Frankfurter, Felix 1938
Dear Herrgott,

Many greetings from President Wilson, who is in London.

It was an honor to meet him, and I am looking forward to your visit here.
Dear Zach,

Let me interrupt you long enough to tell you how much you are in my thoughts and my heart these days. When I think of the bloody trail to the White House these days — the noise, the ignorant, the self-seeking, the ambitious, and the cowardly — it seems exactly does you should have been the country, and offer your empty sloganeering, insidious, and irrelevant generalities with which I do it. I think of all the people, foolish, uninforme, self-seeking and fadid. who used to feel the Turin road to be in the war. No one believes he can understand your problem.
and profoundly be with you in your efforts.

That: the way I have been feeling all these weeks — thinking of you, feeling for you and witnessing for the country's sake, your unshakable faith in your fellow beings, your anticipative voice of success, your silent belief, your entire complete self, in the great democracy across body of American interest, how in — and began to the democratic people of the world — you continue to embody their best and abiding hopes.

Sincerely yours,

[Signature]
FELIX FRANKFURTER
CAMBRIDGE, MASS.

February 14

And here...

Happily you do not need the spirit of top-ripe reading material, but the page, as the lees of the wine, the cotent is bed-side material in its least perfect scene.

But - you may really be interested in footnotes 2, 373, 598. I find those you have added to the schemes above pp. 177-179, 1598-637. Much thanks.
HARVARD LAW REVIEW

FEBRUARY, 1938

LEADING ARTICLES

{Felix Frankfurter} {Adrian S. Fisher}

PERPETUITIES IN A NUTSHELL ....... W. Barton Leach 638

CHANGES IN CORPORATE REORGANIZATION PROCEDURE PROPOSED BY THE CHANDLER AND LEA BILLS .......... Cloyd Loporle 672

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The entire article section of the February issue of the Review is devoted to a Symposium on the Security and Exchange Commission's recommendations for Congressional legislation concerning Reorganization, and the resulting Chandler and Lea bills, now pending. This authoritative analysis and criticism of matters of such immediate importance will prove of great interest to all lawyers and students of the field.
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*Cartmell Paint & Glass Co. v. Cartmell, (Delaware) 186 A. 897 (1936) citing Secs. 593, 595, 597, 631, quoting Sec. 593
*Scarlett v. Young, (Maryland) 185 A. 129 (1936) citing Secs. 47, 49
*Red Star Milling Co. v. Moses (Mississippi), 169 S. 785 (1936) citing Sec. 741
  3 N. E. (2d) 140 (1935) citing Secs. 27, 94
*Husdlon v. McBride (1936) (Massachusetts) Advance Sheets, 2085; 4 N. E. (2d) 443
  (1936) citing Secs. 281, 283, 287, 288, 289
  Nov. 17, 1936, citing Secs. 631, 632, 647
  Sec. 102 A

*SPECIAL NOTE: — The case of Chain v. Wilhelm was carried to the United States
  Supreme Court and the Court in its opinion cited Sec. 1253 (Vol. IV. of Willis-
  ton) three times, (57 S. C. 394)
THE BUSINESS OF THE SUPREME COURT AT THE
OCTOBER TERMS, 1935 AND 1936

JUST twenty-five years ago, Mr. Justice Holmes had occasion to
say of his Court: "We are very quiet there, but it is the quiet
of a storm center..." The Supreme Court has come within
the purview of the general historian of the United States only for
the intermittent periods when the Court was the country's storm
center. There are about half a dozen such periods, dating from
the beginning of Marshall's magistracy. These explosive chapters
in the life of the Court synchronized with periods of intense eco-
nomic and political conflicts, and were invariably manifestations
of controversy between the Court and other branches of the gov-
ernment. Last term wrote another such chapter. Like all the
previous entanglements of the Court in the turbulent currents of
politics, the controversy through which the country and the Court
have just passed was not an instance of spontaneous combustion
but the culmination of a long maturing process.²

¹ February 15, 1913, HOLMES, LAW AND THE COURTS IN COLLECTED LEGAL PAPERS
(1920) 292.
² See, for example, the views of former President Wilson in a letter, just pub-
lished, to John H. Clarke on the occasion of the latter's resignation, on September
1922, as an Associate Justice of the Supreme Court. "Like thousands of other
liberals throughout the country, I have been counting on the influence of you and
Justice Brandeis to restrain the Court in some measure from the extreme reac-
tionary course which it seems inclined to follow... The most obvious and imme-
diate danger to which we are exposed is that the courts will more and more outrage
the common people's sense of justice and cause a revulsion against judicial authority
These dramatic issues are not the immediate concern of the papers in this series. The substantive doctrines of constitutional law are not under scrutiny here but the procedure by which the Court speaks — or abstains from speaking — as the ultimate voice of the Constitution. This is a study not of product, but of form and function. To be sure, procedure and substance are interacting forces, especially when the forms and formalities of a technical lawsuit serve as vehicles for adjudicating great public issues. Powerful tensions without are not devoid of influence, however imperceptible, within the judicial process. Procedure is sensitive to these tensions insofar as procedural hurdles must be cleared to reach substantive goals. During the terms under review, the stresses and strains within the political society, of which the Court is so pervasive a part, have not failed to leave their mark in those more recondite phases of the Court's labors which interest the professional student much more than the general historian. These influences and their judicial repercussions are hardly the stuff of statistics, though even in this elusive territory an occasional statistical vein is revealed which deserves refined exploration. But no less important is a quantitative appraisal of the Court's total business. It furnishes leads to inquiry which illumine the judicial habits and practices of the Court, the pressures upon time and energy exercised by different categories of litigation, the modes which the Court evolves for dealing with them, and the exactions which it makes upon bar and lower courts. All these factors, if warily pursued, may yield comprehension of the process by which the Supreme Court exercises its functions in the great body of cases which are outside the orbit of popular interest or understanding, but, in their aggregate, profoundly affect the angles of intersection of government and enterprise, of national authority and the localities. Moreover, the disposition of voluminous undramatic cases — their procedural determination

which may seriously disturb the equilibrium of our institutions, and I see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action." 6 Baker, Woodrow Wilson (1937) 137.

8 Frankfurter and Landis, The Supreme Court Under the Judiciary Act of 1925 (1928) 41 Harv. L. Rev. 1; The Business of the Supreme Court (1929) 43 id. 53; (1930) 44 id. 1; (1931) 45 id. 271; (1932) 46 id. 226; Frankfurter and Hart (1933) 47 id. 245; (1934) 48 id. 238; (1935) 49 id. 68.
and the atmosphere which they generate within the Court — inevitably has its reflex bearing upon the disposition of the dramatic cases.

I

Utilizing the control over its business afforded by the Act of 1925, the Court has continued to achieve the result, first realized during the 1930 term, of keeping abreast of its docket. At the close of the 1935 term 90 cases remained on the docket; and 98 were left from the 1936 term. But every case ready for argument had been argued and every argued case had been decided, except six cases assigned for reargument at the close of the 1936 term. Barring these rearguments, ordered in cases raising ticklish problems in the application of difficult principles, the Court carried over only those cases in which petitions for certiorari had been too recently granted or jurisdictional statements too recently submitted to permit argument on the merits, and those cases in which appeals and petitions for certiorari had been docketed but not submitted.

The Court year for both terms lasted 34 weeks, of which 16 were devoted to the hearing of argument and 18 spent in recess. Twice during the 1935 term and once during the 1936 term the Court adjourned in the middle of the week because cases were not ready to be argued. During the last five terms there has been a steady increase in the allowance of extra time. For the 1932 term it was 14 hours, while for the last two terms the extra time was 39 1/2 and 48 1/2 hours, respectively. The Court continued its almost conclusive practice against rehearings. Of rearguements on the Court's initiative there were two during the 1935 term and five during the last term. The balance sheet of the

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4 See Frankfurter and Landis, supra note 3, 45 HARV. L. REV. at 274.
6 During the 1933 term, 19 hours; during the 1934 term, 35 hours.
7 In one instance during the 1935 term and in three instances during the 1936 term rehearings were granted of orders denying certiorari. Triplett v. Lowell, 296 U. S. 570 (1935); New York City v. Goldstein, 290 U. S. 522 (1933); United States ex rel. Girard Trust Co. v. Helvering, 300 U. S. 643 (1937); Stone v. White, 300 U. S. 643 (1937).
Court's most vital activity — adjudication upon full consideration — is as follows: in the 1935 term, the Court decided 210 cases of which only two were submitted wholly on briefs, while in the 1936 term 203 cases were determined of which only five were submitted wholly on briefs. In the 1935 term 146 full opinions were written for 185 cases; these evoked three concurring opinions and 20 dissents. In the 1936 term 149 opinions were written for 181 cases; with one concurring opinion and 17 dissents.

The appropriateness of particular cases for full opinion as against summary disposition, the individualization of opinions according to the issue at stake or the gifts of different members of the Court, invite a critique of juristic and personal factors quite outside the scope of a statistical study. But in view of the summary disposition of a substantial percentage of cases fully argued before the Court, it becomes relevant presently to discuss the considerations which apparently move the Court to dispense with opinions.

In the gross analysis of the Court's business, the past two terms continue tendencies which have been heretofore observed. For all statistical discussion the starting point is the volume of business that confronts the Court. The substantial balance between business presented and business done has been noted. And so, inquiry must direct itself to the problems implicit in the actual volume of cases on the docket — their number, the issues raised, the aid which the Court derives from counsel and from lower courts, the exigencies that may demand more expedition than is normally healthy for wise judicial incubation. These and similar factors inevitably determine the Court's response to its business. They influence the time for deliberation, the feeling of serenity or pressure in exploring and composing differences of view within the Court, the fullness or brevity of opinions, the giving of opinions as against summary disposition, the austerity or generosity with which standards for discretionary jurisdiction are applied. These conditions and activities of the Court's physiology pose the most exciting and crucial inquiries for the student of the Supreme Court's business. Unfortunately statistics afford little illumination except here and there a ray of knowledge, an intimation, an hypothesis to be proved or rejected by future statistics.
The fears raised by the sizable increase in business for the 1933 term — 1021 dispositions as against 906 for the previous term — have, for the time at least, been dispelled. The total appellate work for the 1935 term was 986 and for the last term 941. In conjunction with the prior three years they reveal, for the past quinquennium, a decreasing variation about a mean. From which one may hesitatingly infer that the professional, economic, psychological factors which control the volume of the Court's business have reached a temporary equilibrium.

Last term's decrease of 45 in the total appellate business is almost identical with the decrease from 717 to 671 in the petitions for certiorari denied or dismissed. The number of adjudications increased from 256 to 260, which is the resultant of an increase by 11 of dispositions upon preliminary papers and a decrease by seven of cases in which argument was heard. The latter decrease, in turn, is reflected in a decrease, from 185 to 180, in the number of cases decided by full opinion, and of two in the per curiam decisions.
If the past is any guide, the problems raised for the Court by the volume of its business will largely be solved by the use which it makes of the two devices for exercising selective jurisdiction—the jurisdiction which Congress has made discretionary and that which, by the Court’s own invention of a procedural device, is attaining likenesses to discretionary jurisdiction. Throughout the last five terms the figures disclose a correspondence between the increases or decreases in total appellate dispositions and increases or decreases in dispositions otherwise than by full opinion after argument. How the Court saves itself from the latter — whether through denials of certiorari or through summary dispositions—cannot be expressed mathematically. Such variations as are disclosed by the business of the last two years in the distribution of dispositions on petitions for certiorari and under Rule 12, respectively, are due to last term’s change in the ratio between obligatory and discretionary business. The increase, last term, in per curiam without argument (while all other modes of disposition decreased) must be set against the increase in appeals, both absolutely and proportionately, compared with the 1935 term, from 109 to 121, 42.6% to 46.5%.

Ever since its promulgation, Rule 12 has had a steadily mounting significance as a means of winnowing good appeals from bad. The importance of the Rule derives from the nature of the factors which the Court is gradually evolving in its tests of an appeal. Rule 12 in action—what lies implicit in hundreds of cases in which appeal has been invoked and summarily denied since July 1, 1928, when Rule 12 became effective—affords one of the most fascinating studies in the history of judicial procedure. It proves in striking fashion how much opportunity for creativeness in judicial administration remains even within a jurisdictional orbit defined by the legislature.

Having persuaded Congress to contract drastically the area of review as of right, the Court inevitably had to protect the avenues of access to it through spurious appearances of appeal. And so

---

6 It cannot be said, however, that this marks a trend toward increasing importance of the obligatory jurisdiction. This increase is caused largely by the fact that the cases which were not reached for a hearing during the 1935 term contained an exceptionally high percentage of appeals. The total appeals docketed decreased from 123 to 112.
Rule 12 was devised. Its hopes doubtless were to restrict effectively the docketing of cases that have no claim on the Court's time, or to secure their summary disposition once they get into the stream of the Court's business. The Act of 1925 was a measure of judicial conservation, to the end that litigation of the gravity properly requiring the august adjudication of the Supreme Court should be decided with a promptness consonant with the fullest play of the deliberative function. To waste the Court's time reading briefs and records and listening to argument on appeals that are either intrinsically frivolous or that do not satisfy vindicated procedural requirements is to make the Supreme Court the victim of irresponsibility and incompetence. To save the Court, its exclusionary rules must be explicit and comprehensive in their demands. They must enlist the lower courts as well as the bar in the utilization of the sifting process, and must enable the Court itself to test fulfillment of its jurisdictional criteria with accuracy and speed.

