Genius—Quenched?" said:

From the beginning the bench and bar concerned with patent matters took a dislike to this new character, and either refused to accept him into their scheme of things, dismembered him by analysis, attempted to show him up as an imposter posing under a new name without any new attributes, or merely noted his existence and ignored him.⁸⁸

The second is an account of a lower court opinion which attempted to apply the "flash" test. The heading suggests the horror of the idea "The Flash of Genius Doctrine Approaches the Patent Office." The story continues

The 'flash of genius' test for invention has been received by the patent bar with irreverence, considering its high sponsorship. So long as it remained a fiction on Mt. Olympus, it was not intolerable. That it would filter down to the lesser courts was recognized as probable but the hope remained that it would be modified, restricted, or abandoned before the danger went too far.⁸⁹

⁸⁶ A considerable amount of ink was expended to prove that the "flash of genius" test left the law exactly as it had been before. For example, the principal examiner, Div. 12, Pat. Off., wrote, "It is the conclusion of the writer that the standard of invention as generally followed in the Patent Office has not been raised by the much discussed *Cuno v. Automatic Devices . . .* and that even this standard remains qualified by the exception set forth in *Goodyear v. Ray-O-Vac*, 321 U.S. 275." Spintman, *Has the Standard of Invention Been Raised?*, 27 J. Pat. Off. Soc. 422 (1945). And see Nielsen, *Flash of Genius*, 24 J. Pat. Off. Soc. 371, 374 (1942), concluding that "the facts of the case do not warrant the inferences that any new measure of patentability has been instituted."

⁸⁷ Gottschalk, *Further Comments on Recent Patent Decisions and Current Trends*, 26 J. Pat. Off. Soc. 151, 188 (1944). The author is patent counsel for the Corn Products Refining Co., and is not associated with the Patent Office.

⁸⁸ 25 J. Pat. Off. Soc. 771 (1943).

⁸⁹ Sellers, *The Flash of Genius Doctrine Approaches the Patent Office*, 26 J. Pat. Off. Soc. 275 (1944). The frightening decision was *Potts v. Coe*, 140 F. 2d 470 (App. D.C., 1944). The Court of Customs and Patent Appeals on occasion has dug in its heels as deeply as the Patent Office. See *In re Shortell*, 142 F. 2d 292 (Cust. & Pat. App., 1944).

Note the "danger." The Supreme Court had formulated a rule to which the patent bar "took a dislike" and "refused to accept." With a lower court actually attempting to apply the Supreme Court mandate, rendering it no longer merely "a fiction," there was grave "danger" to the Patent Office itself.

The Patent Office intransigence is attributable to many factors, few of which the Supreme Court can correct. The nonadversary system under which most patents are granted means that examiners are rarely given both sides of a case;⁹⁰ the training of an examiner is not calculated to arouse his concern in a public interest other than that which results from patent grants; and, though this is not to imply an impropriety, for none is suspected, he can scarcely escape knowing that his own economic future outside the Patent Office lies with private concerns interested in obtaining patents.⁹¹ As a result patent examiners seem rarely to ask themselves: How can I cheerfully, effectively, and in a spirit of full cooperation with my *judicial* superiors translate the attitude reflected by their opinions into the living law of the patent system?

From the standpoint of the institutional history of the Supreme Court, the resistance of the Patent Office is of peculiar interest because it opens the question of whether the Supreme Court can make itself effective when met by a determined challenge. To date the answer appears to be in the negative. If the Court continues to hear only one to three patent cases a year, the defiance can continue indefinitely. A Court hearing, as in the past two years, 120 cases a year in the entire field of the law is a poor match for an administrative agency which in a year can grant up to 50,000 patents.

Hence the solution which Justice Jackson derides is clearly not a good solution; but it is the only course left, unless the Supreme Court is ready to quit the contest altogether. In other fields the Court has on occasion shown that it means business and wants lower tribunals to follow the law it has declared;⁹² and perhaps it will eventually do the same in the

⁹⁰ It is widely believed that the recent Patent Commissioner, Mr. Casper Ooms, went into office sincerely determined to improve the operation of the Patent Office, and that he found the task more than one man could do. Ooms has observed that the Patent Office itself would not grant patents in most cases in which the patent is eventually held invalid if it had before it the same elaborate data which is given a court. Address quoted in Smith, *Recent Developments in Patent Law*, 44 Mich. L. Rev. 899, 906 (1946).

⁹¹ The foregoing comments are taken from informal remarks of an attorney with wide experience in patent matters.

⁹² The Court appears to be making major progress in another long term dispute, this time with lower courts and in regard to jury trials in civil cases. The effort of the Court to bring district courts into closer conformity with the Supreme Court's conception of the meaning of

patent field. If the "Patent Office passion for granting patents" is not at least matched in the Supreme Court by "an equally strong passion . . . for striking them down," then the Patent Office will surely escape the "danger" that the Supreme Court of the United States will promulgate anything more than what the *Journal* calls "fictions from Mt. Olympus."

c) *Classifications and Equal Protection*

The death of substantive due process as a control of legislation has been followed by an effort to give new vitality to the equal protection clause, so that it might serve as a substitute avenue for invoking judicial review. That effort made no important headway this year.

*Wheeling Steel Corp. v. Glander*⁹³ invalidated an Ohio tax on foreign corporations doing business in that state on the ground that, since there was no equivalent tax on domestic corporations, the law denied equal protection. Justice Douglas' dissent, joined by Justice Black, asserted that the term "person" in the first section of the Fourteenth Amendment extends to "natural and not artificial persons." Conceding that the Court had held to the contrary since 1886,⁹⁴ Douglas contended, as had Black in his first year on the Court, that this line of cases should be overruled. Historical research now makes quite clear that inclusion of corporations within the term "person" was not specifically contemplated by those who passed and ratified the Fourteenth Amendment.⁹⁵ And yet for purposes of historical interpretation the significance of the word "person" ought not to be considered separately from the meaning of the privileges and immunities, due process, and equal protection clauses of the Amendment on which it is de-

the civil jury provision of the Seventh Amendment is reviewed extensively in *Wilkerson v. McCarthy*, 336 U.S. 353 (1949), rehearing den. 336 U.S. 940 (1949), in the opinion of Justice Douglas and its appendix. In the civil rights field the Court appears to end a long battle over post-trial procedures in Illinois with a peremptory command this year. See note 117 *infra* and text. It previously took firm action with respect to the fifth circuit's attitude on review of the NLRB. *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206 (1940). But the Patent Office, behind its barricade of factual variations from case to case, may prove impregnable to reproof.

⁹³ 69 S. Ct. 1291 (1949).

⁹⁴ *Santa Clara v. So. Pac. R. Co.*, 118 U.S. 394, 396 (1886).

⁹⁵ The leading study is Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *Yale L.J.* 371 (1937), 48 *Yale L.J.* 171 (1938). An exhaustive and excellent unpublished study concluding that the term "person" as used in the Fourteenth Amendment was not originally understood to include corporations is James, *The Framing of the 14th Amendment* (1939), an unpublished Ph.D. Thesis at the University of Illinois. The writer has recently completed, in conjunction with Mr. Robert Munro, a reasonably comprehensive study of the original materials on the Fourteenth Amendment for a forthcoming article on the origins of equal protection, revealing that for the years 1866-68 there was no evidence of any kind that the word "person" was intended to include corporations.

pendent and which have undergone even more radical distortions.⁹⁶ The proper question therefore is whether the Court ought to return the entire section to its original meaning.

In *Railway Express Agency v. New York*⁹⁷ Justice Jackson also expressed basic notions about the equal protection clause. The Court held valid a New York City ordinance which purported to be a safety regulation. It prohibited Railway Express from using its 1,900 trucks in New York City for general advertising, but permitted trucks to be used for advertisement of the owner's own commodity.⁹⁸ The Court found this to be a reasonable classification, leading one to conclude that self-advertising attracts no attention.

Justice Jackson, concurring, expressed his basic philosophy on the difference between due process and equal protection: "For my part, I am more receptive to attack on local ordinances for denial of equal protection than for denial of due process, while the Court has more often used the latter clause."⁹⁹ The difference, he thought, was that invalidation of a regulation on due process grounds leaves a problem beyond regulation at all; while invalidation under equal protection means merely that it must be regulated on a more general level. Equal protection thus protects against arbitrariness because it precludes officials from abusing a minority, and thus escaping "the political retribution that might be visited upon them if larger numbers were affected."

A majority made easy work of a claim that a Michigan statute was invalid which precluded women from serving as bartenders unless they were the wives or daughters of male owners.¹⁰⁰ Women bartenders generally are thus excluded, and a woman owner can neither keep her own bar nor have her daughter do so. The Court thought that so long as Michigan might conceivably suppose that morals were improved by keeping unprotected ladies from behind the bar, it could not gainsay Michigan's right to insist on that protection.

⁹⁶ The studies referred to in note 95 supra induce the conviction that "privileges and immunities" were meant to include all of the Bill of Rights, and probably a good deal more of an undefined sort; that "due process" was meant to be wholly procedural; and that "equal protection" was intended to have far greater effect in achieving genuine equality in race relations than it has ever been given.

⁹⁷ *Ry. Express Agency v. New York*, 336 U.S. 106 (1949).

⁹⁸ Municipalities have wide latitude to regulate advertising on their streets. *Valentine v. Chrestensen*, 316 U.S. 52 (1941). And numerous cases uphold regulations of some similarity to that in the instant case. See particularly *Packer v. Utah*, 285 U.S. 105 (1932); but cf. as an unreasonable classification an ordinance discussed in *Murphy, Inc. v. Westport*, 131 Conn. 292, 40 A. 2d 177 (1944), which permitted professional people only to post signs.

⁹⁹ 69 S. Ct. 463, 467 (1949).

¹⁰⁰ *Goesaert v. Cleary*, 335 U.S. 464 (1948).

The barmaid case illustrates that equal protection is far indeed from being a serious control over state economic legislation. The usual approach is that unless a regulation is unreasonably discriminatory on its face, it is valid. Hence, says the Court, "we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."¹⁰¹ Justices Rutledge, Douglas, and Murphy, dissenting, thought this legislation palpably discriminating.¹⁰²

It is exceedingly improbable that equal protection will play a significant role in respect to economic legislation so long as courts decline to explore the facts. In the field of racial discriminations, the Court normally requires full details as to the exact situation, as, for example, when it is charged that schools for white and colored persons are unequal.¹⁰³ Similar procedure in the economic field—though as discussion above indicates, this would be far indeed from the contemplation of those who passed the Amendment—would make equal protection a very substantial control over commercial laws.

III. CIVIL RIGHTS

During 1948-49, civil rights, although playing a less dramatic role, remained in substantially as precarious a position as they had been the year before. The election made superficial difference in the intensity of the "loyalty program," as the purge of government employees was called, but the prying-machine had become institutionalized, and continued to run on.¹⁰⁴ A President was elected on a strong civil rights platform which included steps toward equal treatment of the races, but his program was quickly stopped by filibusters and abandoned. Small race riots occurred in St. Louis and Washington, D.C., because of efforts to stop segregation at public swimming pools. The House Committee on Un-American Activities encountered considerable resistance when it attempted to censor the

¹⁰¹ *Ibid.*, at 467.

¹⁰² The arguments pro and con the lady at the spigot are collected in "Bar Maids Come Back," *N.Y. Times*, p. 27, col. 1 (Mar. 18, 1945).

¹⁰³ Annotation, 103 A.L.R. 713 (1936).

¹⁰⁴ A government employee was forced to defend himself against a written charge of disloyalty because he had allegedly "spoken critically of the American Ambassador to Russia"; and another—a Republican, as a matter of fact—was brought to the loyalty bar because many years ago he contributed seventy-five cents when the hat was passed at a dubious public meeting. For the first time some F.B.I. files were published at a trial this year in Washington, D.C., and turned out to be enormous dossiers of information largely insignificant. *N.Y. Times*, § 1, p. 1, col. 1 (June 8, 1949); *Ibid.*, § 1, p. 1, col. 8 (June 9, 1949). The subject of loyalty purges is thoroughly considered in Emerson and Helfeld, *Loyalty Among Government Employees*, 58 *Yale L.J.* 1 (1948).

school books of the nation; but a group of the country's highest educators adopted a statement endorsing the purge of political undesirables from their own faculties.¹⁰⁵

In this atmosphere of rising tension, the Supreme Court civil rights problems seemed almost academic, a struggle over fine points when fundamentals were elsewhere in issue. To this, the most substantial exception was *Terminiello v. Chicago*.¹⁰⁶

Terminiello, a notorious associate of Gerald L. K. Smith, gave a speech in Chicago. The auditorium in which he spoke was surrounded by enemies of his cause, and filled with his friends. The outsiders created disturbances, throwing stones through the window, and otherwise threatening riot and great violence. This in turn incited the group within. Terminiello's speech, which was violently anti-Semitic, contributed nothing to the peace of the occasion. He inflamed his auditors with accounts of alleged Jewish misdeeds, such as a claimed conspiracy to inject all Germans with syphilis germs. He also spoke of the group outside as "slimy scum." It does not appear, however, that his supporters took physical action other than self defense. He was found guilty of breach of the peace, the court charging the jury in part that a breach of the peace included conduct which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." His counsel did not specifically object to this particular portion of the charge, though they did generally preserve his rights under the Fourteenth Amendment at all possible points. The significance of that passage was not considered in the Illinois appellate courts or before the Supreme Court until the opinion was announced.

The Court, in an opinion by Justice Douglas, felt that in view of the charge it was unnecessary to consider whether Terminiello's language itself was entitled to Fourteenth Amendment protection. The Constitution, he wrote, does not permit making an offense of conduct which "invites dispute" or "creates a disturbance." Indeed, said the Court, the First Amendment would be flabby stuff if it extended only to speech which never invited dispute.

The opinion is the clearest Supreme Court utterance squarely on the rights of speakers threatened by hostile persons.¹⁰⁷ Whether the police can

¹⁰⁵ N.Y. Times, § 1, p. 1, col. 8 (June 9, 1949).

¹⁰⁶ 69 S. Ct. 894 (1949).

¹⁰⁷ *Hague v. CIO*, 307 U.S. 496 (1939), had rejected the argument that disorders by the opponents of the speaker could be used as a pretext to suppress speech, but the case was distinguishable, though thinly, on the ground that in the Hague case the law enforcement officers themselves fomented the disorder. The general topic of the right to prohibit assembly or speech when violence is feared is exhaustively treated in *Prohibition of Lawful Assembly when Op-*

take the easy way out by jailing the speaker instead of disciplining a threatening crowd deserved a new Supreme Court consideration. The *Terminiello* case put the weight of the Constitution with the better cases of several jurisdictions.¹⁰⁸

Chief Justice Vinson dissented solely on the ground that the question considered by the Court had not been saved in the record, stating that if it had been saved, he would have agreed with the majority. Justices Frankfurter, Burton, and Jackson dissented on that ground and also on the merits. The Jackson dissenting position is particularly important because it meets the majority head-on at the central issue decided. His position is that valuable as free speech may be, it can be limited where it will result in disorder. Justice Jackson worried that the "doctrinaire" approach of the majority would turn the Bill of Rights into a "suicide pact." As always, he would cherish civil rights, but he would be practical about it.

Another colorful free speech case was *Kovacs v. Cooper*,¹⁰⁹ in which the Court held valid a Trenton, New Jersey, prohibition of sound trucks. Last year the Court made the fairly obvious decision that if sound trucks were to be licensed, it must be on a completely nondiscriminatory basis; but it left undecided the right of a city to make complete prohibition.¹¹⁰ What was done this year is somewhat confused, because there were three opinions for the five Justice majority, and two dissents for the four dissenters. Justice Reed, for three of the majority Justices, declared that total prohibition of sound truck use was "probably unconstitutional,"¹¹¹ but rested this opinion on the ground that cities could control the volume of sound trucks and that here the defendant had been guilty of "raucous noise."¹¹² The dissent of Justice Black rested primarily on the enormous

posed by Threat of Violence, 24 Ind. L.J. 78 (1948), on which much in the following paragraphs is based. See also Verbal Acts and Ideas—The Common Sense of Free Speech, 16 Univ. Chi. L. Rev. 328 (1949).

¹⁰⁸ Last year the Court of Appeals for the Eighth Circuit was required to correct a district judge who permitted police to prevent a meeting of Jehovah's Witnesses because the townspeople were hostile to them. *Sellers v. Johnson*, 163 F. 2d 877 (C.C.A. 8th, 1947), cert. den. 322 U.S. 851 (1948). Several attempts have been made to suppress anti-Semitic newspapers because they would create anger and incite to violence against the publisher. See *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479 (D.C. Ohio, 1921); *People v. Downer*, 6 N.Y.S. 2d 566 (1938); cf. *Near v. Minnesota*, 283 U.S. 697, 721 (1931). In the leading English case, Salvation Army parades had been attacked by hoodlums and finally resulted in a riot of over 1,000 persons. Yet when police attempted to stop the Army from parading again in the face of yet another mob, the court held the police without power to do so. *Beatty v. Gillbanks*, 9 Q.B.D. 308 (1882).

¹⁰⁹ 336 U.S. 77 (1949).

¹¹¹ 336 U.S. 77, 82 (1949).

¹¹⁰ *Saia v. New York*, 334 U.S. 558 (1948).

¹¹² *Ibid.*, at 83, 87.

usefulness of inexpensive sound trucks for the purpose of communicating ideas in a world in which all other means of mass communication are dominantly in the hands of persons of wealth.¹¹³

On the basis of the precedents, Justice Reed seems to have all the best of it. The Court in the past has held, essentially, that the state cannot substitute its judgment for that of the individual as to whether he wishes to receive the message of another. Thus a city cannot prohibit door-to-door circulation of leaflets, unless the individual posts on his own house that he wishes no intruders.¹¹⁴ The owner of the company town cannot keep those who convey information away from his town, because the individuals who live there may wish to receive it.¹¹⁵ But at all times the right of the individual as to what he would hear has been as well preserved as the right of him who would speak.

The sound truck batters down this defense of the auditor, leaving complete control of communication to the speaker. The right of choice as to what one says is not of greater importance than the right of choice as to what one hears, and if sound trucks roam the streets, the passer-by who wishes to be left alone has no protection. Justice Reed stressed the helplessness of the unwilling listener. Justice Black, in dissent, contended that loud-speakers could be controlled in volume, and kept off busy streets though not off all streets. But it is hard to find in the Constitution a requirement that anyone, whether he lives on a busy street or a quiet one, can be compelled to hear a message which he does not choose to hear.

In the area of criminal procedure, including court-martial procedure,¹¹⁶ there were several noteworthy decisions. The most outspoken pronouncement of the Court during the year was the granting of eight petitions by imprisoned persons for certiorari to various Illinois courts. All eight cases were remanded with the admonition, "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case."¹¹⁷ Legislation passed in

¹¹³ See, for example, the various reports of the Univ. Chi. Comm. on a Free and Responsible Press (1947); Ernst, *The First Freedom* (1946).

¹¹⁴ *Martin v. Struthers*, 319 U.S. 141 (1943).

¹¹⁵ *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹¹⁶ *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949), held that Navy personnel are not subject to court martial during a second enlistment for offenses committed during the first. *Wade v. Hunter*, 335 U.S. 907 (1949), held that a soldier was not placed in double jeopardy when his court martial was suspended in the middle due to the "tactical situation" of the military and he was later tried anew. *Humphrey v. Smith*, 336 U.S. 695 (1949), held that the lack of a full and fair pre-trial investigation in accordance with Article of War 70 was not "jurisdictional," i.e., was not a gross enough error to be subject to judicial review.

¹¹⁷ *Young v. Ragen*, 69 S. Ct. 1073 (1949).