Rules of court, like adjudications, reflect an empiric process, a response of doctrine to experience. By the amendment effective May 31, 1932, the Court closed the considerable gap left open by reliance on the bar's own judgment for determining appealability. Fulfillment of the jurisdictional requirements has now to be attested by the judge or Justice who allowed the appeal. Four years more of experience sharpened still further the Court's formulation of the Rule. An amendment, effective July 1, 1936, added to the words “The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on”, the far-reaching requisite “including a statement of the grounds upon which it is contended the questions involved are substantial (Zucht v. King, 260 U. S. 174, 176, 177)”. This serves formal notice of the discretionary ingredient even in review as of right. A claim of unsubstantiality inevitably invokes judgment, even

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9 275 U. S. 603-04 (1928); see Frankfurter and Hart, supra note 3, 47 Harv. L. Rev. at 253-62.
10 285 U. S. 602-03 (1932); see Frankfurter and Hart, supra note 3, 47 Harv. L. Rev. at 263; 48 id. at 247-49.
11 297 U. S. 733 (1936). This gives added meaning to the following clause: “and shall cite the cases believed to sustain the jurisdiction.”
in those cases where the question is whether its solidity has evaporated in the course of prior decisions. The 1936 amendment to Rule 12 also strengthened its effectiveness by underlining two of the historic technical prerequisites for a review of state court adjudication. Since the Court, in its review of state decisions, does not consider a federal question which was not seasonably raised in the state court, Rule 12 now specifically requires explicit proof of the fulfillment of this requirement. Since the Court does not review state decisions which rest upon an adequate non-federal ground, the amendment prescribes that the satisfaction of this requirement shall be documented.

The part that Rule 12 plays in the business of the Court calls for answer to four questions. How many cases which have no business there does it avert from coming to the Court at all? How many cases are rejected at the threshold without the waste of oral argument because inspection of the brief documentation suffices to disclose that they do not fulfill the relevant jurisdictional requirements? What is the needless drain on the Court’s time through testing the existence of the jurisdictional requirements on the preliminary showing? Finally, how effectively does the disposition of cases under Rule 12 guide the bar in bringing itself within the requirements of the Rule so as to avoid waste both to litigants and to Court?

The last two terms confirm the potentialities of Rule 12 as an important means of avoiding the hearing of a sizable percentage of unworthy appeals. Of the 123 appeals in the 1935 term, 41 were dismissed or affirmed on the jurisdictional statement. Of

12 "If the appeal is from a state court the statement shall specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears, (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) [such] as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.” 497 U. S. 733–34.

13 “The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases,
the remaining 82 cases,\(^{14}\) nine had a fate irrelevant to this study,\(^{16}\) but 16,\(^{16}\) which had passed the tests of Rule 12, either disclosed jurisdictional lacks on fuller consideration or were decided 

per curiam with a brevity which implies a substantiality so tenuous that dismissal might well have ensued.\(^{17}\) For the 1936 term, the application of Rule 12 gives this showing: in 55 out of the 112 appeals the jurisdictional statement sufficed for a disposition; of the remaining 57, 45 received consideration before the end of the term, and the Court's treatment of only seven\(^ {18}\) of this number gives rise to the suggestion that they might also have been settled upon the preliminary papers.\(^ {19}\)

But the last two terms also indicate the heavy drain upon the Court's time by appeals that have no claim to be heard. To be sure, the inhibitory influence of the Rule in preventing appeals, either through the spontaneous action of counsel or disallowance

\section*{Footnotes}

\(14\) These figures include cases which were finally disposed of by the Court during the 1936 term.

\(15\) Four cases were dismissed on motion of the appellant, two were dismissed per stipulation, two were dismissed in vacation pursuant to Rule 35, and one was carried through the 1936 term to the 1937 term.

\(16\) Not including two cases in which 

\(17\) Eleven cases were felt to justify only per curiam opinions. Of these, nine were affirmed, one dismissed and one remanded to enable the court below to clarify the grounds of its decision. Five cases were disposed of by per curiam orders, of which one was affirmed and four dismissed. Out of the 16 cases, five involved lack of technical requirements for appellate jurisdiction, six involved review of decisions which were clearly right, and five involved rulings of three-judge district courts on interlocutory injunctions, or questions of fact, or application of local law, which the Supreme Court will not reverse unless clear error is shown.

\(18\) These figures do not include one case affirmed by an equally divided Court. Railroad Comm. of Calif. v. Pacific Gas & Elec. Co., 301 U. S. 669 (1937).

\(19\) In one case, decided on full opinion, the cause was remanded to enable the lower court to clarify the facts which underlay its decision. Two cases were affirmances by per curiam opinions and four were dispositions by per curiam orders. Of the seven cases, only one involved lack of technical appellate jurisdiction, five were cases in which the subject of the controversy was well settled, and one was a review of a decision of a three-judge district court turning on state law.
**TABLE II +**

**ADJUDICATIONS ON APPELLATE DOCKET**

**Adjudications by Full Opinion**

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**Adjudications Per Curiam ‡**

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**Total Adjudications**

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+ Slight corrections in a few of the statistics heretofore employed in this series have been made in this Table.
* Excluding one case (No. 202, October Term 1935) in which certiorari was granted during the time limit of the 1936 term.
† Including petitions for certiorari dismissed by full opinion.
§ Including partial affirmances, decisions on petitions for certiorari, on motions, etc.
‡ Excluding petitions for certiorari disposed of per curiam.
‡ Excluding four cases (Nos. 18, 19, 20, 21) affirmed by an evenly divided Court, which were set down for argument at the 1934 term on petition for rehearing. See 190 U. S. 591 (1933), 292 U. S. 612 (1934), 293 U. S. 191 (1934).
by lower courts, cannot be measured numerically. But 33.3% of the appeals brought before the Court in the 1935 term were given the short shrift of summary disposition on the basis of the jurisdictional statement,\textsuperscript{20} and in the 1936 term the percentage of such dispositions was 49.1%,\textsuperscript{21} the highest in the administration of the Rule.\textsuperscript{22} If a sizable percentage of cases does not satisfy the Court's criteria for jurisdiction, the bar either does not understand the criteria or is indifferent to them, or the Court has not made itself clear in their formulation or precise in their application.

A study of the workings of Rule 12 in detail lays bare nice questions of degree in the enforcement of the more technical requirements of jurisdiction. It is to be expected that there will be a few cases every term that raise legitimate doubts, even in the minds of conscientious counsel, whether the decision of a state court involves the "validity of a statute,"\textsuperscript{23} whether there was a non-

\textsuperscript{20} This percentage was made up of 41 out of 123 appeals, six affirmed and 35 dismissed. Nine appeals were dismissed for lack of jurisdiction, nine for want of a substantial federal question, three because of the presence of a nonfederal ground adequate to support the decision below, seven for want of a properly presented federal question, four for want of a properly presented substantial federal question, one for want of a final judgment and two for lack of sufficient interest on the part of the appellant.

\textsuperscript{21} This percentage was made up of 55 out of 112 appeals, three affirmed, 51 dismissed and one vacated, the cause being moot. Ten appeals were dismissed for lack of jurisdiction, 29 for want of a substantial federal question, six because of the presence of a nonfederal ground adequate to support the decision below, two for want of a properly presented federal question and four because the appeal was not from the final judgment.

\textsuperscript{22} The highest proportion of appeals disposed of upon the jurisdictional statements prior to the 1936 term was 41.6% during the 1933 term. Comparison with the terms immediately following the promulgation of the Rule, however, is dangerous unless the greater number of improper appeals which survived the preliminary tests and received a hearing on the merits is borne in mind.

\textsuperscript{23} The statutory formula governing the obligatory jurisdiction of the Court over the judgments of state tribunals—"where is drawn in question the validity of a statute [or treaty] of any State [of the United States]"—has given rise to some of the subtlest problems in federal jurisdiction. Jett Bros. Distilling Co. v. Carrollton, 252 U. S. 1 (1920), held that under the 1916 Act an allegedly discriminatory assessment made under a general tax law whose validity was not attacked was reviewable only by \textit{certiorari}. The case created the distinction between the validity of an "authority" and the validity of its exercise. See Frankfurter and Hart, \textit{supra} note 3, 48 Harv. L. Rev. at 252, n.30. The withdrawal of attacks upon authorities from the Court's obligatory jurisdiction was largely nullified by decisions that municipal ordinances and "legislative" orders of state administrative boards are "stat-
federal ground adequate to sustain such a decision, whether the federal question was seasonably raised below, whether, in any event, the judgment was final. But the very technicality of such matters tends to fence in the area of doubt. Judgment is more at large when inquiry concerns the substantiality of a legal question otherwise within the ambit of the Court's reviewing power. Here

"within the meaning of the Act of 1925. King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928); Sultan Ry. v. Department of Labor, 277 U.S. 135 (1928). As a result, the Jett case continued to be cited to confine these decisions to orders "legislative" in character. The precise effect of the Jett case, however, had been made doubtful by a case holding that review as of right lay when a particular application of a statute, as distinguished from the statute itself, was attacked as unconstitutional. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1922).

In the Dahnke-Walker case the question was whether the business of a particular company was interstate so as to be outside the disqualification of foreign corporations from suing in the state, unless they had complied with certain conditions for doing business. The determination of this issue certainly implicated such a range of commercial activities as to involve, in a colloquial sense, the meaning of the statute; hence the decision of the state court holding it applicable was considered to involve its validity. On the other hand, in the Jett case, partly through the nature of the subject matter, i.e., the specialized circumstances of a particular claim of discrimination, and partly because these circumstances were adjudged by an intervening administrative agency, the action complained of was not deemed to touch the statute as such but merely the use made of it in a specific, nonrecurring situation. These are, of course, not clear-cut distinctions, and insofar as valid they shade into one another. They are merely suggested as guides for harmonizing the action of the Court in applying the doctrines of these two cases from term to term. See two cases during the 1935 term which were held not properly before the Court on appeal but reviewable by certiorari. Baltimore Nat. Bank v. State Tax Comm., 296 U. S. 516 (1935), 297 U. S. 209 (1936) (imposition by state board of tax upon national bank shares owned by RFC); P. J. Carlin Const. Co. v. Heaney, 298 U. S. 637, 299 U. S. 41 (1936) (award by state workmen's compensation board for injuries claimed to be within the exclusive jurisdiction of the courts of admiralty). Compare two cases in which appeals were dismissed in which the statutes claimed to be involved were general regulations of court procedure. Lindley v. Ohio, 299 U. S. 506 (1936) (statute permitting amendment of indictment); Mississippi Central R. R. v. Smith, 299 U. S. 518 (1936) (statute permitting partial reversal upon appeal). It has, however, been suggested that the decision in the prior two cases is due to the fact that the federal claim below was based on the denial of a federal "right, title, privilege or immunity" rather than on the unconstitutionality of the state statute. See ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) § 11; cf. Whitemore v. Salt Lake City, 300 U. S. 644 (1937) (statute not referred to at time federal question raised).

The change from three to six in the number of cases dismissed because of the presence of a nonfederal ground adequate to sustain the decision below does not indicate a failure of Rule 12 to bring this jurisdictional limitation to the attention of counsel. Indeed, in only one out of the six cases of the 1936 term as op-
is the real center of conflict between the standards of the Court and those of the bar. By its recent amendment to the Rule the Court implied admonition to the bar that formal requisites for appeal are not enough. An issue really doubtful on the merits, something rising to the gravity of a matter that the Supreme Court may justly be called upon to adjudicate, must be presented, not a mere gossamer claim or a chose jugée. The record of dismissals plainly dictated this admonition. Since the promulgation of the Rule, 170 out of 347 dismissals had been for want of substance. Even with its more explicit directions, Rule 12 is evidently making slow headway in winning the bar to the Court's notions of substantiality. At the 1935 term only nine cases out of 35 were dismissed for want of a substantial question,26 while this figure rose to 20 out of 51 dismissals at the last term, and that, too, after the stiffening amendment.27 The bar now seems to be fully aware of the requirement of substantiality; certainly the jurisdictional

posed to two out of the three cases of the 1935 term did the jurisdictional statement fail to deal with the problem. The cases which were dismissed reveal the difficulties inherent in the application of this jurisdictional limitation. In only one of the cases of each term did the nonfederal ground have no relation to the statute which was claimed to be invalid. In all the other cases the nonfederal ground was either a decision that the principles of estoppel or the local rules of procedure prevented the appellant from attacking the statute, or decisions as to the nature of the rights, dependent upon state law, which underlay the constitutional claim of the appellant. The main significance of these dismissals is a determination that the nonfederal ground by which the state courts satisfied themselves that they were not required to pass upon the federal question, was sufficiently distinct to be independent.

26 There was a marked decrease in the number of appeals which were dismissed because the federal question was not properly raised below. Eleven appeals suffered from this defect during the 1935 term; only two during the 1936 term. This decrease coincided with the amendment of Rule 12 requiring a specific statement of the manner in which the federal question was raised below. At least four of the statements in the cases filed during the 1935 term were drawn on the theory that it was only necessary to show that the state statute whose validity was attacked had been applied below. The statements filed during the 1936 term show an increased awareness of the necessity to show the exact steps by which the federal question was raised below. How much of the decrease in the number of appeals dismissed is due to the amendment in Rule 12 remains a matter of conjecture.