Illinois after the Court's order has established proper procedure there.¹¹⁸

The case of most general importance in criminal procedure was *Upshaw v. United States*,¹¹⁹ which held that a confession obtained during a thirty-hour period after arrest without warrant could not be used against the defendant, whether or not it was obtained by coercion. Justice Black for the majority of five stressed that this was an interpretation of the Federal Rules of Criminal Procedure, and not a constitutional decision, but it is nonetheless applicable in all federal prosecutions. Rule 5 (a) of the Criminal Rules provides that persons must be formally charged "without unnecessary delay," and thirty hours of waiting for a confession is obviously not "without unnecessary delay." The case called for and received a routine application of *McNabb v. United States*.¹²⁰ Four Justices joined in a dissent by Justice Reed, the pithiest section of which summarized the position of all those who have criticized the *McNabb* rule—the police, the House of Representatives, some states, and some law reviews. "Today's decision," said Justice Reed, "puts another weapon in the hand of the criminal world."¹²¹

The case thus poses a question with which some Justices felt themselves confronted several times during the term: How shall I choose between constitutional ideals and efficient law enforcement? The majority on the issue of speedy arraignment in the *Upshaw* case are also the Justices most alert to strike down forced confessions, and to them the speedy arraignment rule is one method of preventing such forced confessions. Justice Reed, in his dissent, pointed out that the defendant is protected against the use of forced confessions when it appears in fact that there was force; although he dissented in two of the three cases he cites exemplifying the rule against forced confessions.¹²² In short, the dissenters in the *Upshaw* case, though they certainly do not approve of forced confessions, are less troubled about them in particular cases than are the majority.

This was further illustrated by a group of forced confession cases this

¹¹⁸ The case was treated as front page news in the St. Louis Post Dispatch (June 6, 1949). Such publicity, coupled with the strenuous efforts of a large group in Illinois including Mr. Albert E. Jenner, Jr., President of the Ill. State Bar, resulted in passage of a bill at the 1949 legislative session which establishes an effective post-trial procedure. St. Louis Post Dispatch, p. 8a (July 3, 1949). See also Katz, An Open Letter to the Attorney General of Illinois, 15 Univ. Chi. L. Rev. 251 (1948); Power to Appoint Counsel in Illinois Habeas Corpus Proceedings, 15 Univ. Chi. L. Rev. 945 (1948); A Study of the Supreme Court, 15 Univ. Chi. L. Rev. 107, 126-31 (1948).

¹¹⁹ 335 U.S. 410 (1948).

¹²⁰ 318 U.S. 332 (1943).

¹²¹ 335 U.S. 410, 436 (1948).

¹²² *Haley v. Ohio*, 332 U.S. 596 (1948); *Malinski v. New York*, 324 U.S. 401 (1945). In *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), Justice Reed was with the majority.

year.¹²³ In the case of *Watts v. Indiana*, the defendant was held for six days without being arraigned, during part of which he was kept in solitary confinement in a cell called "the hole." He was questioned in relays during virtually all of each night but one, and was often interrogated during the days as well. He finally produced a confession satisfactory to the police, on the basis of which he was convicted. In *Turner v. Pennsylvania*, the defendant was held incommunicado and without charge through five days of questioning, although he was interrogated for shorter periods than *Watts*. In *Harris v. South Carolina*, the defendant, an illiterate Negro, was arrested on Friday, held until Monday before he was told that he was suspected of murder, and was then interrogated in relays for most of each of three days before he "confessed." In the *Watts* and *Harris* cases there was the usual conflict of testimony as to physical abuse. In all three cases the Court, with the leading opinion by Justice Frankfurter in each, held that the convictions must be set aside.

The four Justices who had dissented in the *Upshaw* case also dissented in these three cases. The position of Justice Jackson, speaking for the group, was that as long as violence is not used, simple interrogation without counsel for protracted periods of time is no violation of a right, particularly because "once a confession is obtained it supplies ways of verifying its trustworthiness."¹²⁴ He granted that "arrest on suspicion and interrogation without counsel . . . largely negates the benefits of the constitutional guaranty of the right to assistance of counsel,"¹²⁵ but this he seemed to consider a necessary part of the cost of law enforcement.

The foremost practical difference between the two groups of Justices on this issue is the difference in the extent to which they believe that violent abuse of prisoners follows automatically from secret questioning. For example, the *Harris* case interrogation was of the relay type by groups of officers in a room eight feet by eleven. *Harris* asserted that at one point he was struck with force. The officer said he merely placed a hand on *Harris*' shoulder. The dissent presumably believes the officer. The majority presumably believes that episodes which give rise to such divergencies should not be allowed to occur in the first place. As Justice Frankfurter put it, "To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."¹²⁶

¹²³ *Watts v. Indiana*, 69 S. Ct. 1347 (1949); *Turner v. Pennsylvania*, 69 S. Ct. 1352 (1949); *Harris v. South Carolina*, 69 S. Ct. 1354 (1949).

¹²⁴ *Watts v. Indiana*, 69 S. Ct. 1347, 1357 (1949). ¹²⁵ *Ibid.*, at 1358. ¹²⁶ *Ibid.*, at 1350.

A federal procedure decision which will have almost its only impact in the District of Columbia involved facts odd enough to make it worth recitation.¹²⁷ The defendant, Frazier, was charged with violating the Narcotics Act, a statute administered by the Treasury Department. He was tried by a jury in the District of Columbia which consisted entirely of government employees, including one who was an employee of the Treasury Department and another whose wife was employed there. Defendant claimed the lack of an impartial jury as required by the Sixth Amendment.

Justice Rutledge surprisingly held that Frazier had nothing of which to complain. The "government quality" of the jury had in part been created by his own challenges to some nongovernment employees on the panel, a fact which Justice Rutledge stressed. But the defendant's use of his challenges is entirely his own prerogative, and he should scarcely be required to use it to take government employees off the panel if they should not have been there in such numbers in the first place.¹²⁸ Although it has long been recognized by statute and decision that government employees should serve as jurors, it is surprising the Court should not feel that 12 out of 12 are too many. Excerpts from a paragraph of Justice Jackson's dissent, joined by Justices Frankfurter, Douglas, and Murphy, are so forceful that they are appended in a note.¹²⁹

Four search and seizure cases give evidence of the renewed attention being given that subject. In the most important of them, *Wolf v. Colorado*,¹³⁰ the majority, like an army on parade, marched impressively up the field and then came back again to where they had started. If the figure may be pursued, the parade was magnificent, but the enemy remained unscathed.

¹²⁷ *Frazier v. United States*, 335 U.S. 497 (1948).

¹²⁸ Justice Jackson asserted in dissent that the reason for the large number of government employees on District of Columbia juries is that the court dismisses those who do not wish to serve. Compensation for jurors is \$4.00 a day, except that government employees get their regular salaries from their agencies. They are thus the only group of employed persons eligible for jury service who do not have something to gain by taking advantage of the opportunity to avoid jury service, since the \$4.00 is obviously not compensatory for most other persons.

¹²⁹ "This criminal trial was an adversary proceeding, with the government both an actual and nominal litigant. It was the patron and benefactor of the whole jury, plus one juror's wife for good measure. At the same time that it made its plea to them to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. . . . Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind." 335 U.S. 497, 514-15 (1948).

¹³⁰ 69 S. Ct. 1359 (1949).

In the *Wolf* case, the defendant had been charged with a criminal offense in the courts of Colorado, where evidence obtained by an alleged unlawful search and seizure was admitted against him. The issues before the Court were two: (1) Is the Fourth Amendment, through the Fourteenth Amendment, a limitation on the states as well as on the federal government? (2) If so, is the federal rule declared in *Weeks v. United States*,¹³¹ that wrongfully seized evidence may not be admitted, also a limitation on the states?

What the Court decided on the first point is a little elusive. In the view of the Court majority, for whom Justice Frankfurter spoke, no one of the amendments in the Bill of Rights is, as such, made applicable to the states by the 14th Amendment. Rather, so many of the Bill of Rights conceptions are made applicable to the states as are "implicit in the concept of ordered liberty."¹³² This does not mean that one may simply label a right "implicit" or not. Instead, under this majority view, a single principle of the Bill of Rights may be obligatory on the states in some situations and not in others. For example, the right to counsel is "implicit in the concept of ordered liberty" in capital cases,¹³³ but is usually not "implicit" in larceny cases.¹³⁴

In the *Wolf* case, the Court split the search and seizure protection and withheld one part. *Something* of the search and seizure conception is declared to be a limitation on the states. Justice Frankfurter called it "The security of one's privacy against arbitrary intrusion by the police."¹³⁵

On the other hand, it was held that evidence illegally seized by a state could be admitted at trial although under the federal rule such evidence would be inadmissible. Justice Frankfurter held that the inadmissibility aspect of the Fourth Amendment,¹³⁶ though "we stoutly adhere to it" for the federal system, was not so important that it must also be applied to the states. The primary element inducing his conclusion was that thirty states do not now apply the *Weeks* rule, and that therefore the failure to apply it was not sufficiently arbitrary or unjust to require federal correction.

This result leaves the question of how the prohibition against illegal

¹³¹ 232 U.S. 383 (1914).

¹³² *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹³³ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹³⁴ *Betts v. Brady*, 316 U.S. 455 (1942). In two cases this year the Court found that petitioners had been denied due process by trials without counsel in non-capital cases. *Uveges v. Pennsylvania*, 335 U.S. 437 (1949); *Gibbs v. Burke*, 69 S. Ct. 1247 (1949).

¹³⁵ 69 S. Ct. 1359, 1361 (1949).

¹³⁶ The inadmissibility rule, of course, is based upon both the Fourth Amendment and the self-incrimination safeguards of the Fifth Amendment.

searches and seizures is to be enforced against the states if the police are to be permitted to use evidence which is the fruit of illegality. The Court pointed out that persons so victimized may resort "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."³⁷

Justices Douglas, Murphy, and Rutledge dissented. To Justice Murphy, author of the principal dissent, remand to "private action" and "internal discipline" was tantamount to holding that there was no federal limitation at all on the rights of states to make searches and seizures. The Murphy opinion, from the standpoint of good clear prose and reserved strength of expression, is one of the rare great documents to emerge from the judicial process, and deserves reading in full. The Murphy thesis was that of the *Weeks* case—if wrongfully seized documents can be used as evidence, the Fourth Amendment "might as well be stricken from the Constitution."³⁸ He derided the Court's alternatives to the rule of exclusion of evidence, saying, "There is but one alternative to the rule of exclusion. That is no sanction at all."³⁹

The other search and seizure cases were less impressive. *Brinegar v. United States*⁴⁰ followed the rule of *Carroll v. United States*,⁴¹ permitting search without a warrant upon a showing of very probable cause that a crime was being committed and that the person searched was escaping in an automobile. In *McDonald v. United States*⁴² the Court held a search illegal in which the police without a warrant sneaked into a house through a window, peered at a tenant through a transom, saw him doing something illegal, and then claimed the right to seize the implements of his misdeed because they had actually seen them. The defendant had been under observation for two months, and no reason for proceeding without a warrant was even suggested. The most interesting aspect of the *Brinegar* and *McDonald* cases was the view expressed by Justice Jackson that the interpretation of the Fourth Amendment ought to vary with the offense charged. McDonald was charged with being in the numbers racket, *Brinegar* with bootlegging. Both of these offenses seemed unimportant to Justice Jackson, who observed, "Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it."⁴³

³⁷ 69 S. Ct. 1359, 1369 (1949).

³⁸ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

⁴¹ 267 U.S. 132 (1925).

⁴² 335 U.S. 451 (1948).

³⁹ 69 S. Ct. 1359, 1369 (1949).

⁴⁰ 69 S. Ct. 1302 (1949).

⁴³ *Ibid.*, at 459.

A summary of the positions of the Justices in the nonunanimous civil rights cases follows. As always, such data must be read with the greatest of caution, for in some respects it is misleading.¹⁴⁴ Cases are classified by result, without regard to whether a particular Justice may have been preoccupied with procedural issues. The cases collected on the happenstance of appearing in the same term may bulk overlarge in some areas and omit others. For example the record of Chief Justice Vinson, who is more disturbed about racial discriminations than he is about trial abuses, is somewhat distorted for this year, in which there were no racial discrimination cases but several fair trial problems.

Moreover, the summary makes no allowance for extremeness of position. Thus Justice Black is predominantly on the "pro civil rights" side of the table despite the fact that his lone position on searches and seizures in *Wolf v. Colorado* may well be the most restrictive interpretation of the Fourth Amendment by any Justice in the Court's history. Justice Frankfurter is listed at the middle of the group, although the views expressed by him in his lone opinion in *Kovacs v. Cooper* represent the most basic hostility, not to freedom of speech but to judicial protection of freedom of speech, of any member on the Court.¹⁴⁵ Justice Reed is listed as being least persuaded by claims of civil rights; yet he apparently rejects the extreme Frankfurter position in the *Kovacs* case, and wrote a unanimous opinion upholding the right to counsel in a borderline situation.¹⁴⁶ Finally, a careful note should be made that allocation of a digit to one side or another of the table is not an expression of the wisdom or legal rightness of the position.¹⁴⁷

With all these and other qualifications, the list is nonetheless of some value. If a given Justice's decisions put him preponderantly in one column

¹⁴⁴ The principal popularizer of the "statistical method" of approaching Supreme Court decisions is Professor C. Herman Pritchett. See, for example, his book, *The Roosevelt Court* (1948). But Professor Pritchett himself is far more reserved concerning the merits of the method than some who have toyed with it. I have expressed my own strong doubts as to the usefulness of the device in a review of the Pritchett book, 34 *Iowa L. Rev.* 143 (1948); see Yarmolinsky, 16 *Univ. Chi. L. Rev.* 598 (1949), also reviewing Professor Pritchett's book.

¹⁴⁵ Justice Frankfurter elaborated at some length his view that the well-known footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), and the numerous cases following it had *not* put the civil rights in a "preferred position," protected by a "presumption of unconstitutionality."

¹⁴⁶ *Gibbs v. Burke*, 69 S. Ct. 1247 (1949).

¹⁴⁷ Since one tends to measure "rightness" by his own convictions, the writer notes that he thought the claim of a violated civil right unsound in four of the cases in the group of eighteen cited note 148 *infra*. The four are *Brinegar v. United States* (search of automobile), *Hirota v. United States* (review of war crimes), *Kovacs v. Cooper* (suppressing of sound trucks), and *Wade v. Hunter* (question of double jeopardy in court martial).

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

There were eighteen divided civil rights cases at the 1948 term.¹⁴⁸ There were in addition four civil rights cases this year in which the Court was unanimous, twice upholding the claim and twice disallowing it.¹⁴⁹

TABLE 3
DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL RIGHTS CASES

JUSTICE	IN SUPPORT OF THE CLAIMED RIGHT				IN DENIAL OF THE CLAIMED RIGHT			
	1946	1947	1948	TOTAL	1946	1947	1948	TOTAL
Vinson.....	0	6	2	8	12	21	16	49
Black.....	8	19	12	39	4	7	6	17
Reed.....	2	4	2	8	10	23	16	49
Frankfurter...	2	12	9	23	10	15	9	34
Douglas.....	8	23	16	47	4	4	2	10
Murphy.....	10	25	18	53	1	2	0	3
Jackson.....	2	7	5	14	9	20	12	41
Rutledge.....	11	26	15	52	1	1	2	4
Burton.....	3	6	1	10	9	21	17	47

With all the limitations of the case-counting approach in this area, it does at least establish clearly, for example, that Justices Rutledge and Murphy on the one hand, and Justice Reed and Chief Justice Vinson on the other, have wholly different schemes of values in respect to civil liberty.

IV. LAWYER'S LAW

FEDERAL JURISDICTION

a) *Certiorari Jurisdiction*

In last year's article it was suggested that the published rules and statements concerning certiorari jurisdiction are rapidly on their way to be-

¹⁴⁸ *Brinegar v. United States*, 69 S. Ct. 1302 (1949); *Fisher v. Pace*, 334 U.S. 827 (1948); *Frazier v. United States*, 335 U.S. 497 (1948); *Harris v. South Carolina*, 69 S. Ct. 1354 (1949); *Hirota v. MacArthur*, 335 U.S. 906 (1948); *Humphrey v. Smith*, 336 U.S. 695 (1949); *Klapprott v. United States*, 335 U.S. 601 (1949); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Lustig v. United States*, 69 S. Ct. 1372 (1949); *McDonald v. United States*, 335 U.S. 451 (1948); *Terminiello v. Chicago*, 69 S. Ct. 894 (1949); *Turner v. Pennsylvania*, 69 S. Ct. 1352 (1949); *United States ex rel. Johnson v. Shaughnessy*, 69 S. Ct. 921 (1949); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Wade v. Hunter*, 336 U.S. 684 (1949); *Watts v. Indiana*, 69 S. Ct. 1357 (1949); *Wolf v. Colorado*, 69 S. Ct. 1359 (1949). In view of the Chief Justice's position in the *Terminiello* case, in which his dissent was solely on procedural grounds and in which he noted that if he had reached the issue considered by the majority, he would have concurred, he is listed as supporting the claimed right in that case.

¹⁴⁹ *Gibbs v. Burke*, 69 S. Ct. 1247 (1949); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949); *Young v. Ragen*, 69 S. Ct. 1073 (1949).

coming legal fictions.¹⁵⁰ At least some expressions this year add support to this view.

The three rules regarding certiorari which in fact seem to be in process of change are (1) that certiorari will be granted, among other circumstances, where an important public question is raised; (2) that certiorari will be granted where four Justices so vote; and (3) that the denial of certiorari is not even a tacit affirmance, and expresses no judgment one way or the other on the merits.¹⁵¹

The article on the 1947 term collected a number of certioraris denied that year on which a reasonable person might have supposed that the writ would be granted on the basis of the first proposition above. During the 1948 term, however, the Court seems to have been unduly generous, under this rule, in one or two of its grants of the writ.¹⁵²

The term witnessed an attack by Justice Frankfurter on the second proposition above—the “rule of four.” When the bulk of the Court’s jurisdiction was made discretionary by Congress in 1925, it was on the promise explicitly made for the Court by its representative at the Congressional hearings that certiorari would be granted on the vote of four Justices.¹⁵³ This year Justice Frankfurter declared that he would not vote on the merits of the Federal Employers’ Liability Act cases even though certiorari had been granted under the “rule of four.” He believes that the Court should not spend its time on such cases, which usually involve problems of the operation of civil juries under the Seventh Amendment. Nevertheless a substantial number of certioraris are granted in these cases. In *Wilkinson v. McCarthy*, Justice Frankfurter detailed his reasons for believing

¹⁵⁰ 1947 Term Article, at 34-35.

¹⁵¹ A leading work analyzing certiorari practice is Boskey, *Mechanics of the Supreme Court’s Certiorari Jurisdiction*, 46 Col. L. Rev. 255 (1946).

¹⁵² It is so frequently difficult to understand dismissal orders in appeal cases because of the widely variant present practice in respect to them. For examples, in *Hall v. Virginia*, 335 U.S. 875 (1948), the appeal was dismissed with no reason or citation given, although Justices Douglas and Murphy felt strongly enough to the contrary to note dissents. *Hodge v. Tulsa County Elec. Bd.*, 335 U.S. 889 (1948), was dismissed, a reason being given that the case was moot, supported by citations. In *Georgia R. Co. v. Musgrove*, 335 U.S. 900 (1949), an appeal was dismissed for the stated reason that there was an adequate state ground for the judgment below. Justice Jackson dissented, and no cases were cited. In *Superior Court of California v. Lillifloren*, 335 U.S. 811 (1948), an appeal was dismissed for the same reason, this time with citations.

In *Michelson v. United States*, 335 U.S. 469, 474 n. 5 (1948), Justice Jackson, author of the opinion of the Court, noted his own doubts as to whether certiorari should have been granted at all. *Fisher v. Pace*, 336 U.S. 155 (1949), a contempt of court case turning entirely upon unique facts and in which the judgment either way was necessarily very close, exemplifies the type of case in which it is hard to understand why certiorari should have been granted.

¹⁵³ See Boskey, *op. cit. supra* note 182, at 257; Burton, *Judging Is Also Administration*, 21 Temple L.Q. 77, 84 (1947).

that these cases were cluttering the docket of the Court and concluded, "I would, therefore, dismiss the petition as having been improvidently granted. Since, however, that is not to be done, I too have been obliged to recanvass the record . . ." ¹⁵⁴ and he thereupon recorded his position on the merits. In *Hill v. Atlantic Coast Line R.R.*, ¹⁵⁵ an FELA case, certiorari was granted and the judgment below reversed without argument in a per curiam decision. Justice Frankfurter noted that the petition itself should not be granted, and apparently did not participate on the merits. In *Reynolds v. Atlantic Coast Line R.R.*, ¹⁵⁶ a similar FELA case, he joined in the Court's opinion on the merits only because the case could be disposed of on the pleadings and did not require him to read a record.