27 These are the figures for the three preceding terms: 1933 term, 15 out of 38; 1933 term, 27 out of 49; 1934 term, 13 out of 33.

28 In only three of these appeals was the jurisdictional statement filed before the amendment became effective, and even these were filed some time after it had been promulgated.
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TABLE III (continued)

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| Reversed          | 0    | 0    | 0    | 1    | 1    |
| Total             | 247  | 270  | 242  | 256  | 260  |

TABLE IV

EXTENT OF DISCRETIONARY REVIEW

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<td>138</td>
<td>150</td>
<td>147</td>
<td>139</td>
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<tr>
<td>Total</td>
<td>247</td>
<td>270</td>
<td>242</td>
<td>256</td>
<td>260</td>
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</tbody>
</table>

|                  |      |      |      |      |      |
| Obligatory Jurisdiction | 42.1% | 48.9% | 38.0% | 42.6% | 46.5% |
| Discretionary Jurisdiction | 57.9% | 51.1% | 62.0% | 57.4% | 53.5% |

statements of the last term paid it ample lip service. That there should be differences of opinion in appraising an issue as either flimsy or settled must be expected. But, if the last term is to be taken as an index to tendency, the gap between Court and counsel is too wide.

What proportion of this too large number of futile attempts at appeal is attributable to the conscious desire of counsel to prolong hopeless litigation, or to what extent counsel are unaware of the standards by which the Court judges substantially, is largely guesswork. But an intensive study of the cases dismissed for
want of a substantial question leads one to believe that there is much misconception by the bar in judging substantiality. This is due in part to the professional qualities of the miscellaneous bar now practicing before the Court compared with the specialized Supreme Court bar of a century ago, partly to the tradition of the bar in raising futile constitutional objections, partly to the limited utilization of costs as a deterrent to frivolous appeals. Evidently, also, the present mode of dismissing cases for want of a substantial federal question, in situations where prior decisions still leave decent room for argument regarding the applicability of former rulings to a new case, leaves the bar uninformed as to the standards of severity which the Court is evolving in finding unsubstantiality. No doubt the Court has resorted to summary dismissal to save the time that would be necessary to write opinions expounding the ground of dismissal. To be sure, indications of the basis of substantiality are afforded by the recent practice of giving the citation of the opinion below and also by more sharply pointed references to the cases which are avouched for un substantiality. Even so, it might, on the long swing, prove an ultimate saving of time for the Court, in the transitional process of educating the bar to its requirements by a knowledge of American constitutional law, to include in its per curiam a statement of the facts of the particular case sufficient to show its nature in the light of prior decisions which, even though not necessarily relevant by stare decisis, make the case undeserving the Supreme Court’s deliberations.

The bulk of the Court’s business, in gross as well as adjudicatory, continues to derive from the enlarged scope of discretionary jurisdiction on petitions for certiorari conferred by the Act of 1925. Certiorari absorbed 90.5% of the total appellate business of the Court during the 1935 term and 87.9% during the 1936 term. Certiorari was responsible for 71.9% and 71.8% of the cases in which full opinions were written during the 1935 and 1936 terms, respectively. And the dominance of certiorari in the Court’s economy is emphasized by its share of that business which is the chief consumer of the Court’s time, namely, the cases adjudicated after full argument — for the 1935 term, 67.6%, for the 1936 term, 67.5%. During the last five years, the depth and density of the stream of litigation through certiorari have remained substantially
### TABLE V

<table>
<thead>
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<th></th>
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<td><strong>Total</strong></td>
<td>247</td>
<td>270</td>
<td>243</td>
<td>256</td>
<td>260</td>
</tr>
</tbody>
</table>

* Supreme Court, District of Columbia, prior to Act of June 25, 1936, 49 Stat. 1921.
the same. During the 1935 term 865 petitions were filed of which 148, 17.1%, were granted. During the 1936 term 824 petitions were filed of which 153, 18.6%, were granted. For the five year period ending with the 1936 term, the petitions for certiorari have fluctuated between 797 and 880. The petitions deemed worthy of the Court's attention have fluctuated between 148 and 165, 16.8% and 19.8%.

A continuous disparity, such as these figures indicate, between the Court's notion of review-worthiness and that of the bar, clearly implies a maladjustment. Either the bar is too loose in its conception of issues deserving the attention of the highest tribunal, or the Court too rigid. This is not a matter that lies on the level of statistical proof. Only by quarrying in the hundreds of dreary petitions for certiorari which have been denied could pedantic demonstration be made of some of the niggling points, or issues long since set at rest, on which the bar seeks the Court's reviewing power. Enough of these have been sampled to leave no doubt that lawyers moving in the more austere professional atmosphere of the English bar and subject to the restraining influence of heavy costs of the English judicial system for fruitless appeals," would abstain from filing many of the petitions for certiorari which are annually presented to the Supreme Court. With such a volume of business, it would be strange indeed if petitions were not rejected which raised issues for which responsible and skilled lawyers properly sought the Court's adjudication. And there are doubtless ample instances among the four-fifths of rejected petitions in which the Court's discretionary judgment as to the gravity of an issue was justifiably solicited."

For the guidance of the bar, the Court has indicated the general direction of its mind when asked to issue the discretionary writ of certiorari. Rule 38 indicates "the character of reasons" which will move the Court." They vary, of course, according to the

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29 Mr. Chief Justice Hughes estimated that "There are probably about 20 per cent or so [of the petitions for certiorari] in addition which have a fair degree of plausibility but which fail to survive critical examination." See Sen. Rep. No. 711, 75th Cong., 1st Sess. (1937) 40.
30 Of course the reasons stated are "neither controlling nor fully measuring the
court whose action is sought to be reviewed, but underlying all are two governing considerations for not leaving undisturbed the judgment of one of the inferior federal courts, or of a state court wherein a federal question had been raised. The Supreme Court will intervene either to quiet a conflict which it alone can compose, or to declare the law when the intrinsic importance of an issue calls for its most authoritative determination.

Conflict — whether between two lower courts or between a lower court and the Supreme Court — represents a relatively well-canal-

court's discretion ". See Revised Rules of the Supreme Court of the United States (1936) § 38(5).

25 Subparagraphs (a) and (c) relating to certiorari from state courts and from the United States Court of Appeals for the District of Columbia respectively do not refer to a conflict with the decision of a lower federal court as a reason for granting certiorari. Yet the cases show that this reason is operative. Noble v. Oklahoma City, 297 U. S. 481 (1936); Pufhal v. Estate of Parks, 299 U. S. 217 (1936); United States ex rel. Girard Trust Co. v. Helvering, 301 U. S. 540 (1937).

26 Subparagraph (b), relating to certiorari from the circuit court of appeals, is as follows: "(1) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; (2) or has decided an important question of local law in a way probably in conflict with applicable local decisions; (3) or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; (4) or has decided an important question of federal law which has not been, but should be, settled by this court; (5) or has decided a federal question in a way probably in conflict with applicable decisions of this court; (6) or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A numerical analysis of the reasons given for the granting of certiorari to the lower federal courts during the 1935 term gives the following results: Reason one, 20; reason two, 1; reason three, 0; reason four, 15; reason five, 3. In three cases both one and four were given as the reason, in one case one and five were given, and in one case one and six. For the 1936 term: Reason one, 15; reason two, 7; reason three, 0; reason four, 25; reason five, 4. In one case one and four were the grounds. Reasons for the granting of certiorari to state courts were given in eight cases during the 1935 term. A conflict was assigned once, a conflict and the importance of the question once, and the importance of the question six times. During the 1936 term a conflict was assigned once and the importance of the question twice.

27 Where the conflict is within the federal judicial system, either with the decisions of another circuit court of appeals or with the decisions of the Supreme Court, there is no requirement that the question be especially important. Where the conflict is with local courts on a question of local law, or with the weight of authority or the "better view" on a question of general law, the question must be one of importance. Importance alone, apart from any conflict, is sufficient if the question is one of federal law.
TABLE VI

<table>
<thead>
<tr>
<th></th>
<th>1932</th>
<th>1933</th>
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<th>1936</th>
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<td>880</td>
<td>855</td>
<td>855</td>
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</table>

ized concept. For skilled lawyers the issue of conflict, in the great majority of cases, comes close to a mechanical determination. When the existence of a conflict is legitimately debatable, the question really presents a phase of the dynamic quality of lawmaking through courts. Conflict in this sense becomes an adjustment between abstract logical relevance and the accommodation of logic to varying circumstances. For instance, is an old decision of the Supreme Court to be given an application rigorously consonant with syllogistic reasoning, or should the light of new circumstances permit what mere logic would deem a contraction or departure? Cognate considerations of ultimate juristic philosophy are involved when the Court is asked to resolve a conflict of decisions between two circuit courts of appeals where the conflict is not such a head-on collision as a difference by two circuits regarding the validity of a patent. Here, factors relevant to judicial administration, different from those operative when a claim is made of departure from the Court's own ruling by an inferior tribunal, undoubtedly influence the Court in deciding whether to adjust the conflict or to stay

* Exclusive of appeals treated as petitions for certiorari under the provisions of the Act of Feb. 13, 1935; of petitions for certiorari denied by full opinion of the Court; of petitions for certiorari, when denied, filed in cases in which review by appeal was also sought; and of petitions for certiorari granted to enable reversal of a case without consideration. The disposition of these petitions has been excluded from this table in order to prevent duplication in the statistics.
its hand, at least for the moment. All these more subtle cases of conflict present precisely the kind of situation for which the Court's discretion is properly invoked. And concordance between the Court's conception of conflict and that of the litigants is not always to be expected.

The claim of "importance" of necessity is subject to judgment and not to rule. Only by the cumulative effect of the specific instances that convey the Court's notion of importance can the bar be educated to acquire the feel of the expert. Just because the area of discretion is so large, the function of professional self-restraint is dominant. But lawyers are lawyers and not judges, they have the responsibility for pressing the legitimate interests of clients, and unavoidably they look at legal questions with a special focus. Notions of importance through general professional acceptance cannot be left wholly to the bar's own process of induction merely from the nature of the cases taken, and hardly at all from the petitions rejected. Apart from the demands this makes upon professional intellectual disinterestedness, it presupposes time and facilities for study of records quite beyond the reach of active practitioners. On the negative side, experience does not call for a modification of the belief that the reasons for the device of certiorari would be defeated if the Court, in any appreciable number of instances, had to state, however briefly, the reasons for the denial of certiorari. But the wherefore of importance, except in cases of obvious public significance, if suggestively articulated, would help to adjust the particularistic slant of the bar. The density of litigation dependent upon the ruling in a

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84 See Frankfurter and Hart, supra note 3, 48 Harv. L. Rev. at 275. The value of an occasional full opinion upon the denial of a petition for certiorari has been adumbrated. See ibid.

85 See, for example, the statement of Mr. Justice Roberts in United States v. Constantine, 296 U. S. 387, 390 (1935). "In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other Circuit, called attention to diverse decisions in the district courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly."

The practice of stating at least a formal ground on which certiorari was granted varies among the Justices. The following table shows the relationship between the
particular case and its repercussion upon affairs, governmental or economic, are the chief determinants of importance. And these will vary according to time and circumstance. An issue for which *certiorari* once seemed inopportune may, through the accumulation of similar instances or in the clearer perspective of the ramifications of the particular problem, later emerge as obviously important. Such shift in emphasis or keener sensitiveness to implications is, perhaps, most felt in tax litigation. The exigencies of the docket play their part, the impact of the arguments in support of a petition, and the respondent's concurrence in or opposition to the granting of the writ can hardly be without weight. These delicate imponderables, like the nuances of a great chef, can neither be measured nor conveyed. But the major elements of importance — what general interests, from the point of view of national law, are represented by a particular case — are certainly susceptible of brief and guiding formulation.

Inevitably law reflects the forces of economic and social dislocation implied in a great depression and its consequent readjustments. This is true not merely of substantive legal doctrines. A

<table>
<thead>
<tr>
<th>1935 Term</th>
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<td>Reasons</td>
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<td>Roberts</td>
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<tr>
<td>Cardozo</td>
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</table>

These figures must be read with the qualification that in some cases the obvious importance of the case would have made a statement redundant. *e.g.*, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

88 Del Vecchio v. Bowers, 296 U. S. 280 (1935) (sufficiency of evidence under District of Columbia Workmen's Compensation Act; *certiorari* granted only because decision would also be a precedent for Longshoremen's and Harbor Workers' Compensation Act).
general tendency toward enlarged governmental activity and the
centripetal influences within economic enterprise which make for
increasing exercise of national authority, have their repercussions
in judicial organization and administration. The broader ques-
tions of jurisdiction and procedure affecting the federal courts have
always presented some of the most delicate problems in the work-
ing of our constitutional government. It would indeed be surpris-
ing if the recent stresses and strains in our national life had not
reflected themselves in the workings of the federal judicial system.
All the devices by which procedural changes come to pass have
played their part. Rules of the Supreme Court for the conduct of
its own business and that of the "inferior courts", resourceful em-
ployment of the Court's discretionary powers, fluctuations in the
Court's attitude toward its jurisdiction, are all registered in the
latest volumes of the United States Reports. In addition to these
readjustments through judicial self-determination, Congress, dur-
ing the last term of Court, deemed it necessary to intervene by
redistributing power within the federal judicial system. By modi-
fying, in an important way, the Judiciary Act of 1925, Congress
has illustrated the historic truth that every judiciary enactment
since the great statute of 1789 is but one of a series, a part of the
continuous living process of making the federal courts appropriate
instrumentalities for the changing needs of the Union.