These three cases seem to amount to an expression by Justice Frankfurter of a policy not to participate in FELA cases on the merits where a record is involved. If four Justices were to join the Frankfurter position, cases would presumably be put on the docket by four Justices and taken off by the other five as a matter of routine. To this extent the "rule of four" is vitiated in these cases, for it is simply a form to grant a certiorari if the case is not then to be considered. While it may be an unsound policy to leave to four Justices the authority to determine what cases the Court will hear, it is doubtful that Congress would have granted the discretionary jurisdiction on any other basis.

It was suggested last year that denial of certiorari is rather frequently coming to mean tacit approval of the opinion below. That at least some of the Justices themselves have this view was indicated in the dissent in *Christoffel v. United States*. ¹⁵⁷ The conviction of Christoffel of perjury before a Congressional Committee was set aside by a majority of the Court on the ground that it did not appear that a quorum of the Committee before which he had testified had been present at the time of the alleged perjury. Justice Jackson, joined by Justices Reed, Burton, and Chief Justice Vinson, dissented in part on the ground that the identical issue had been raised in a previous perjury case on which certiorari had been denied. Justice Jackson noted that the earlier denial "of course does not imply approval of the law announced below," ¹⁵⁸ but nonetheless he did stress the denial in the previous case at some length. In his oral delivery of his opinion, this was perhaps the point most vigorously made. In the written opinion he concluded, "I do not see how the Court can justify such discrimina-

¹⁵⁴ *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949).

¹⁵⁵ 336 U.S. 911 (1949).

¹⁵⁷ 69 S. Ct. 1447 (1949).

¹⁵⁶ 336 U.S. 207 (1949).

¹⁵⁸ *Ibid.*, at 1452 n. 4.

tion."¹⁵⁹ The whole tone of this portion of his opinion is that the action of the Court in the two cases is somehow incompatible, which is true only if denial of certiorari is something other than totally colorless, conveying no attitude whatsoever toward the case denied review. The discussion heightens the impression that, regardless of the formula, denial of certiorari in at least some cases is coming to be an indication that the decision below was correct.

b) *District of Columbia—Diversity Jurisdiction*

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,¹⁶⁰ the Court passed upon the validity of the 1940 Act permitting District of Columbia residents to have access to the federal diversity jurisdiction. That jurisdiction is restricted by Article III of the Constitution to citizens of different "states," and it had early been held by Marshall that the District of Columbia and the territories were not "states" and that legislation passed under that clause did not give their citizens access to federal courts. In 1940, Congress attempted to undo the Marshall result by passing an explicit authorizing act which rested primarily on Article I of the Constitution rather than Article III; relying on its power to make laws "necessary and proper" for the District of Columbia and the territories.

Justice Jackson, joined by Justices Black and Burton, declared the statute invalid if it rested on a theory that "states" in Article III included the District of Columbia, but that it was valid as an exertion of the power under Article I. Justices Rutledge and Murphy thought it invalid as an exercise of Article I power, but valid under Article III. Justices Frankfurter, Reed, Vinson, and Douglas thought it invalid under both. Thus, although a majority of the Court thought the statute invalid on each theory, the combination of theories resulted in its being upheld by a vote of five to four. There are times when the whole is greater than the sum of its parts.

Jackson contended that under the various grants of power in Article I, Congress was empowered to add to the jurisdiction of the district courts. It had previously been generally thought that Article III was exclusive, and that, while Congress could subtract from the jurisdiction of the lower courts, or indeed abolish them, it could not add to their jurisdiction.¹⁶¹ That view still prevails as a result of the rigorous adherence to it of six of the Justices in this case. Under the Jackson view, the whole unintelligible mass of doctrine concerning the relations of "legislative" and "constitu-

¹⁵⁹ *Ibid.*, at 1453 n. 4.

¹⁶⁰ 69 S. Ct. 1173 (1949).

¹⁶¹ The opinions of Justices Rutledge and Frankfurter deal thoroughly with this question. *Ibid.*, at 1184, 1195.

tional" courts would have been taken out of the District of Columbia cubby hole in which it primarily resides and would have been inflicted on the district courts in the forty-eight states.¹⁶² This is avoided by the other positions taken.

The best of the argument lay with Justice Frankfurter when he contended in his dissent, "A decent respect for unbroken history since the country's foundation, for contemporaneous interpretation by those best qualified to make it, for the capacity of the distinguished lawyers among the Framers to express themselves with precision when dealing with technical matters, unite to admonish against disregarding the explicit language of Article III. . . ."¹⁶³

It is usually thought that Chief Justice Marshall performed an almost senseless act when he originally interpreted "state" so narrowly as to exclude the District, and Justice Rutledge treats his opinion as one in which "the master hand . . . faltered." But Marshall, for all the aggressiveness of his nationalism, was careful not to give needless affront to the prejudices of his time when the matter involved was of no great importance, as this one was and is not. There was once great local jealousy against the District of Columbia. In the Virginia ratifying Convention on the Constitution, which Marshall attended, that attitude was expressed strongly. Such men as Patrick Henry, in their opposition to the Constitution, vigorously argued that the power over the "ten miles square" might be used to create an oligarchy which would reach out and enjoy special privileges in the rest of the country in derogation of the laws of the states. Those fears were specifically answered by categorical pledges from the Federalists in that convention that the District power would be restricted to the District, and particularly that no corporations chartered there would be given special privileges elsewhere.¹⁶⁴

In view of that peculiar attitude toward the District which was so prominently in public attention when the Constitution was ratified, it is very possible that Marshall's hand did not falter and that he accurately reflected the convictions of the Constitutional era. The summary of other historical materials by Chief Justice Vinson shows that the jealousies of the 18th century toward the federal judiciary resulted in deliberately making Article III exclusive.

¹⁶² Justice Rutledge discusses this aspect of the problem at some length. *Ibid.*, at 1186 n. 7 and text following.

¹⁶³ *Ibid.*, at 1199.

¹⁶⁴ References to Elliot's Debates on this point are collected in Frank, *Review of Curtis, Lions Under the Throne*, and McCune, *The Nine Young Men*, 96 U. of Pa. L. Rev. 597, 600 (1948).

c) *Federal and State Courts*

In addition to the usual run of *Erie v. Tompkins* cases, one of which removed some doubts as to the meaning of *Angel v. Bullington*,¹⁶⁵ there were two cases of considerable importance on the relation of state and federal courts. *Stainback v. Mo Hock Ke Lok Po*¹⁶⁶ was probably brought up for review to consider a basic problem of civil rights; but it served to settle an important matter of procedure. The proceedings were brought in the federal court in Hawaii, rather than the territorial court, to challenge the validity of a territorial law precluding the operation of foreign language schools there. In addition to other procedural matters of less general significance, the Court in an opinion by Justice Reed held that, as a matter of equitable discretion, the suit should have been remanded by the federal to the territorial courts. The language used is equally applicable to a great variety of important suits anywhere in the United States.

This is but the most recent of a long line of cases limiting federal jurisdiction in injunction suits by the device of equity's discretion. Perhaps no aspect of federal-state court relations has been more unsatisfactory than federal intervention to enjoin state administrative or legislative actions on ground of unconstitutionality. The *Stainback* opinion went considerably farther than any previous case to end that practice, holding that:

where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course.¹⁶⁷

The references to "acts of importance primarily to the people of a state" and "exceptional circumstances" leave considerable leeway for the future, but the passage is very broad nonetheless.

The policy of giving the states first try at questions arising from their own laws was very carefully limited by the Court in *Propper v. Clark*¹⁶⁸ to federal constitutional cases. This was an action brought in a federal court by the Alien Property Custodian. His rights in this complicated proceeding were substantially dependent on New York law. Justice Frankfurter expressed the view that the case should be remanded to the district court so that declaratory judgment proceedings might be instituted

¹⁶⁵ 330 U.S. 183 (1947). *Woods v. Interstate Realty Co.*, 69 S. Ct. 1235 (1949), holds that the two grounds of decision in the *Angel* case are equally effective precedent, and that, in substance, under this application of the *Erie* rule, state legislatures may limit the jurisdiction of federal courts in diversity cases by limiting the jurisdiction of their own courts. For a brief criticism of *Angel v. Bullington* on this point, see the 1946 Term Article, at 32-33.

¹⁶⁶ 336 U.S. 368 (1949).

¹⁶⁷ *Ibid.*, at 383, 384.

¹⁶⁸ 69 S. Ct. 1333 (1949).

in New York state courts to obtain a declaration of the New York law.¹⁶⁹ Justice Reed in the opinion of the Court met this suggestion with a flat rejection, holding that such declaratory judgment proceedings would not be used except where necessary to avoid possible unnecessary decision of a constitutional question by the federal court. The device, he said, "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."¹⁷⁰ It is fortunate that the matter was thus resolved, for the device of holding litigation in federal courts pending proceedings elsewhere is likely to make the federal litigation interminable.

d) Sovereign Immunity

The old tune of sovereign immunity was played again in *Larson v. Domestic & Foreign Commerce Corp.*,¹⁷¹ and when it was over the sovereign had somewhat more immunity than he had had before. The suit was brought against the War Assets Administrator to enjoin him from delivering to anyone but the plaintiff, coal which the plaintiff alleged had been sold to him. The case was thus in effect an action for specific performance. The Court in an opinion by the Chief Justice, recognized two legitimate types of injunction suits against government officials: where their acts were beyond the powers given them by statute, and where the statute or order under which they proceeded was unconstitutional. The Court rejected a third theory, that where an officer held property the "title" of which was in another, the true holder of the "title" might sue to recover the property. This required a very narrow construction of *United States v. Lee*,¹⁷² the leading case in the field, and the overruling of *Goltra v. Weeks*.¹⁷³ Justice Frankfurter, in a dissent joined by Justice Burton, digs into the subject with enormous thoroughness, and the opinion of the Court as well as the dissent make this the leading, as well as the most recent, exposition of the jurisdictional law applicable when the government holds property claimed by another. If there is any modern development to modify sovereign immunity, the majority opinion sets the crusade back considerably.¹⁷⁴

¹⁶⁹ Justice Frankfurter advanced a similar suggestion in *Comm'r v. Estate of Church*, 335 U.S. 632, 674 (1949).