Ordinary problems of judicial administration make little appeal
to the imagination of legislators. The Supreme Court is entangled
as much as it is in the political history of the United States because
its work is so largely an expression of statecraft and interwoven
with the political problems of our national life. Except on the rare
occasions when the Court itself needs congressional relief to mas-
ter its docket, judiciary legislation invariably is the political an-
swer of Congress to what are believed to be judicial obstructions
to needed activities of government. Barring the tariff and land
grants, the establishment of the Interstate Commerce Commission,
in 1887, was the first major intervention of the Federal Govern-
ment in the area of economic enterprise. For the past half century
our major domestic issues have been phases of a single central
problem, namely, the interplay between enterprise and govern-
ment. Taxation, utility regulation, control of the security market,
banking and finance, industrial relations, agricultural controls, are
### TABLE VII

**Subject Matter of Petitions for Certiorari During the 1935 and 1936 Terms**

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<td>Antitrust Laws</td>
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<td>Bankruptcy</td>
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<td>2. Constitutionality of State Regulation</td>
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<td>3. Construction of Federal Regulation</td>
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<td>b. Federal Employers' Liability Act and Related Acts</td>
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* Not otherwise classified.
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<td>Immigration and Naturalization</td>
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issues that derive from the circumstances of modern, large-scale, industrialized society, and ultimately turn on conceptions of the relation of individuals one to another in the context of our society. For Congress they present a blend of law and policy; to the Supreme Court, under our Constitution, they come as legal problems. Clashes between courts and Congress affecting the ultimate fate of such legislation often have their origin in procedure. Who may raise legal questions about laws, what tribunals may dispose of them and when they will be finally adjudicated, are all contingencies of legislation. To effectuate its own policies — as well as those of the states when challenged in the federal courts — Congress has deemed it necessary, from time to time, to modify procedural practices of the federal courts, to exercise its constitutional power to define the authority of the inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court.

Since the intermediate federal appellate tribunals were established in 1891, they have been utilized to relieve the Supreme Court of its obligatory jurisdiction, leaving with the circuit courts of appeals final adjudication in those types of cases for which certiorari was a sufficient safeguard of the national interest. First by the Act of 1916 and then by the more comprehensive measure of 1925, the flow of cases coming to the Court as of right was greatly dammed. What issues may, as a matter of course, be brought before the Supreme Court is partly a technical, professional matter, but also, by touching the feelings of the general community, becomes a more dominant concern of legislative policy. In placid periods, when the distribution of jurisdiction is pre-eminently a matter of the internal economy of the judicial system, Congress is naturally responsive to the authoritative wishes of the Court. And so, the adjustments of 1891, 1916 and 1925, to enable the Court to meet adequately the swelling tide of its business, were made by Congress at the Court’s own insistence.

On the other hand, for different categories of litigation, Congress had to formulate its own notions of jurisdictional policy to give effect to the social and economic movements which got

87 Act of March 3, 1891, 26 Stat. 826.
under way in the administration of Theodore Roosevelt. Orders of the Interstate Commerce Commission often have ramifying economic consequences. Such issues have special claims for prompt, final adjudication, and their complexity, as well as their prior scrutiny by the Commission, requires at nisi prius the wisdom and experience of more than a single judge. By the Act of February 11, 1903, in cases involving orders of the Interstate Commerce Commission, Congress initiated the device of an original court of three judges and direct review by the Supreme Court. In other spheres, the ignition of public excitement through judicial action deemed adverse to the public interest, has led to successive extensions of the Supreme Court's historic scope of review and to a recession from the general tendency to curtail its obligatory jurisdiction.

First, the traditional practice against reviewing rulings in favor of the accused, even where no double jeopardy was at stake, had consequences unknown to the common law when Congress affixed

40 32 Stat. 823 (1903), amended, 36 Stat. 854 (1910), 15 U. S. C. §§ 28, 29, 49 U. S. C. §§ 44, 45 (1934). By this Act, suits in equity brought by the United States under the antitrust and interstate commerce laws, when designated by the Attorney General as of "general public importance", have precedence and must be tried by a three-judge court. It also provided for a direct appeal to the Supreme Court in all suits in equity brought by the United States under these statutes. For a background of the Expedition Act, see 36 Cong. Rec. 1679, 1747, 1871 (1902); 1 SHARPFMAN, THE INTERSTATE COMMERCE COMMISSION (1911) § 2, n. 24. The Hepburn Act, having provided penalties for disobedience of the orders of the Interstate Commerce Commission, extended the Expedition Act to suits to enjoin the enforcement of Commission orders and gave direct review by the Supreme Court from interlocutory injunctions. 34 Stat. 584, 593 (1906). The Mann-Elkins Act vested jurisdiction of all suits to enjoin the enforcement of the orders of the Commission in the Commerce Court. 36 Stat. 1146, 1149 (1911). When this Court was abolished, the jurisdiction reverted to the three-judge district courts. 38 Stat. 219 (1913), 28 U. S. C. §§ 46, 47 (1934). The considerations of public interest which introduced the district court of three judges and direct review by the Supreme Court in litigation arising under the Interstate Commerce Act and the Sherman law were, of course, relevant when Congress fashioned the procedure under the Shipping Act, the Packers and Stockyards Act, the Perishable Agricultural Commodities Act and the Federal Communications Act. And so, the provisions applicable to orders of the Interstate Commerce Commission were incorporated by reference in each one of these statutes. 39 Stat. 738 (1916), 46 U. S. C. § 830 (1934), superseded by, 49 Stat. 1887, 46 U. S. C. § 1114 (Supp. II 1936); 42 Stat. 158 (1911), 7 U. S. C. § 217 (1934); 46 Stat. 533 (1930), 7 U. S. C. § 499k; 48 Stat. 1093, 47 U. S. C. §§ 402(a), 402(a) (1934).

### TABLE VIII

**Distribution of Opinions**

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* Because of illness, Mr. Justice Stone did not sit between October 13, 1936 and February 1, 1937.

† Including No. 910, Helvering v. Davis, 302 U. S. 619 (1937), in which Mr. Justice Cardozo wrote the opinion of the Court upholding the old age provisions of the Social Security Act, but, speaking for himself and Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Roberts, found an absence of those requirements for equitable relief which are indispensable to the adjudication of a constitutional question.
penal sanctions to legislation involving far-reaching issues of policy.\footnote{See \textit{Frankfurter and Landis, The Business of the Supreme Court} (1928) 115–17.} The Criminal Appeals Act of 1907 put an end to the power of a single judge to hold up the enforcement of a law for years by invalidating it improperly.\footnote{34 Stat. 1246, 18 U. S. C. § 682 (1934).} Then, the growing range of economic control by the states brought them into conflict with the federal courts. The initial shift from a fundamentally \textit{laisses-faire} emphasis in government to its modern regulatory activities largely affected public utilities. At first it expressed itself through legislative rate regulation. To federal judges the invalidation of such measures presented only a simple application of conventional doctrines to prevent irreparable damages. To the general public it was nullification of vital state policy by a single federal judge.
Congress promptly responded to this feeling,44 and by the Act of 1910 45 applied the safeguards against too irresponsible judicial restraint of the Interstate Commerce Commission to the protection of state laws. Thereafter 'no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state' because of unconstitutionality could be issued except by a three-judge district court, and an appeal could be taken directly to the Supreme Court. That Congress should have used this device only when statutes were called into question, and not for orders of state commissions, is a striking instance of the narrowly empiric nature of the legislative process. For by 1910 it had become abundantly clear that effective utility regulation demanded expert administration, and the movement for the establishment of utility commissions was well under way.46 But for many judges these new administrative agencies only served to render the trend towards social legislation still more un­congenial. Courts seemed as unaware of the emergence of modern administrative law as an indispensable evolution of the Rule of Law, as the great common-law judges in the days of Coke were unresponsive to the proper rôle of emerging equity.47 And so, by the Act of March 4, 1913,48 protection against frustration of state

44 See 45 CONG. REC. 7453-58 (1910).
45 36 STAT. 557 (1910).
46 See MOSEH AND CRAWFORD, PUBLIC UTILITY REGULATION (1913) 22-26.
The Wisconsin and New York Public Service Commissions were established in 1907.
47 American scholars early called attention to the social-economic phenomena which were bound to give impulse to an Anglo-American administrative law, see GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893); freund, THE LAW OF THE ADMINISTRATION IN AMERICA (1894) 9 POL. SCI. Q. 403, and, some twenty years later, the present Chief Justice and eminent leaders of the bar sounded warning. See Hughes, SOME ASPECTS OF THE DEVELOPMENT OF AMERICAN LAW (1916) 39 N. Y. B. A. REP. 266, 269-70; Root, Public Service by the Bar (1916) 41 A. B. A. REP. 355, 358-69; Sutherland, PRIVATE RIGHTS AND GOVERNMENT CONTROL (1917) 42 A. B. A. REP. 197. The powerful influence of Professor Dicey's THE LAW OF THE CONSTITUTION (But cf. JENKINS, THE LAW AND THE CONSTITUTION (1933) passim) tended to obfuscate understanding of the actual development of English law, but Local Gov't Board v. Arlidge, [1915] A. C. 120, compelled Dicey to acknowledge (See Dicey, THE DEVELOPMENT OF ADMINISTRATIVE LAW IN ENGLAND (1915) 31 L. Q. REV. 148) what Maitland, with his usual eye for reality, had been expounding at Cambridge as early as 1887. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908) 415 et seq. See COMMONWEALTH FUND STUDIES IN ADMINISTRATIVE LAW; HARVARD STUDIES IN ADMINISTRATIVE LAW; Frankfurter, THE TASK OF ADMINISTRATIVE LAW (1927) 75 U. OF PA. L. REV. 614.
48 37 STAT. 1013. The Act was amended in 1925 to extend the requirement of
regulation by a single federal judge and direct review by the Supreme Court was extended to administrative as well as legislative action.

Shortly after the amendment of 1913, the general movement of social legislation led to the first extension of the Supreme Court's appellate jurisdiction over state court decisions. Probably no single episode in American judicial history illustrates better the limited relevance of doctrines derived from specialized political preoccupation in legal arrangements when the emphasis of government shifts from politics to economics. The authority of the Supreme Court to review state decisions was, naturally enough, confined by the famous Section 25 of the first Judiciary Act to instances where the state courts denied a federal claim. The assumption that state courts would not find in the Federal Constitution a bar to state laws was valid enough at a time of historic jealousy against national authority. Moreover, the psychological environment in which state court judges move is very different from what it was a hundred years ago, now that economics and law have become more closely interrelated and the vague contours of the Fourteenth Amendment have greatly extended the orbit of judicial discretion. And so, when, in 1911, the New York Court of Appeals temporarily arrested the progress of the now commonplace workmen's compensation legislation, partly by invoking the Fourteenth Amendment, the inability to secure authoritative interpretation of that clause from the Supreme Court inevitably led to legislation.

three judges and the right of appeal to the Supreme Court to the final hearing in such suits. 45 Stat. 958, 28 U. S. C. § 380 (1934). The statute does not apply, however, where an interlocutory injunction is not sought. Ex parte Buder, 271 U. S. 461 (1926). The relation between federal courts and state public utility regulation remained a perplexing problem. The statutory proceeding staying proceedings in the federal courts, if, any time before final hearing, a suit is brought in the state court to enforce the order and the order was stayed pending determination, was not adequately utilized by the states. See Pogue, State Determination of State Law and the Judicial Code (1928) 41 Harv. L. Rev. 623. But hostility to federal curbs on local utility regulation led to still further curtailment of the power of the lower federal courts. The Johnson Act deprived the district courts of jurisdiction in such cases where a "plain, speedy and efficient remedy may be had at law or in equity in the courts of such state." 48 Stat. 775, 28 U. S. C. § 41 (1), (2a) (1934).

46 Ives v. South Buffalo Ry., 201 N. Y. 277, 94 N. E. 431 (1911). This case was deemed contrary to the implications of the Supreme Court decision in Noble State Bank v. Haskell, 219 U. S. 104, 575 (1911).
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3. Construction of Federal Regulation
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      - 9
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   b. Federal Employers’ Liability Act, etc.
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Constitutional Law *
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Construction of Miscellaneous Statutes

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Crimes and Forfeitures †
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Due Process and Equal Protection

1. Regulation and Economic Enterprise
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2. Relating to Procedure
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3. Relating to Liberties of the Individual Citizen
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† Exclusive of cases under the Prohibition Acts.
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The Act of March 23, 1914, as sponsored by Senator Elihu Root, extended the Supreme Court's review to a state court ruling even when it sustained a claim under the United States Constitution. This was accomplished by allowing the use of *certiorari* to the Supreme Court in such cases.