¹⁷⁰ 69 S. Ct. 1333, 1344 (1949).

¹⁷¹ 69 S. Ct. 1457 (1949).

¹⁷² 106 U.S. 196 (1882)

¹⁷³ 271 U.S. 536 (1926).

¹⁷⁴ A recent scholarly plea for limitation of the immunity is found in Block, *Suits against Government Officers and the Sovereign Immunity Doctrine*, 59 Harv. L. Rev. 1060 (1946).

V. THE INSTITUTION AND ITS JUSTICES

THE WORK OF THE INSTITUTION

At the 1948 term, the number of cases decided by opinion, including per curiams but excluding simple companion cases, was 122. At the preceding term the number was 119. This is a far cry from the usual 200 or so cases a year which made up the docket before the war.

As was observed here last year, this smaller docket is the product of a number of factors, such as the elimination of many constitutional issues once in controversy, the *Erie v. Tompkins* rule eliminating diversity cases, and the *Dobson* rule eliminating review of many tax cases. Compensating to a small extent for these factors are the increased number of civil liberties cases.

Perhaps partly a result of and perhaps partly a cause of the small docket is a shift in the manner in which the Court is doing its work. While

TABLE 4
DISTRIBUTION OF MAJORITY OPINIONS

Vinson	9	Murphy	10
Black	19	Jackson	10
Reed	15	Rutledge	10
Frankfurter	12	Burton	7
Douglas	19	Per cur.	11

the number of cases being decided is about 60 per cent of pre-war normal, the number of words being written is at least as great as ever, and this year the Court stayed in session almost a month longer than was once usual.¹⁷⁵ Presumably, some of the present Court believe that more extensive discussions are desirable than was formerly the custom. The Court also appears to be turning more and more toward individual statements by each Justice, thus subordinating the role of "the opinion of the Court," and, indeed, rather frequently obliterating it.¹⁷⁶

None of these generalities applies to the entire Court. The Chief Justice, for example, almost never writes separately, and Justices Black and

¹⁷⁵ The Court adjourned this year on June 27. The latest date of any adjournment from 1931 to 1940 was June 5 at the October 1948 term. That year the Court disposed of 247 cases on the merits, 307 U.S. 683 (1939), more than twice as many as this year.

¹⁷⁶ There was no "opinion of the Court" to which a majority subscribed without additional expression in any of the following cases: *Comm'r v. Culbertson*, 69 S. Ct. 1210 (1949); *Harris v. South Carolina*, 69 S. Ct. 1354 (1949); *Interstate Oil Pipeline Co. v. Stone*, 69 S. Ct. 1264 (1949); *Klapprott v. United States*, 335 U.S. 601 (1949); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Lustig v. United States*, 69 S. Ct. 1372 (1949); *McDonald v. United States*, 335 U.S. 451 (1948); *Nat. Mut. Ins. Co. v. Tidewater*, 69 S. Ct. 1173 (1949); *United States v. Penn Foundry*, 69 S. Ct. 1009 (1949); *Turner v. Pennsylvania*, 69 S. Ct. 1352 (1949); *Watts v. Indiana*, 69 S. Ct. 1347 (1949); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949). This is approximately ten per cent of the cases.

Douglas are approximately as concise as they were ten years ago. But the description is generally accurate.

The distribution of majority opinions among the Justices was as shown in Table 4.¹⁷⁷

At the 1946 term, Justices Frankfurter and Jackson prevailed in a considerably larger number of important cases than did Justices Black, Douglas, Murphy, and Rutledge. At the 1947 term, that balance shifted markedly, and in 1948, it stayed approximately as it was the year before. At all three terms, Justices Reed, Burton, and the Chief Justice have been consistently of the majority. For each of the past two years, Justice Jackson has been the most frequent dissenter in important cases.

The degree of prevalence of the views of particular Justices can be measured by concentrating on the most important of the decisions, and for this purpose I have arbitrarily chosen two groups of cases which seemed to me to have the most important consequences to society. The first group consists of the five cases which seem the most significant of the year.¹⁷⁸ The second group of twenty-four are definitely less important, but are not routine.¹⁷⁹ The data in Table 5 are taken from these two groups. Disquali-

¹⁷⁷ The text table is the writer's count. Data in the *Washington Post* (July 5, 1949), which does not eliminate companion cases of an extremely simple sort, are as shown in the accompanying tabulation.

	Majority	Conc.	Diss.	Other
Vinson.....	10	0	4	0
Black.....	10	3	7	0
Reed.....	16	0	8	0
Frankfurter.....	14	11	20	0
Douglas.....	20	5	12	1
Murphy.....	9	1	9	0
Jackson.....	10	4	17	3
Rutledge.....	9	6	8	0
Burton.....	7	2	5	0

The imbalance of the distribution among the Justices was more noticeable during the term than at its somewhat protracted end. Justice Frankfurter, for example, handed down seven of his twelve opinions at the last two sessions of the Court in June. On March 28 the distribution of the majority opinions was as follows:

Vinson.....	2	Murphy.....	4
Black.....	13	Jackson.....	5
Reed.....	8	Rutledge.....	2
Frankfurter.....	3	Burton.....	3
Douglas.....	10	Per cur.....	8

¹⁷⁸ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *International Union, UAW v. WERB*, 336 U.S. 245 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Terminiello v. Chicago*, 69 S. Ct. 894 (1949); *Wolf v. Colorado*, 69 S. Ct. 1359 (1949).

¹⁷⁹ *Algoma Plywood Co. v. WERB*, 336 U.S. 301 (1949); *Comm'r v. Estate of Church*, 335 U.S. 632 (1949); *Fed. Power Comm'n v. Panhandle Eastern Pipeline Co.*, 69 S. Ct. 1251 (1949); *Frazier v. United States*, 335 U.S. 497 (1949); *Hirota v. MacArthur*, 69 S. Ct. 197, 1238 (1948);

fications give some Justices less than a total of twenty-nine.

The distribution of agreements among the Justices in these 29 cases, whether in majority or dissent, is shown in Table 6.

TABLE 5
VOTING DISTRIBUTION

JUSTICE	MAJORITY VOTES			DISSENTING VOTES		
	Major	Important	Total	Major	Important	Total
Vinson.....	4	18	22	1	6	7
Black.....	4	17	21	1	7	8
Reed.....	5	19	24	0	5	5
Frankfurter.....	4	15	19	1	9	10
Douglas.....	3	16	19	2	8	10
Murphy.....	3	16	19	2	7	9
Jackson.....	4	13	17	1	10	11
Rutledge.....	3	17	20	2	6	8
Burton.....	4	17	21	1	7	8

TABLE 6
AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frank- furter	Douglas	Murphy	Jack- son	Rut- ledge	Burton
Vinson.....		14	24	19	14	12	25	13	24
Black.....	14		17	12	25	20	10	20	13
Reed.....	24	17		18	15	15	20	16	21
Frankfurter.....	19	12	18		10	12	23	13	23
Douglas.....	14	25	15	10		20	12	18	13
Murphy.....	12	20	15	12	20		10	24	11
Jackson.....	25	10	20	23	12	10		9	24
Rutledge.....	13	20	16	13	18	24	9		12
Burton.....	24	13	21	23	13	11	24	12	

At the 1948 term, the pattern of agreements among the Justices remained much as it had been before. The most marked change was the great increase in agreements at this term between Chief Justice Vinson

Hood & Sons v. DuMond, 336 U.S. 525 (1949); *Klapprott v. United States*, 335 U.S. 601 (1949); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Larson v. Domestic & Foreign Corp.*, 69 S. Ct. 1457 (1949); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *MacDougal v. Green*, 335 U.S. 281 (1948); *Michelson v. United States*, 335 U.S. 469 (1948); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949); *Standard Oil Co. v. United States*, 69 S. Ct. 1051 (1949); *United States v. Cors*, 69 S. Ct. 1086 (1949); *United States v. ICC*, 69 S. Ct. 1410 (1949); *United States v. Nat. City Lines*, 69 S. Ct. 955 (1949); *Upshaw v. United States*, 335 U.S. 410 (1948); *Urie v. Thompson*, 69 S. Ct. 1018 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *Wheeling Steel Corp. v. Glander*, 69 S. Ct. 1291 (1949); *Williams v. New York*, 69 S. Ct. 1079 (1949); *Young v. Ragen*, 69 S. Ct. 1073 (1949).

and Justice Jackson. Of the thirty-six possible combinations of nine Justices into pairs, Chief Justice Vinson and Justice Jackson, and Justices Black and Douglas were the pairs most often in agreement; while Justices Rutledge and Jackson, Justices Black and Jackson, Justices Frankfurter and Douglas, and Justices Murphy and Jackson were the pairs least often in agreement.¹⁸⁰

THE WORK OF THE INDIVIDUAL JUSTICES

Chief Justice Vinson's third year on the bench found him following the lines laid down in previous years, as the work before the Court presented no particularly new problems for him. Since the Chief Justice is the one member of the Court who can regularly choose the cases on which he writes, Vinson's choice of opinions is some measure of his own interests. He is apparently particularly interested in matters of jurisdiction and procedure, evidenced by the fact that of his nine majority opinions, four were in that area.¹⁸¹

It is too soon to assess the Chief Justice in terms of his accomplishments not as a Justice but as a Chief Justice, but a tentative evaluation may be made. A Chief Justice has special opportunity to bring divergent views into harmony by virtue of his chairmanship of the conference, but if strong Justices disagree, there is substantially nothing a Chief Justice can do about it. He has the special duties both to assign opinions fairly, making the most of the special talents of each member of his bench, and to make sure that the work of the Court is rapidly and efficiently done. It now appears that Chief Justice Vinson cannot use his office to promote intellectual harmony. Perhaps no one could. In any case, as Justice Jackson observed good humoredly from the bench of the decision of the District of Columbia diversity case, the Court sometimes mounts its horse and rides off in all directions.¹⁸² The Chief Justice's assignment of opinions has been admirable, with a fair distribution of the dull and the interesting; and if anything, he has skimmed himself in the distribution of the more interesting cases. The unusual length of the term evidenced that he has not been particularly successful in getting the work done speedily. It is unlikely that he will menace Taft and Hughes as holders of the Court's laurels as the great administrators.