Although today dramatic ingredients may bulk large, the Judiciary Act of August 24, 1937 will surely take its place as part of the sequence of congressional adjustments of judicial administration which begot the Acts of 1903, 1910, 1913, 1914. That the fate of acts of Congress should depend, even temporarily, upon the view of a single judge; that the United States should have no standing to defend effectively a law of the utmost national importance simply because the canons of legal procedure make the controversy merely a private litigation; that the ultimate validity of a statute may be a long drawn out process depending in part upon the state of the Supreme Court's docket and its notions of exigency, have long been sources of anxiety to students of public

50 38 Stat. 790, 28 U.S.C. § 344(b) (1934). However, since the New York Court of Appeals in the Ives case had rested its decision partly on the state constitution, the Supreme Court would have been without jurisdiction to reverse the judgment. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934). But cf. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 88 (1936). But the incongruity of having state and federal courts give different meaning to the same concept of "due process" contained in different constitutions eliminated fine shadings in jurisdictional learning as to the availability of such a statute as that of March 23, 1914. As a matter of history, "New York immediately adopted a constitutional amendment legalizing workmen's compensation legislation, and a statute passed under this amendment was upheld by the Supreme Court. New York Central R. R. v. White, 245 U.S. 188 (1917). Accord: Arizona Employers' Liability Cases, 250 U.S. 400 (1919).

51 50 Stat. 811. See Legis. (1937) 57 HARV. L. REV. 148. To govern appeals under this Act the Court, January 10, 1938, promulgated Rule 46. "Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under Section 2 of the Act the service required by paragraph 2 of Rule 12 shall be made on all parties to the suit other than the party or parties taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

52 Delay in settling the constitutionality of important statutes is not confined to the United States. The Canadian Industrial Disputes Investigation Act of 1907 was declared *ultra vires* the Dominion Parliament by the Privy Council after it had been in operation for eighteen years. *Toronto Electric Comm. v. Snider*, [1925] A.C. 396.
law and have occasioned remedial proposals in Congress. To be sure, in a period when legislative energies run strong and the judiciary interposes powerful and persistent restraints, the pace of procedural reform is accelerated. At no time in the country's history did the judiciary play a more permeating part in the affairs of the country. At no time in the country's history was there a more voluminous outpouring of judicial rulings in restraint of acts of Congress than the body of decisions in which the lower courts, in varying degree, invalidated every measure deemed appropriate by Congress for grappling with the great depression. Friction between Congress and the judiciary was intensified by the atmosphere which enveloped some of the opinions of the lower court judges. There were utterances more appropriate to the hustings than to the bench, reminiscent of political harangues by early Federalist judges which involved the federal judiciary for the first time in the conflict of politics.

As in similar periods when the judiciary interposed obstacles to legislative policies having wide popular support, the traditional scope of judicial review in constitutional controversies came under scrutiny and numerous bills proposing drastic modifications were introduced in both houses of Congress. The past further re-


55 See, e.g., DAVIS, LIFE OF MARSHALL (1919) 30, n.1; 2 McRee, Life of Iredell (1857) 505; 1 Warren, The Supreme Court in United States History (rev. ed. 1926) 165, 274.

56 Several years prior to the President's message on Feb. 5, 1937 concerning reform of the federal judiciary, a large number of bills were proposed to deprive the courts altogether of their power to declare federal statutes unconstitutional. 74th Cong., 1st Sess., H. R. 4534, 8123; H. J. Res. 187, 335, 380; S. 1581; S. J. Res. 147. 74th Cong., 2d Sess., H. R. 10315; H. J. Res. 462, 509, 655. 75th Cong., 1st Sess., H. R. 44, 50, 51, 3265, 3855, 4270. The proposal to require the concurrence of various percentages of the Justices to declare acts of Congress unconstitutional was also revived. 74th Cong., 1st Sess., H. R. 8100, 8123, 8168; H. J. Res. 301. 74th Cong., 2d Sess., H. R. 10102, 10196, 10362; S. 3739. 75th Cong., 1st Sess., S. 1098, 1176.
peated itself in that narrower measures for reform were urged to remove inadequacies in the existing federal procedure when applied to cases of large public moment. Speedy justice has been the aim of Anglo-American law reformers since Magna Carta, and evils entailed through avoidable delay in adjudication were deemed to be especially far-reaching when the operation of economic measures affecting large regions or even the whole nation depended upon judicial validation. The motive power for such reform is usually some concrete experience, close to the interests of a particular legislator. The prosecution of its program by the Tennessee Valley Authority had a strong regional hold on Senator Black of Alabama. The decision of Judge Grubb on November 28, 1934, put at hazard a scheme of public development which, after more than a decade of political struggle, received overwhelming congressional approval. Clothed as abstract issues of governmental power, the litigation affected vast investments and touched the lives of millions of people. Yet ultimate decision, argued Senator Black, had to take the tortuous path of reaching the Supreme Court through the circuit court of appeals.

By a bill introduced on March 6, 1935, Senator Black addressed himself to the single, narrow purpose of securing prompt, definitive disposition of decrees restraining the operation of federal laws. The crux of his proposal was to eliminate the circuit court of appeals in these cases and to route them from the district court

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88 The fight over Muscle Shoals had been under way for years when Senator Black entered the Senate, in the 70th Congress, 1st Session (1927). During four sessions of Congress, Senator Black was active in support of this legislation. 69 Cong. Rec. 2521-29, 3473-64, 4087-94, 4179-90, 4253-55, 4310-34, 4391-93, 4449-68, 4510-34, 4536-51, 9698, 9825-26 (1928); 70 Cong. Rec. 2312 (1929); 71 Cong. Rec. 1963, 2148, 3786, 5591, 5753 (1929); 72 Cong. Rec. 584, 6373-77, 6400-04, 6427-40, 6495-508, 6564, 10849-52, 10995, 11177-78, 11313, 11672, 11965-70, 12382-85 (1930); 74 Cong. Rec. 317-18, 1922-04, 2920, 3375-304, 3376-91, 3675, 3691, 5017, 5169-85, 5720-15, 7070-93 (1931).
90 See Hearings before the Committee on Judiciary on S. 2176, 74th Cong., 1st Sess. (1935) 13 et seq.
directly to the Supreme Court. The bill was referred to the
Senate Committee on Judiciary and the Court invited to express
its views. On behalf of the Court, the Chief Justice appeared with
two of his colleagues and gave reasons against the enactment of
the measure. The public interest with which Senator Black
was concerned seemed to the Court sufficiently safeguarded through
its power to jump a circuit court of appeals by the discretionary
use of certiorari. To open the door to every case that came
within the ambit of the Black bill, seemed to the Chief Justice to
be an inroad on the philosophy of selective jurisdiction under-
lying the Act of 1925 without compensating advantage. Not
to have its docket thrown out of balance was a driving con-
sideration with the Court. Probably, also, it regarded the illumina-
tion which serious questions should derive from passing through
a circuit court of appeals as valuable to the perspective and thor-
oughness of the Court’s own deliberative process. The bill never
emerged from Committee.

The fate of acts of Congress in the lower courts and some of
the circumstances attending their invalidation were not calculated
to allay congressional concern over procedural inadequacies. The

61 S. 2176, 74th Cong., 1st Sess. It provided direct appeal to the Supreme
Court from any “restraining order, decree, judgment, or injunction prohibiting
any Federal official or employee, or Federal agency or bureau” from carrying out
a federal statute.

62 Mr. Justice Van Devanter and Mr. Justice Brandeis appeared with the Chief
Justice. Mr. Justice Van Devanter briefly reiterated the views of the Chief Justice;
Mr. Justice Brandeis merely expressed concurrence with what had been said by his
colleagues.

63 See Hearings before the Committee on Judiciary on S. 2176, 74th Cong.,
1st Sess. (1935) 2–4. The Chief Justice pointed to the exercise of this power in the
Gold Clause and Railroad Retirement Act cases and assured the Committee that
there was every probability of similar action in future cases involving the con-
stitutionality of important acts of Congress.

64 See id. at 6–8. The Chief Justice also stated that the provision for appeals
from restraining orders and interlocutory injunctions would cause the bill to delay
decisions upon the constitutionality of statutes. Senator Black controverted the
force of all three points made by the Chief Justice. He stated that every case men-
tioned by the Chief Justice to prove that the bill was unnecessary had taken two or
three months before it reached the Supreme Court after decision by the district
court, and that under the proposed bill that could be accomplished in ten days.
He also denied that the statute would have a dilatory effect or unduly burden the
Court, stating that reliance could be placed upon the Attorney General to exercise
the right of appeal only when an important issue would be presented to the Court.
See id. at 13 et seq.
existing scheme of procedure did not preclude delay in securing the final word from the Supreme Court. Thereby uncertainty hung over many of the most important activities of government. Moreover, the ability of the government adequately to represent the national interest within the framework of purely private litigation, while an old problem, emerged with new intensity. Chairman Sumners of the House Committee therefore renewed the proposal of the Black bill and widened its scope. His bill provided both for direct review and for participation by the United States in litigation in which, under settled practice, it would have no standing as a party.\footnote{Attempts to meet this problem in the past have been through the device of allowing the United States to appear as amicus curiae. \textit{E.g.}, Pollock v. Farmers' Loan \& Trust Co., 157 U. S. 419, 469, 499 (1895); First Employers' Liability Cases, 207 U. S. 493, 499 (1908); \textit{Ex parte Grossman}, 267 U. S. 87, 108 (1925). But the increasing importance of facts in constitutional decisions and the difficulties inherent in the process of establishing them before the appellate tribunal keeps this expedient from being a satisfactory solution. See \textsc{Frankfurter and Landis, The Business of the Supreme Court} (1928) 310–18. For a prior statutory provision regarding the appearance of state officers in private suits, see \textsc{New York Executive Law} § 68 (1933).} But attention was diverted from these attempts to

\footnote{H. R. 2260, 75th Cong., 1st Sess. This bill was introduced in the House and referred to the Committee on Judiciary on January 8, 1937. 81 CONG. REC. 139 (1937). The bill did not contain Section 3, but in other respects was similar to the present Act. The bill was amended and reported favorably by that Committee, debated in Committee of the Whole, reported favorably, and passed by the House on April 7. H. R. REP. NO. 212, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 3273.}

\footnote{In the meantime, on February 5, 1937, President Roosevelt addressed a special message to the Congress recommending the enactment of legislation for judicial reform and attached a draft bill embodying his suggestions. The proposed bill was introduced, as S. 1392, by Senator Ashurst, and was referred to the Committee on Judiciary. After extensive hearings this committee made an adverse report on June 14. \textit{Hearings before Senate Committee on Judiciary on S. 1392, 75th Cong., 1st Sess.} (1937); SEN. REP. NO. 711, 75th Cong., 1st Sess. (1937). On July 6, Senator Robinson introduced an amendment to S. 1392, in the nature of a substitute, which had been proposed by Senator Logan for himself and for Senators Hatch and Ashurst on July 2. After a debate lasting through July 13, a motion to recommit the bill to the Committee on Judiciary was passed on July 22. 81 CONG. REC. 7375–81 (1937). A bill similar to S. 1392 was introduced in the House as H. R. 7765, on July 6, and was referred to the Committee on the Judiciary. 81 CONG. REC. 6869 (1937).}

\footnote{On July 28, the Senate Committee on the Judiciary reported out H. R. 2260 with amendments, and recommended that the bill pass. SEN. REP. NO. 965, 75th Cong., 1st Sess. (1937). The bill was debated on August 7, amended and passed as amended. 81 CONG. REC. 8515 (1937). On August 9, the House disagreed to the amendments, requested a conference and appointed conference. 81 CONG. REC. 8557}
adapt the ways of private litigation to their serious public implications by the dramatic emergence of the great political controversy to which the President's proposal regarding the Supreme Court gave rise. Only after this issue was no longer before Congress, did the Senate address itself to these seemingly technical aspects of litigation. Their important relation to the whole process of constitutional litigation then became manifest, and the Senate Committee on the Judiciary unanimously reported the Judiciary Act of 1937 in substantially its present form.

In sum, the new Act gave matured expression to the combined aims of the Black and Sumners bills. The decision in In re American States Public Service Co.65 vividly demonstrated that the power of the United States to share in the control of litigation, whereby the constitutionality of legislation of the profoundest national import would be effectively tested, ought not to be thwarted by the use of subtle legal forms available to a private litigant. Section 1 of the Act therefore put the exclusion of the United States from such litigation beyond the power of any judge.66 Again, the denial

(1937). The Senate, having insisted on the amendments, appointed conferees the same day. 81 Cong. Rec. 8537 (1937). On August 10, the Senate conference report was made, and was adopted by the Senate. 81 Cong. Rec. 8569 (1937). The House conference report, made on the same day, was adopted on August 11 after debate. 81 Cong. Rec. 8795 (1937). On August 24, the President approved the bill with an explanatory memorandum. 81 Cong. Rec. 9679 (1937).

65 12 F. Supp. 667 (D. Md. 1935), aff'd sub nom. Burco, Inc. v. Whitworth, 81 F.2d 721 (C. C. A. 4th, 1936). In this case the lower courts considered the constitutionality of the Public Utility Holding Company Act of 1935 upon a trustee's petition for instructions under 77B. The Government did not receive notice of the proceedings until the petitions had been filed, and the issues joined and largely concluded by admissions of fact and law in the pleadings. Counsel for the Government appeared as amicus curiae ten days after the filing of the petitions, but were denied a continuance for the purpose of investigation. The Government was allowed to cross-examine on the issue of jurisdiction but was not allowed to share in building the record of the substantive issues. The district court held the Act unconstitutional in its entirety; the circuit court of appeals held the Act unconstitutional as applied to the particular company. When certiorari was asked the Government submitted a statement in opposition, fundamentally because under the circumstances of the litigation the record was inadequate for a decision upon the constitutional problem. It was urged that the parties, through collaboration in the pleadings and in the presentation of testimony, had not made an accurate representation of the facts underlying the relation of the Act to the reorganization and the constitutionality of the Act as applied to the debtor. The Supreme Court denied certiorari, 297 U. S. 724 (1936).

66 Whenever the constitutionality of an Act of Congress affecting the public in-
by the Supreme Court of a speedy test of the Public Utility Holding Company Act of 1935, sought both by the utility interests and by the Government in the Electric Bond & Share case, reinforced the momentum of the proposals for direct review. This is the essence

terest is drawn into question, the United States is entitled to intervene and become a party for the presentation of evidence and argument upon the constitutionality of the Act.

A deluge of injunction suits had made it necessary for the Securities & Exchange Commission practically to suspend the operation of the Public Utility Holding Company Act of 1935 until a decision upon its constitutionality could be obtained in an adequate test of the law such as was involved in its suit against the Electric Bond & Share Co. The Supreme Court upheld the staying of suits to enjoin the enforcement of the Act until the decision of the district court in that case. Landis v. North-American Co., 299 U. S. 248 (1936); see Note (1937) 50 Harv. L. Rev. 615. Upon a stipulated record, the result of a year's negotiation between the parties, Judge Mack upheld the validity of the registration provisions. Securities & Exchange Comm. v. Electric Bond & Share Co., 18 F. Supp. 121 (S. D. N. Y. 1937). An appeal was taken to the Circuit Court of Appeals for the Second Circuit and a petition for certiorari filed in the Supreme Court. The Government joined in a request for certiorari, setting forth the necessity for speedy determination and pointing out that the nature of the record made intermediate review by the circuit court of appeals superfluous. The Supreme Court, however, denied certiorari and postponed by at least six months the earliest possible time at which the Act could become effective. 301 U. S. 709 (1937). In Davis v. Boston & Maine R. R., 299 U. S. 614 (1936), there was an attempt to secure certiorari to review the action of a district court upholding the constitutionality of the unemployment provision of the Social Security Act. No questions of fact were involved in the case and it was desirable to have a quick decision upon the constitutionality of the statute, both from the standpoint of the large number of people who had to make returns and pay the tax within six and a half weeks, and from that of the Government, faced as it was with large expenditures in setting up administrative machinery and with the possibility of a multiplicity of suits for want of a speedy decision. Certiorari was, however, denied. The denial of certiorari to the Court of Claims in Continental Mills, Inc. v. United States, 299 U. S. 614 (1936), delayed a decision upon the constitutionality of the provisions of the Revenue Act of 1936 dealing with the recovery of taxes paid under the Agricultural Adjustment Act. Here, too, the Government joined in the request for certiorari.

Certiorari was granted prior to decision by the circuit court of appeals in the cases involving the Gold Clause, the First Railroad Retirement Act, the Bituminous Coal Conservation Act and the processing tax on Philippine coconut oil. The Government did not seek review prior to decision by the circuit court of appeals in cases involving the validity of the Agricultural Adjustment Act, Titles I and II of the National Industrial Recovery Act and the Tennessee Valley Authority Act. Cases involving the validity of the National Labor Relations Act and the Silver Purchase Act of 1934 reached the Supreme Court as speedily as possible. The Government did not file memoranda on the question of certiorari in the cases between private persons involving the validity of the Bankhead Cotton Control Act, the first and second Frazier-Lemke Acts and the Railway Labor Act.
of Section 2 of the Act. Finally, the inevitable irritation of Congress at the free-handed way in which single judges throughout the country enjoined the enforcement of some of the most vital meas-

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70 Section 2 gives all parties a right to appeal to the Supreme Court from any interlocutory or final judgment or decree involving a decision against the constitutionality of an act of Congress made by any court of the United States in a case to which the United States, any agency, officer or employee thereof was a party or to which the United States had intervened pursuant to Section 1.

The legislative history of the first two sections of the Act is extremely enlightening. The bill which was originally passed by the House was not drafted on the theory that the United States should become a party but gave the United States the right to appear in any proceeding in which it was not already represented in which the constitutionality of a federal statute was drawn into question, provided that the court deemed the question substantial. The right of direct appeal to the Supreme Court of the United States was given to the United States alone, and this right existed whether or not the United States had appeared in the lower court. 81 Cong. Rec. 3573 (1937). The fact that the right of direct appeal was given to the United States alone, whether it was a party or even whether it had appeared, raised constitutional difficulties. Muskat v. United States, 218 U. S. 346 (1914); Columbus & Greenville Ry. v. Miller, 283 U. S. 96 (1931); see Legis. 1937) 52 Harv. L. Rev. 148, 149-51. Aware of these doubts, the Senate Committee on Judiciary changed the theory of the bill to provide that the United States should become a party, but only on showing that it had a legal interest in the case. The Committee stated, however, that the interest was not limited to a pecuniary interest but covered the rights and duties relating to sovereignty. See Sen. Rep. No. 963, 75th Cong., 1st Sess. (1937) 2; cf. Texas v. Interstate Commerce Comm., 258 U. S. 158 (1922); In re Debs, 158 U. S. 564, 584 (1895). The Senate Committee retained the requirement that the lower court find the question substantial, and eliminated many objections to the House bill by putting the section relating to appeals in its present form. Sen. Rep. No. 963, supra. The bill was passed by the Senate, after the requirement that the lower court find the question substantial had been eliminated. 81 Cong. Rec. 8515 (1937). The conference report, adopted by both houses, retained the theory of the Senate bill that the United States become a party but eliminated the requirement that the United States have a legal or probable interest; it inserted the requirement that the statute involved affect the public interest. 81 Cong. Rec. 8537, 8705 (1937).

This compromise eliminated many of the defects of both House and Senate bills. Through its provision that the United States alone could appeal, the House bill rested upon the incorrect assumption that the interest of the United States in a favorable decision as to the constitutionality of a federal statute, in a case to which neither it nor any of its agents is a party, is sufficient to create a case or controversy. By providing that the original party injured by the decision against constitutionality could appeal, the Senate bill made it unnecessary in any case in which this right was exercised to consider the Government as the only party whose interests could sustain a case or controversy. In such cases it would be possible to support the participation of the United States as being merely auxiliary to a controversy already in existence. But the provisions inserted by the Senate Committee which limited the right of the United States to intervene to cases in which it had a legal interest made
ures ever enacted, made inevitable the requirement of Section 3 for a court of three judges to set aside the will of Congress. 71 This feeling fused with considerations derived from the gravity of the issues presented by such litigation and from the desire for their thorough exploration before they reached the Supreme Court. 72

The new Judiciary Act contains inevitable frailties of draftsmanship. Like all its predecessors, it will have to be supplemented by authoritative construction. 73 But the operations of the new

it possible that, as a matter of construction, the statute was dependent upon the right of the United States to maintain an independent suit. The conference amendment eliminated this difficulty. Under the bill as passed, the right of the United States to participate in a controversy already in existence and the right of the United States to maintain a suit of its own are clearly separated; the latter problem arising only when the United States attempts to appeal by itself.

71 Injunctions by single judges practically forced suspension of the Public Utility Holding Company Act of 1935 and of the construction of power projects under Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935. Approximately one quarter of the taxes due under the Agricultural Adjustment Act were impounded by injunctions. There was considerable injunctive interference with the operation of the National Labor Relations Act although there seemed to be no grounds for equitable relief. There was not a great deal of equitable interference with the operation of Title I of the National Industrial Recovery Act of 1933 or with the taxing provisions of the Social Security Act. See Injunctions in Cases Involving Acts of Congress, Sen. Doc. No. 42, 75th Cong. 1st Sess. (1937).

Probably the greatest single psychological impression was created by the extremely broad preliminary injunction issued by Judge Gore in Tennessee Electric Power Co. v. Tennessee Valley Authority, M. D. Tenn., Dec. 14, 1936, rev'd, 90 F.(2d) 885 (C. C. A. 6th, 1937). It was estimated, in a letter by the Chairman of the Authority, that the injunction cost the Authority $1,500,000 in power revenue alone. See Injunctions in Cases Involving Acts of Congress, Sen. Doc. No. 44, 75th Cong., 1st Sess. (1937) 7–8. For the feelings which the Gore injunction aroused in Congress, see 81 Cong. Rec. 235, 248, 480–82, 2142–43 (1937). Whatever may have been the specific justification as a matter of substantive law of this or that individual decision, the cumulative effect of this barrage of injunctions by single judges on the wide front of governmental activity aroused a sense of disquietude regarding the potentialities of the existing procedural situation.

72 Section 3 provides that interlocutory or permanent injunctions restraining the enforcement or operation of an act of Congress as unconstitutional shall be issued only by three-judge district courts, and that there shall be an appeal to the Supreme Court from any decree granting or denying an interlocutory or permanent injunction in such a case.

73 The relation of the right of appeal to the Supreme Court granted by the new Act to the right of appeal to the circuit court of appeals is not explicitly treated. The right of appeal to the Supreme Court from the decision of a single judge under Section 3 probably should not preclude an appeal to the circuit court of appeals. On the other hand an appeal to the circuit court of appeals from a three-judge
procedure, as has been true of all important judiciary acts, will depend mostly on the general environment in which it moves. Thus it becomes sheer speculation to estimate the extent to which clashes between Congress and the judiciary would have differed had the enactment of last August governed constitutional adjudications since March 4, 1933. The materials for prophecy of its future consequences for American constitutional law are no less exiguous. Some obvious factors in the administration of the Act will limit the freedom of the federal courts and that of the Government as litigant. The requirement of three judges entails an absorption of judicial resources which may have unexpected repercussions upon judicial efficiency, should there be a plethora of litigation. Again, the course of litigation is not automatic. It depends not a little on the strategy of litigants. To the extent that the new Act makes mandatory appeals to the Supreme Court from rulings adverse to the validity of legislation, it circumscribes the discretion of the Attorney General. But these are all factors contingent upon larger forces quite outside any judiciary act. They depend upon the future of legislation, its range and volume; they depend on the impregnating political and psychological atmosphere. The Judiciary Act of 1937 is part of a continuous history of interplay between the judiciary and the other branches of the government. Insofar as the Act leaves creative scope for the courts, its ultimate significance in that historic process will be determined by the Supreme Court's attitude toward the inarticulate major premise which underlay the enactment of that statute.

district court would be futile and would doubtless be found to be precluded by Section 3.

14 The device of a stay order which was used in Landis v. North American Co., 299 U. S. 248 (1936), may be used to prevent the waste of effort involved in simultaneous consideration of the same issue by more than one three-judge court. This may be supplemented by the holding that a plaintiff is not entitled to a three-judge court when the complaint plainly does not state a case. Ex parte Poresky, 290 U. S. 30 (1933). The increase in the obligatory jurisdiction of the Court naturally directs attention to the effect which it will have upon the docket of the Court in a period of legislative exuberance. An examination of the cases of the last four years suggests that the increase in the number of appeals caused by the Act will largely be absorbed by an increase in those disposed of on the jurisdictional statement.
If it be true that substantive common law was "gradually secreted in the interstices of procedure" \( ^{75} \) it is no less true that procedure, in large measure, has determined the course of American constitutional law. To utilize the technical forms of litigation devised originally for relatively narrow controversies between man and man in the adjustment of great public issues, is one of the most creative achievements of lawyers. The transference of ordinary legal procedures and modes of thought to such politico-legal controversies could not have been accomplished, and certainly could not have maintained itself, but for procedural safeguards devised partly by the Supreme Court itself and partly by Congress, by which the course of constitutional adjudication was to be confined. With full consciousness of the terrific implications of the power of judicial review over legislation, particularly in view of the silences and spacious phrasing of the Constitution, the Supreme Court evolved criteria and practices for the exercise of its "delicate" function. And so it has come to pass that the history of substantive constitutional law is intertwined with professions and practices delimiting the controversies which the Court will take, as well as the scope of its decision when it takes them.