¹⁸⁰ For comparative data on the categories discussed in the foregoing section see the 1946 Term Article, at 37 et seq.; 1947 Term Article, at 45 et seq.

¹⁸¹ *Callaway v. Benton*, 336 U.S. 132 (1949); *Ex parte Collett*, 69 S. Ct. 944 (1949); *Kilpatrick v. Tex. & Pac. R. Co.*, 69 S. Ct. 953 (1949); *Larson v. Domestic & Foreign Corp.*, 69 S. Ct. 1457 (1949); *United States v. Nat. City Lines*, 69 S. Ct. 955 (1949).

¹⁸² See note 176 supra.

Justice Black, along with Justice Douglas, was as usual the author of appreciably more majority opinions than most of his brethren. The year was dramatic for Black principally because it required him to choose between two of his basic ideals—the maximum freedom of legislatures and the optimum welfare of labor. The freedom of legislatures clearly triumphed, since he wrote the two principal decisions upholding the legislative right to restrict closed shops and picketing.¹⁸³

In his other opinions, Black's year was about as would have been expected. As has been noted above, he took the most extreme position of anyone on the Court in suggesting a sharp limitation on the meaning of the search and seizure provision of the Fourth Amendment,¹⁸⁴ but this general attitude toward that Amendment is not new. From the standpoint of simple exposition, his least satisfactory opinion of the year was in *United States v. Interstate Commerce Commission*.¹⁸⁵ From the standpoint of simplicity as well as comprehensiveness, his best opinions were the Missouri picketing case,¹⁸⁶ the case invalidating confessions in the absence of prompt arraignments in federal courts,¹⁸⁷ and *Williams v. New York*,¹⁸⁸ a case not discussed above. The *Williams* case holds valid a law authorizing judges to use probation reports in determining sentences despite the fact that such data are not collected in accordance with the commands of due process. The opinion considers the relevant "nonlegal" materials carefully, and is turned out with a polish that makes it one of the best opinions of the year.

The 1948 term for Justice Reed was a session of solid professional application which took him into most of the areas with which the Court deals. It was a measure of his significant role on the Court that in the most important cases of the year, he was of the majority more than often any other Justice.

Reference to a few of Reed's opinions indicates the variety of his work. He wrote the opinion of the Court in two civil rights cases upholding a right to counsel;¹⁸⁹ in the two cases involving application of federal labor

¹⁸³ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

¹⁸⁴ *Wolf v. Colorado*, 69 S. Ct. 1359 (1949).

¹⁸⁵ 69 S. Ct. 1410 (1949). The Court upheld the right of the United States as a shipper to appeal to the courts from adverse decisions of the ICC. Since the United States has enormous claims on wartime overcharges, the matter is of considerable practical importance. *New Republic* 7 (July 11, 1949).

¹⁸⁶ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

¹⁸⁷ *Upshaw v. United States*, 335 U.S. 410 (1948).

¹⁸⁸ 69 S. Ct. 1074 (1949).

¹⁸⁹ *Uveges v. Pennsylvania*, 335 U.S. 437 (1949); *Gibbs v. Burke*, 69 S. Ct. 1247 (1949).

statutes outside the continental United States;¹⁹⁰ in two cases involving important matters of procedure;¹⁹¹ and in a case holding that the Natural Gas Act did not give the Federal Power Commission authority to regulate sales of reserves of a producing company.¹⁹² His unhappiest opinion of the year from the standpoint of clarity of expression is probably *Hynes v. Grimes Packing Co.*,¹⁹³ a case involving an Alaska fishery, which represents Reed in his occasional opaque style. One of his best written opinions was *Smith v. United States*,¹⁹⁴ an analysis of the problems of self-incrimination arising when a person testifies in an administrative hearing and is later prosecuted for offenses closely connected with the matter of his testimony. However, from the standpoint of amassing and clarifying large amounts of divergent materials and of making clear the real meaning of elusive precedents, the decisions dealing with the application of the Fair Labor Standards Act to Bermuda¹⁹⁵ and the sound truck case¹⁹⁶ are outstanding.

The 1948 term was outstanding for Justice Frankfurter.¹⁹⁷ At the preceding term, Frankfurter's energies had been taken up so largely with what at times seemed almost aimless separate opinions, that there was little of substance left.¹⁹⁸ At the 1948 term he again had something to say in approximately one-third of the cases, but it was more important. He wrote substantial majority opinions both in the *Standard Oil* anti-trust case,¹⁹⁹ and in the *Algoma Plywood* case involving the right of the states to forbid closed shops.²⁰⁰ He dealt comprehensively with difficult matters for the majority in a significant admiralty case,²⁰¹ and for the dissent in the case involving extension of diversity jurisdiction to citizens of the District of Columbia.²⁰² His major research jobs of the year were very elaborate

¹⁹⁰ *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

¹⁹¹ *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949); *Propper v. Clark*, 69 S. Ct. 1333 (1949).

¹⁹² *Fed. Power Comm'n v. Panhandle Eastern Pipeline Co.*, 69 S. Ct. 1251 (1949).

¹⁹³ 69 S. Ct. 968 (1949).

¹⁹⁴ 69 S. Ct. 1000 (1949).

¹⁹⁵ *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948).

¹⁹⁶ *Kovacs v. Cooper*, 336 U.S. 77 (1949).

¹⁹⁷ For an extended and thoughtful analysis of Justice Frankfurter's first ten years on the bench see Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 *Harv. L. Rev.* 357 (1949)

¹⁹⁸ The point is enlarged upon in the 1947 Term Article, at 51.

¹⁹⁹ *Standard Oil Co. v. United States*, 69 S. Ct. 1051 (1949).

²⁰⁰ *Algoma Plywood Co. v. WERB*, 336 U.S. 301 (1949).

²⁰¹ *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386 (1949).

²⁰² *Nat. Mut. Ins. Co. v. Tidewater Co.*, 69 S. Ct. 1173 (1949).

studies in the sovereign immunity case,²⁰³ and in the case dealing with state searches and seizures.²⁰⁴ As has been noted, he adhered vigorously to his view that the Court should leave the states wide latitude to restrict free speech.²⁰⁵

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 the 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.²⁰⁶

For Justice Douglas, 1948-49 may well be a year to forget. Many of his opinions must have been dull work, a job to be done.²⁰⁷ The leading Douglas opinions of the year were the *Terminiello* case;²⁰⁸ an important decision in the law of eminent domain;²⁰⁹ an analysis of the permissible breadth of statutory injunctions;²¹⁰ his dissent in the *Standard Oil* case;²¹¹ and his concurrence in *Hirota v. MacArthur*.²¹² The *Standard* dissent is startling in both its theory and its tone. The opinion asserts that the Court "consciously pushes the oil industry" toward cartelization.²¹³ Since the

²⁰³ *Larson v. Domestic & Foreign Corp.*, 69 S. Ct. 1457 (1949).

²⁰⁴ *Wolf v. Colorado*, 69 S. Ct. 1359 (1949).

²⁰⁵ Note 145 supra.

²⁰⁶ *Empress Siderurgica, S.A. v. Merced County*, 69 S. Ct. 995 (1949); *Hill v. Atl. Coast Line R. Co.*, 336 U.S. 911 (1949); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Nye and Nissen v. United States*, 336 U.S. 613 (1949); *Propper v. Clark*, 69 S. Ct. 1333 (1949); *Estate of Spiegel v. Comm'r*, 335 U.S. 701 (1949); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

²⁰⁷ See, e.g., *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (1949), the kind of tedious ICC review problem that eight other Justices must be delighted to see Justice Douglas write.

²⁰⁸ *Terminiello v. Chicago*, 69 S. Ct. 894 (1949).

²⁰⁹ *United States v. Cors*, 69 S. Ct. 1086 (1949).

²¹⁰ *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

²¹¹ *Standard Oil Co. v. United States*, 69 S. Ct. 1051 (1949).

²¹² 69 S. Ct. 1238 (1948).

²¹³ The same underlying theory that a law must be interpreted favorably to some part of the business community if the business community is to be restrained from frustration of the object of the law had perceptible influence on the majority of the Court in *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198 (1949), in which the government rather than the employer is held liable under the Longshoremen's Act for certain injuries to persons who have been previously injured. The Court thought that if the employer were held liable, he would not employ persons in the class involved at all, and this fear was read back into the interpretation of the act. Justice Douglas dissented.

majority of five included three Justices who have consistently upheld the anti-trust laws as strongly as Justice Douglas, it was extreme to suggest that they deliberately sought to "remake America in the image of the cartels."

Justice Douglas has consistently shown that if he has political aspirations, his opinions are unaffected by them. His independence was dramatically illustrated again this year in the *Hirota* case, where his opinion is scarcely calculated to improve his standing with some very prominent members of his own party, and where he could safely have joined in a per curiam opinion of the Court. The ultimate issue was whether an American court could review the Tokyo war crimes trials by writ of habeas corpus, and the Court summarily held that it could not. Justice Douglas concurred in the result, quoting at length, and with apparent agreement, from the opinion of Justice Pal of India, dissenting from the judgment of the Tokyo Tribunal:

The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. . . . Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having been cloaked by a juridical appearance.

Douglas put his acquiescence thus: "As Justice Pal said, it [the Tribunal] did not therefore sit as a judicial tribunal. It was solely an instrument of political power."²⁴⁴ Hence Douglas held the trials unreviewable not because of lack of jurisdiction in habeas corpus, but because the trials were not "legal" at all. The disposition of the defendants was thus a political question, unreviewable for that reason alone.

Justice Murphy's accomplishments at the 1948 term were the more remarkable because for the second consecutive year he was seriously hampered by ill health. Unable to hear arguments for the first part of the term, he participated in the cases of that period on the briefs. For the remainder of the term he attacked his work with renewed energy. He wrote the opinion of the Court upholding the validity of a South Carolina statute providing that undertakers might not serve as agents for insurance companies;²⁴⁵ and while the point is not difficult, the opinion disposes of it with neat dispatch. An opinion interpreting the Longshoremen's Act, also on a

²⁴⁴ *Hirota v. MacArthur*, 69 S. Ct. 1238 (1949). For a full description of a war trial in the nature of an operation of "political power" see Reel, *The Case of General Yamashita* (Univ. Chi. Press, 1949).