Despite the most tempting appeals of patriotism, the Supreme Court at the very outset of its career declined the rôle of adviser even on legal aspects of policy, and defined its function strictly as that of a court of law. In 1793 the first Chief Justice, on behalf of himself and his Associates, in graceful Addisionian language, abstained from advising Washington "extra-judicially", "being judges of a court in the last resort." \( ^{76} \) Nor could its opinion be solicited merely because invited through the formalities of a legal

\[ ^{75} \) See MAINE, EARLY LAW AND CUSTOM (1883) 389, quoted in MAITLAND, EQUITY (1909) 395.

\[ ^{76} \) J. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (1891) 486. The Court might easily have "slipped into the adoption of a precedent that would have engrailed the English usage upon our system." J. B. Thayer, Advisory Opinions in Legal Essays (1908) 53-54; cf. Frankfurter, Advisory Opinions (1930) 1 ENCYC. SOC. SCIENCES 475. In at least two instances, both affecting Monroe, the Court departed from this principle. 1 HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS (1931) 178; 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1946) 595-97.
proceeding. Before their reply to Washington, the Justices individually, in matters coming before them on circuit, had refused to share in the enforcement of an act of Congress which did not leave them finality of adjudication.77

"Judicial power", however large, has an orbit more or less strictly defined by well-recognized presuppositions regarding the kind of business that properly belongs to courts. Their business is adjudication, not speculation. They are concerned with actual, living controversies, and not abstract disputation.78 While adjudication has phases of lawmaking, legislatures not courts are policy-makers in the large meaning of the term.79 Courts, therefore, act within relatively narrow bounds of discretion. Their jurisdiction is contingent upon the means of illumination and the resources for judgment to which the technique of an Anglo-American litigation limits them.80 To be sure, these are the historic deposits of the operations of courts in the English-speaking world for centuries. That is precisely the strength of the doctrines of judicial self-limitation. But these considerations, rooted as they are in the profound empiricism of the common law, have special significance when applied to the peculiar function of the Supreme Court in our federal scheme.

It is true enough, as a matter of doctrine, that the Supreme Court, like every other Anglo-American court, only adjudicates

77 Hayburn's Case, 2 Dall. 409, 410n. (U. S. 1798).
78 United States v. Ferreira, 13 How. 40 (U. S. 1851); Gordon v. United States, 2 Wall. 551 (U. S. 1864); Pelham v. Rose, 9 Wall. 203 (U. S. 1869); Singer Manufacturing Co. v. Wright, 141 U. S. 596 (1891); Muskrat v. United States, 219 U. S. 346 (1912); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928). There must be an actual adverse interest between the litigants.
80 See Gray, NATURE AND SOURCES OF THE LAW (1909) 211-30, 495-512; Holmes, J., dissenting, in Southern Pacific Co. v. Jensen, 244 U. S. 205, 221 (1917). "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."
the rights of litigants, even though a particular litigation may
implicate a constitutional issue. But howsoever inescapable
the duty cast upon the Court, the consequences of invalidate
legislation necessarily involve a clash within the different organs
of government. The legislature of a state or its governor, the
Congress or the President, has affirmed and the Supreme Court has
denied: that is the essence of an adjudication of unconstitu-
tionality. This makes the decisive difference between litigation
enmeshed in affairs of state and the staple business of adjudicating
ordinary private rights. To observe the traditional conditions
binding Anglo-American courts in the exercise of their jurisdiction
has, in constitutional controversies, the added and vital sanction

81 BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912) passim; J. B.
THAYER, CASES ON CONSTITUTIONAL LAW (1895) 48 et seq.
82 In an address as president of the American Bar Association, John W. Davis,
Esq., said: “But august as are the functions of the court, surely they do not go one
step beyond the administration of justice to individual litigants... Shall we
say that when an American stands before the court demanding rights given
him by the supreme law of the land, the court shall be deaf to his appeal? Shall
wrongs visited upon him by the illegal excesses of Congress or legislatures be
less open to redress than those which he may suffer from courts, or sheriffs, or mili-
tary tyrants or civilian enemies? If this be so, if in any such case, the ears of
the court are to be closed against him, it is not the power of the court that has
been reduced but the dearly-bought right of the citizen that is taken away.”
Davis, Present Day Problems (1923) 48 A. B. A. REP. 193, 204.

Upon these comments by Mr. Davis, Lord Birkenhead made the following
observations: “Your constitution is expressed and defined in documents which
can be pronounced upon by the Supreme Court. In this sense your judges are
the master of your executive. Your constitution is a cast-iron document. It
falls to be construed by the Supreme Court with the same sense of easy and
admitted mastery as any ordinary contract. This circumstance provides a break-
water of enormous value against ill-considered and revolutionary change. Whether
if the forces behind revolutionary change become menacing and strong enough the
breakwater will serve must be left for the future to determine. But an outsider
must fully and absolutely admit that up to the present its strength has seemed
extremely adequate. Your President is one for whom intellectually I have a great
admiration; and personally a deep affection. His masterly address today carried
me entirely with him. But surely one refinement was a little subtle. He said that
the Supreme Court had not the right in abstracto to construe your fundamental
constitutional document; but only in relation to the issues presented by an indi-
vidual litigation. But is this in ultimate analysis a very serious derogation? When
an issue challenged by an individual raises the question whether a law is constitu-
tional or not, the decision of the Supreme Court decides this question for all
time; and if the decision is against the legislature, the attempted law is stripped
of its attempted authority.” Birkenhead, The Development of the British Constitu-
tion in the Last Fifty Years (1923) 48 A. B. A. REP. 224, 226.
of avoiding undue political conflicts. To this end the common-law attitude of judicial empiricism has expressed itself in procedural doctrines more sharply relevant to constitutional cases. In myriad instances the Supreme Court has announced rules of self-limitation to avoid entering unduly into an area of political conflict or enlarging that area needlessly.

The Court is not the forum for a chivalrous or disinterested defense of the Constitution. Its business is with self-regarding, immediate, secular claims. Legislation will not be struck down except to vindicate a legally protected interest;¹⁸ damage alone is insufficient.¹⁹ But an assailant of legislation can only urge his interest, not another's." One cannot object to a state tax as an infringement of the commerce clause when the taxed transactions are outside the bounds of interstate commerce. To be sure, this oversimplified generalization smothered subtleties presented by a statute which apparently covers both intrastate and interstate dealings in a single, unseparated provision.⁶⁸ These subtleties explain the confusion and fluctuation in applying the generality.⁶⁷

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⁶⁵ Austin v. The Aldermen, 7 Wall. 694 (U. S. 1867); Tyler v. Judges of the Court of Registration, 179 U. S. 405 (1900); New York ex rel. Hatch v. Reardon, 204 U. S. 152 (1907).

⁶⁶ There are two main aspects of the problem. The first arises when a party affected by a statute argues that in a different situation the same statutory language would be unconstitutional. The second arises when the party argues that in the particular situation in which the statute is being applied it is unconstitutional as to some third person. This was dealt with in Holden v. Hardy, 159 U. S. 356, 397 (1895): "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employers, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class."

⁶⁷ Compare People ex rel. Hatch v. Reardon, 204 U. S. 152 (1907), with Liggett
Just as equity, at common law, created its own jurisdictional problems with special reference to the avoidance of friction between two tribunals, so resort to equity for invalidating legislation generates its special problems, if needless friction between the judiciary and other branches of government is to be avoided. The evasion of the requirement for damage that cannot be compensated has a pungency of consequences in these public law controversies which strikingly underlines traditional equity practice. Public interest, however, exerts contradictory pressures. Considerations for abstention from decision, unless technical equity requirements are satisfied, are met with the temptation to make use of the flexible facilities of equity for prompt allaying of uncertainty. And so the cases reflect an oscillation between a very strict and a very easy-going attitude toward taking equity jurisdiction to decide constitutionality. Even where Congress for obvious fiscal reasons has withdrawn power to enjoin the collection of federal taxes, the Supreme Court has grafted exceptions upon the statute.

The fecund possibilities of equity have been skilfully utilized in proceedings which introduce distorting elements when employed for a constitutional adjudication. The ordinary stockholder’s suit invented for the adjustment of internal corporate difficulties, operates in an environment very different from its com-


Moor v. Texas & New Orleans R. R., 297 U. S. 101 (1936), represents a healthy limitation upon the scope of injunctive relief in constitutional cases. A cotton grower sought a mandatory injunction to compel a railroad to accept for shipment cotton which lacked the bale tags required by the Bankhead Cotton Control Act. There was no showing that the plaintiff was unable to move the remaining cotton; his main embarrassment was that if he moved it by the cheapest method, by buying exemption certificates from private persons, he would be unable to recover what he had paid in the event that the Act was subsequently declared unconstitutional. The Supreme Court upheld the decision of the lower courts that there was an adequate remedy at law and refused to consider the constitutionality of the statute.

mon-law habitat as the offspring of a friendly procedure to have legislation declared unconstitutional.\textsuperscript{80} The time-honored right of a receiver to ask instructions from his judge is invoked in a wholly different context when he asks his court to pass on the validity of an intricate and far-reaching statute which may affect the estate.\textsuperscript{81} Plainly in these situations the deciding factors have been views on the deeper problems of jurisdiction. Intensity of conviction concerning the Court's duty to abstain from constitutional adjudication until decision is really unavoidable, rather than knowledge of recondite equity learning, has determined the fate of these modern equitable devices for securing constitutional review.

The Court has not merely been alert against the use of common-law procedural forms when they are ill-adapted for constitutional adjudications. It has also built up a body of precepts derived from its general postulate of avoiding constitutional adjudication unless the case compels. That means an adequate disclosure in the record of facts which make the constitutional issue an exigent and not a hypothetical problem,\textsuperscript{82} as well as absence in the record

\textsuperscript{80} See pp. 628-32, infra.

\textsuperscript{81} In Burco, Inc. v. Whitley, 81 F.(2d) 721 (C. C. A. 4th, 1936), cert. denied, 297 U. S. 724 (1936), cited supra note 67, a petition for instructions as to the constitutionality of the Public Utility Holding Company Act of 1935 was filed for the avowed purpose of determining whether the trustee should register under the Act and whether any of the proposed plans of reorganization would be feasible. The Government, not a party to the proceeding, felt that it challenged the validity of vital legislation on wholly speculative assumption presented by an inadequate and specious record. One ground upon which the Government opposed \textit{certiorari}, in a statement filed as \textit{amicus curiae}, was that no justiciable controversy over the constitutionality of the Act was presented. The Government denied that the Act compelled registration by the trustee or foreclosed the possibility of reorganization, and further stated that the only effect of a decision upon the constitutionality would be to serve as an advisory opinion for the benefit of one of the opposing groups which were jockeying for strategic positions in the ultimate disposition of the estate. Even this effect, it was urged, would be minimized by the fact that the financial condition of the corporation was such that any reorganization would be merely temporary and would probably result in dissolution before the more vital provisions of the Act had become operative.

of a legal ground other than constitutional on which a claim may rest.\textsuperscript{62}

The Court's general doctrine of avoidance of constitutional adjudication brought in its train special canons of statutory construction. Needless clash with the legislature is avoided by construing statutes so as to save them, if it can be done without doing violence to the habits of English speech.\textsuperscript{63} Indeed, so wary has the Court been at times of entering the domain of constitutional discussion that it has given constricted meaning to legislation.\textsuperscript{64} When a constitutional issue must be faced, the common-law hostility against dicta, against deciding more than has to be decided, is reinforced by admonitions of the highest statesmanship against seeking to foreclose the future.\textsuperscript{65} Finally, of course, there is the overriding doctrine of judicial review in constitutional controversies derived from the "delicate" nature of this power and its inevitable political consequences. Marshall gave it its magistral formulation,\textsuperscript{66} and James Bradley Thayer, in his classic essay "The Origin and Scope of the American Doctrine of Constitutional Law,"\textsuperscript{67} its most luminous exposition.

But the course of constitutional law does not run smooth, either


\textsuperscript{63} See Holmes, J., dissenting, in First Employers' Liability Cases, 207 U. S. 461, 541 (1908). "I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows." Compare Holmes, J., in Towne v. Eisner, 245 U. S. 418 (1918), with Holmes, J., dissenting, in Eisner v. Macomber, 252 U. S. 186, 219 (1920).

\textsuperscript{64} E.g., United States v. Delaware & Hudson Co., 213 U. S. 366 (1909).


\textsuperscript{66} See Fletcher v. Peck, 6 Cranch. 87, 128 (U. S. 1810).

\textsuperscript{67} (1893) 7 Harv. L. Rev. 130, reprinted in Thayer, Legal Essays (1908) 1.
as to procedure or substance. Fluctuations from period to period in the application of unquestioned doctrines, or divisions regarding their incidence within the same Court, affecting the scope of the commerce clause or the “silence of Congress” or due process, have their analogues in the application of procedural doctrines of abstention. The business of the last two terms was rich in opportunities for observance of adjective rules of constitutional law but also in departures from them. Numerous cases added new strength to old reasons for finding them outside the periphery of immediate, unambiguous constitutional controversies. Either the record was dubious regarding the adequate presentation of an issue or the right of a particular party to urge it, or the judgment below could amply be supported on a nonconstitutional ground.

In the whole history of the Court there are few more striking examples of the interplay between explosive political issues and intricate technicalities of procedure than several cases at the last two terms. To the general public and to party leaders the Ashwander case challenged the TVA program and, derivatively, the entire national power policy. For the student of federal jurisdiction it presented a threshold inquiry quite removed from the tensions of politics and the hopes of a social program. The right of George Ashwander, a preferred stockholder in the Alabama Power Company, to question a bona fide business arrangement between the Company and the United States was a hurdle which had to be cleared before the road was open to inquiry into the scope of national power immanent in a national waterway system. Again, to the general understanding, the Carter case brought before the Supreme Court a scheme of Congress, enacted after years of agitation and investigation, for dealing with the

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chronic difficulties of the bituminous coal industry. But consideration of the diverse legal problems with which the congressional solution was entangled was dependent on the answer to the preliminary inquiry whether the Carter Coal Company could raise them in the specific litigation before the Supreme Court.