²⁴⁵ *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 198 (1949).

small point, will serve as a model of the full exploration of the social implications of a statute in aid of its interpretation.²¹⁶

Perhaps the most mysterious intellectual episode of the year was Justice Murphy's dissent without opinion in the *Hirota* case.²¹⁷ The dissent presumably means that he felt the petition should have been received; but it is impossible, for this commentator at least, even to conceive of a theory on which the Supreme Court might have had jurisdiction, and it would have been interesting to know what Justice Murphy had in mind. But if there was necessary lack of clarity in this dissent without opinion, there was no such confusion in Murphy's dissent with opinion in *Wolf v. Colorado*,²¹⁸ the case dealing with state searches and seizures and due process. As has been noted above, this dissent, from the standpoint both of prose and technical presentation, is one of the rare great opinions.

Without attempting to appraise the significance of Justice Murphy's work in terms of his opinions during the years that he served on the Court, his death is likely to have the most substantial consequences on the growth of public law, particularly in the field of civil rights. The balance of the court on so many matters had stood at five-to-four that the replacement of any of the Justices is a matter of utmost consequences. Justice Murphy's consistent support of the most liberal point of view both in the field of civil rights and matters of economic regulation means that the new Justice, Clark, will almost certainly move the Court in a more conservative direction.

Justice Jackson stood out at the 1948 term as the author of several significant opinions and as a writer of striking judicial prose. A major victory for views he has consistently expounded was *Hood & Sons v. DuMond*,²¹⁹ invalidating a New York order denying a license to a person seeking to gather milk and ship it out of state. The denial was held an unconstitutional burden on commerce. Justice Jackson, until the appointment of the present Chief Justice who shares his position, had been the Court's strongest exponent of the view that the Court should put its whole weight against state laws regulating commerce. In this case he carried a majority

²¹⁶ *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198 (1949).

²¹⁷ *Hirota v. MacArthur*, 69 S. Ct. 1238 (1949). The petitioners applied for leave to file applications for the writ of habeas corpus in the Supreme Court. The case does not fall in any of the branches of the categories of original jurisdiction named in the Constitution, and there is no known appellate jurisdiction over the Japanese military tribunal in the Supreme Court. If the case were to be heard in any American court, it would presumably have to begin in a district court, as was done in form in *Ex parte Quirin*, 317 U.S. 1 (1942). Justice Douglas in his concurrence suggests this procedure.

²¹⁸ 69 S. Ct. 1359 (1949).

²¹⁹ 336 U.S. 525 (1949).

of five closer to his own point of view than the Court had previously been. He also wrote an opinion giving extended and careful consideration to the role of character witnesses in federal courts.²²⁰ Either of these would serve as his strongest opinion of the year, while his reputation is likely to gain the least from his opinion in the District of Columbia diversity jurisdiction case.²²¹

As has been noted before, Justice Jackson is probably the least "legal" member of the Court—the most inclined to guide his judgments by notions of social expediency and practicality.²²² This philosophy was particularly apparent in the constitutional field this year, when he advocated different rules of reasonableness for searches and seizures depending upon the gravity of the crime charged;²²³ when he advocated as an antidote to the large number of unsolved murders much wider latitude for police in attempting to get confessions, even though he conceded that his policy "largely negates the benefits of the constitutional guaranty of the right to assistance of counsel";²²⁴ and when he advocated virtual suspension of freedom of speech when necessary to aid the police in keeping order.²²⁵

Justice Rutledge enjoys his work most thoroughly when he can examine a large mass of precedents from which he can skilfully choose a line to follow. Two opinions this year gave him that opportunity. One, *Oklahoma Tax Comm'n v. Texas Co.*,²²⁶ overruled certain precedents holding that the states could not tax oil produced by the lessees of Indian lands. The other held the FELA and the Boiler Inspection Act applicable to industrial diseases.²²⁷

That Rutledge is not doctrinaire was illustrated by his two opinions rejecting claimed abuses of civil rights despite his obvious predilections in behalf of such claims.²²⁸ The process of case by case determination sometimes makes it difficult for him to make up his mind at all, and he is the only member of the Court who occasionally concurs "dubitante."²²⁹ In the

²²⁰ *Michelson v. United States*, 335 U.S. 469 (1948).

²²¹ *Nat. Mut. Ins. Co. v. Tidewater Co.*, 69 S. Ct. 1173 (1949).

²²² See the 1946 Term Article, at 46-47.

²²³ *McDonald v. United States*, 335 U.S. 451 (1948); *Brinegar v. United States*, 69 S. Ct. 1302 (1949).

²²⁴ See discussion note 124 *supra* and text.

²²⁵ *Terminiello v. Chicago*, 69 S. Ct. 894 (1949).

²²⁶ 336 U.S. 342 (1949).

²²⁷ *Urie v. Thompson*, 69 S. Ct. 1018 (1949).

²²⁸ *Frazier v. United States*, 335 U.S. 497 (1948); *Brinegar v. United States*, 69 S. Ct. 1302 (1949).

²²⁹ See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106 (1949); *Ex parte Collett*, 335 U.S. 897 (1949), and related cases.

Hirota case, which the Court disposed of very quickly, he reserved "decision and the announcement of his vote until a later time,"²³⁰ and at the close of the term had not yet announced it. Yet the existence of honest doubts, hesitantly resolved, should not give the impression of aimlessness. The Rutledge opinion in the *Interstate Oil Pipeline Co.*²³¹ case drives hard to the objective of upholding state taxing power, and a dissent in the sound truck case²³² gives a flat answer to the argument of Justice Frankfurter that the Bill of Rights and the Court do not give a "preferred position" to freedom of speech, press and assembly. On fundamentals, once his mind is made up, Justice Rutledge shows no hesitancy at all.

Justice Burton wrote seven opinions of the Court this year, more than in previous years; but the thin docket and his status as junior Justice combined to give him no cases as broadly significant as his renegotiation cases of the preceding term²³³ or the *National Lead*²³⁴ case at the 1946 term. The three leading Burton opinions were *United States v. Wittek*,²³⁵ holding the District of Columbia Emergency Rent Act inapplicable to government owned housing; *Grand River Dam Authority v. Grand Hydro*,²³⁶ dealing with state eminent domain proceedings and the Federal Power Act; and his dissent in *Estate of Spiegel v. Comm'r*.²³⁷ The *Wittek* case is of considerable practical significance to government low-rent housing in the District, and is written with sensitive perception of the squalor in the alleys of the nation's capital.

The Burton opinions are usually extremely long because of the inclusion of matter which another Justice might well have thought either obvious or irrelevant. *Comm'r v. Jacobson*²³⁸ will serve as an example. A taxpayer had issued bonds secured by a trust deed on certain property. At a time when the taxpayer was in straitened financial circumstances but was not insolvent, he bought back some of these bonds at less than their fair value. The issue in the case was whether the difference between what he paid to retire his own paper and what it was worth should be treated as taxable income. Section 22(a) of the Internal Revenue Code includes within the definition of "gross income" all "gains . . . from any source

²³⁰ *Hirota v. MacArthur*, 69 S. Ct. 197, 198 (1948).

²³¹ *Interstate Oil Pipeline Co. v. Stone*, 69 S. Ct. 1264 (1949).

²³² *Kovacs v. Cooper*, 336 U.S. 77 (1949). Reel, op. cit. supra note 214, pays strong tribute to Justice Rutledge's hard-hitting qualities.

²³³ *Lichter v. United States*, 334 U.S. 742 (1948).

²³⁴ *United States v. Nat. Lead Co.*, 332 U.S. 319 (1947).

²³⁵ 336 U.S. 931 (1949).

²³⁷ 335 U.S. 701, 708 (1949).

²³⁶ 335 U.S. 359 (1948).

²³⁸ 336 U.S. 28 (1949).

whatever." Section 22(b), however, excludes "gifts." The court below held that the benefit to the taxpayer on the bond purchases was excluded from gross income as a gift from the bondholders under Section 22(b). The leading previous case was *Helvering v. American Dental Co.*,²³⁹ which the Tax Court and the Court of Appeals attempted to follow; and the technical issue of the case thus became whether the bond purchases were gifts within the *American Dental* rule.

Justice Burton's opinion occupies twenty-two columns of the Supreme Court Reporter. The introduction and the facts occupy seven columns and include a detailed description of the method of bond repurchase and of the circumstances of the bond issue, although the ultimate decision is not made to depend on most of the facts discussed. Four columns follow showing that the transactions create gross income within the meaning of Section 22(a), including more than two columns of quoted regulations and Code, although the applicability of Section 22(a) does not appear to have been doubted at any point below, and in any case the question is completely closed by several decisions. Note 2 sets out at length the applicable provisions of the Code and note 16 sets out at almost a column's length the comparable provisions of the Revenue Act of 1916, although no contention of any kind relates to that Act. The discussion of Section 22(b) occupies eleven columns. The *American Dental* case, the applicability of which was the only substantial point which had troubled the lower courts, is finally distinguished in one sentence in the last paragraph.

It would be misleading to leave the impression that all of Justice Burton's opinions were in the pattern just described. For example, the *Wittek*, *Grand River*, and *Spiegel* opinions mentioned above are not. What is more important, Justice Burton writes progressively fewer "*Jacobson* type" opinions as he adjusts to his judicial career.

VI. CONCLUSION

The life of an institution, like the life of man, knows quiet times. The 1948 term was such a time, a year with only that minimum of excitement which necessarily comes to the highest Court. With few exceptions, for the great mass of the American people life will run on about as if the Court had been in recess for a year.

Perhaps this is more than happenstance, a quirk of the cases which chanced to come up for decision. In part, of course, the decline in the docket is caused by the relaxation of regulatory activities of the government. But, and this is more important, perhaps we are witnessing the in-

²³⁹ 318 U.S. 322 (1943).

evitable result of the twelve year policy of judicial self-denial which began as a response to events of 1936 and 1937. Years of judicial deference to the executive, to legislatures, and to administrative agencies may result finally in the abandonment of recourse to the judges. In a democracy where only judges serve for life, may it not be the ultimate triumph of the "New Deal judges" that they have shifted the real controversies of our time to agencies closer to the electorate?