In both litigations the Court found jurisdiction. In one case it sustained legislation and thereby avoided conflict with congressional policy; in the other it frustrated congressional policy by denying its legality. But, if rules of procedure are modes for assuring the wise exercise of the deliberative process and are independent of the desirability of what is decided on the merits in a particular case, the procedural issues in the Ashwander and Carter cases must be isolated from the fate of the legislation on which they passed. They must be subjected to a critique based on the Court's procedural professions regarding complainants situated as were Ashwander and the Carter Coal Company, but in cases which were unembarrassed by grave political or economic consequences.

Since a single vote decided the jurisdictional issue in both cases, presumably they permitted differentiation from controlling precedents. Where the procedural issue is so delicately balanced it would not be without historic warrant to conclude that the scales were turned in favor of taking jurisdiction by the imponderable pressure of the public importance of the statutes under review.

The Ashwander case is the latest in a series of cases showing the penetrating influence of the corporate form of enterprise even upon the procedural phases of law. One of the most interesting chapters in the history of the federal judiciary is the successive enlargement of its jurisdiction through imaginative use of the stockholder's suit. It was first employed as a means of creating diversity of citizenship. After a while, the Supreme Court curbed the excesses of this circumvention of state courts to avoid undue burdens on federal courts and to mitigate the hostility of

104 In the Ashwander case, Brandeis, Stone, Roberts and Cardozo, JJ., joined in dissent on the jurisdictional point. Hughes, C.J., and Brandeis, Stone and Cardozo, JJ., dissented on procedural grounds in the Carter case.

105 Dodge v. Woolsey, 18 How. 331 (U. S. 1855).
local communities. Gradually, the stockholder’s suit emerged as a conventional instrument of litigation in wider fields of controversy than ordinary corporate squabbles. In the development of this procedure the Supreme Court at times showed a tendency toward its restriction by requiring a serious breach of director’s duty which the stockholder, threatened with serious loss, was powerless otherwise to prevent. However, in assuming jurisdiction in the Pollock case, the Supreme Court gave powerful momentum to the modern practice of contesting the validity of regulatory and revenue statutes through a stockholder’s suit although the directors, as a matter of fair business judgment, preferred obedience to the statute. While jurisdiction cannot be conferred by consent, it would be surprising if the Government’s desire for a decision on the merits of the income tax was without influence upon the Court’s sanction of the practice in the Pollock case.

The Pollock case is clearly a relaxation of some of the rigorous doctrines of the Court against constitutional adjudication except, as it were, in extremis. It thus introduces the opportunity for considerable management in bringing constitutional conflicts to a judicial issue. If it be suggested that the practice is merely a mode of accelerating the test of the validity of a statute that sooner or later will be tested, the Court’s whole history of avowals against anticipating adjudication and the profound conceptions of government on which they are based, give conclusive answer.

106 Equity Rule 94, 104 U. S. 69 (1881); Equity Rule 27, 226 U. S. 656 (1913).
109 Pollock v. Farmers’ Loan & Trust Co., 157 U. S. 429 (1895); Brushaber v. Union Pacific R. R., 240 U. S. 1 (1916); Hill v. Wallace, 259 U. S. 44 (1922). These cases, by widening the area between action by the directors sufficient to justify a stockholder’s suit and action so unreasonable as to show that it was not bona fide, have naturally increased the difficulty of discovering collusive suits.
110 See 157 U. S. at 354.
111 The interests of the stockholders could have been sufficiently protected by a decree prohibiting the payment of the tax voluntarily and thus, under the then statute, barring recovery.
But in Smith v. Kansas City Title & Trust Co.,\textsuperscript{112} decided in 1921, the Supreme Court passed on constitutionality in a stockholder's suit when the likelihood of the issue otherwise coming before it was much more doubtful than in the Pollock case. As a measure for agricultural relief, the Federal Farm Loan Act\textsuperscript{113} sought to reduce interest on agricultural loans through a system of Federal and Joint Stock Land Banks. In brief, tax exempt bonds were to be issued against farm mortgages. Claiming that the Act was invalid and that, therefore, the bonds were worthless, Smith brought a stockholder's suit against the Trust Company to enjoin it from buying these bonds.\textsuperscript{114} It would appear that an eventual determination of the invalidity of the bonds — were that issue ever to get before the Court in some other proceeding — would not necessarily eliminate the value of the underlying mortgages. Therefore, the claim of threatened loss to the stockholder was a preliminary question which should have been canvassed. Instead, the Court sustained the statute on its merits. Here again considerations extrinsic to the procedural analysis of the case encouraged a disregard of jurisdictional austerity. The bonds could not be successfully marketed with a cloud overhanging their validity. Moreover, all parties assumed the claim of the stockholder that the invalidity of the statute was decisive upon his interest.\textsuperscript{115} It is in the context of these qualifications that the assumption of jurisdiction in the Smith case must be placed, and they attenuate the force of its authority.

These qualifications were disregarded by the majority in the Ashwander case and the scope of the Smith case was extended. The Alabama Power Company contracted to sell property to the Tennessee Valley Authority, and arranged for an interchange of power and a division of territory between them for the sale of power. In response to a protest from a group of preferred stockholders, the directors of the Company, although expressing belief in the invalidity of the Tennessee Valley Authority Act, relied

\footnotesize{\textsuperscript{112} 255 U. S. 180 (1921).}
\footnotesize{\textsuperscript{113} 39 Stat. 360 (1916), amended, 40 Stat. 431 (1918).}
\footnotesize{\textsuperscript{114} The statement of the stockholder that "The tax exemption question is the real issue sought to be settled here" casts light upon the true nature of the attack. Brief for Appellant, p. 2.}
\footnotesize{\textsuperscript{115} See 255 U. S. at 199, 201; Brief for Joint Stock Land Bank of Chicago, Intervenor-Appellee, p. 11.}
upon the difficulties of successful litigation to support the contract as a wise business adjustment. Thereupon Ashwander and his group brought suit against the Company and the Tennessee Valley Authority to enjoin enforcement of the contract and for a declaration of invalidity against the Tennessee Valley Authority Act. Speaking for himself and four of the Justices, the Chief Justice found jurisdiction. Ashwander was allowed to sue, not because of any threatened acts of his corporation; it was sufficient that he challenged the lawfulness of the authority of those with whom the corporation was proposing to deal.118

The Chief Justice relied heavily upon Smith v. Kansas City Title & Trust Co.117 But whatever impairment of the common stockholder’s interest was threatened in the Smith case by his Company’s investment in $20,000 worth of bonds of possible invalidity, the preferred stockholder of the Alabama Power Company could show no such danger through consummation of his Company’s contract.118 Moreover, in all previous stockholder’s suits to test constitutionality, with the exception of the Smith case, the stockholder was merely insisting on a constitutional right belonging to the corporation. The stockholder was pressing a derivative claim. In the Ashwander case the Court assumed jurisdiction at the behest of a preferred stockholder although at best it was extremely doubtful whether the Company itself could disaffirm its contract.119

117 See 197 U. S. at 320, 322.
118 The effect of the transaction upon the margin of safety of the preferred stockholders was negligible. The Court stated that there was a possibility of injury to the corporation in that, if the Tennessee Valley Authority Act was unconstitutional, the corporation would have no remedy on the contract against the Authority. Even if such a risk to the corporation could threaten injury to the preferred stockholders, it was eliminated by the cash terms of the contract.
119 It is difficult to see how the Alabama Power Company could rescind the contract as ultra vires the TVA without proving any likelihood that the TVA would not live up to its obligations. Since the Alabama Power Company had been purchasing power from Muscle Shoals since 1925, it is even more difficult to see how it could claim rescission on the ground that the Government was without authority to manufacture this power. Cf. Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581 (1888); Wall v. Parrot Silver & Copper Co., 244 U.S. 407 (1917); St. Louis Co. v. Prendergast Co., 260 U.S. 469 (1923). The provisions in the contract restricting the areas which the TVA and the Power Company could serve indicate a conclusive answer to any claim that the Power Company could test
Against this conclusion Mr. Justice Brandeis, Mr. Justice Stone, Mr. Justice Roberts and Mr. Justice Cardozo vigorously protested. In what is perhaps the most notable opinion expounding the rationale of jurisdiction in constitutional controversies, Mr. Justice Brandeis found infringement of those rules of judicial self-limitation which alone gave coherence to the great body of precedents which he passed under review.

In *Carter v. Carter Coal Co.*, the Court had before it suits on behalf of coal operators to enjoin the regime established by the Guffey Coal Act for the rationalization of the bituminous coal industry. Of the companies for which relief was sought one sold 75% of its total output in interstate commerce, the rest not less than 96%. Part I of the Guffey Act formulated a code of fair practice and price stabilization; Part II outlawed unfair labor practices and provided that collective labor agreements regarding wages and hours entered into between operators and men under defined conditions should be binding on all code members. The device of a coal tax with a drawback of 90% in favor of those who accepted the code was employed for the enforcement of the regime.

In the posture of the litigation before the Court, the only im-

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mediately operative features of the Act were the provisions dealing with unfair trade competition and price fixing. There was no showing that the operators were affected by the code provisions defining unfair labor practices and the Court found no agreement touching hours or wages, or the threat of any, which would adversely affect the operators. Furthermore by the express terms of the statute, operators were not estopped from contesting in the future the validity of the labor provisions by present acceptance of the code. But a majority of the Court, finding that the labor provisions exceeded the power of Congress, invalidated the whole Act. Four members of the Court dissented. Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo observed the jurisdictional proprieties. Finding the price-fixing provisions valid and not dependent upon the labor provisions, they refused to consider the validity of the latter, until a concrete dispute should come before the Court. The Chief Justice agreed with the majority concerning the invalidity of Part II but agreed with the other three Justices concerning the validity of Part I and its separability.

The assumption of the majority that Congress would not have enacted Part I dissembled from Part II, despite the amplest separability clause, was promptly disproved by the re-enactment, in substance, of Part I as an independent statute. But even on its own assumption, the majority included very disparate situations within the single concept of inseparability. To enforce a valid portion of a statute after a more or less closely connected portion has been found invalid is one thing. To refuse to enforce a valid portion of a statute before any judicial necessity has arisen for passing on the constitutionality of the remainder, quite another. Precisely on such distinctions depends observance of the Court’s canons for constitutional jurisdiction.

Of the numerous cases during the last two terms which will pass into history, Morehead v. New York ex rel. Tipaldo represents

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121 Shortly after the decision in the Carter case, the House of Representatives passed a statute containing the price-fixing provisions of the Guffey bill. The bill was reported favorable by the Senate Committee on Interstate Commerce but, due to a filibuster, the Senate adjourned before its passage. Substantially the same statute was promptly re-enacted during the first session of the Seventy-Fifth Congress. 18 U. S. C. A. §§ 828–51 (Supp. 1937).

122 298 U. S. 587 (1936).
the most striking fusion of public explosiveness and procedural technicalities. In that case the majority employed jurisdictional restraints not as means for avoiding conflict with legislative policy but as a self-created disability against the removal of such conflict. The Court had granted certiorari without restriction,\(^{123}\) to review a decision of the New York Court of Appeals \(^{124}\) invalidating a minimum wage law drawn specifically to meet the opinion in the Adkins case.\(^{125}\) Despite the changes in the language of the statute, the New York Court of Appeals deemed itself controlled by the ruling in the Adkins case.\(^{126}\) The Supreme Court invoked two procedural considerations in affirming the Court of Appeals. According to correct appellate practice, so ruled the majority, the only issue before the Court was whether the case at bar could be distinguished from the Adkins case.\(^{127}\) And that issue was sub-

\(^{123}\) 297 U. S. 702 (1936).


\(^{125}\) Adkins v. Children's Hospital, 261 U. S. 525 (1923).

\(^{126}\) See 770 N. Y. at 235–39, 200 N. E. at 801–02.

\(^{127}\) See 398 U. S. at 604–05. A rule of practice limits review upon certiorari to the scope of the petition. Gunning v. Cooley, 281 U. S. 90 (1930); New York v. Irving Trust Co., 288 U. S. 339 (1933); Helvering v. Taylor, 293 U. S. 507 (1934); see ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1937) § 389. The considerations underlying this rule are the same as those which require an assignment of errors on appeal. Opposing counsel and Court should be informed of the issues to be reviewed so that the adjudicatory process may be properly canalized. The discretionary nature of review by certiorari intensifies the importance of this practice. See Frankfurter and Hart, supra note 3, 47 Harv. L. Rev. at 284–85. In all prior cases in which the rule had been applied the conception of a legal issue was derived from the reasons underlying its formulation. E. g., Alice State Bank v. Houston Pasture Co., 247 U. S. 240 (1918) (title as opposed to Statute of Limitations); Steele v. Drummond, 275 U. S. 199 (1927) (illegality of a contract as opposed to its discharge). In the Tiptaloma case, however, the Court's view implies that counsel must set forth not the legal issue which would give adequate notice to the Court and opposing counsel but the range of argument in their support. The issue in the Tiptaloma case was whether the statute was such a limitation on the "freedom of contract" as to violate the Fourteenth Amendment.

An examination of the contents of the petition for certiorari affords a conclusive answer to the views of the majority. It shows that the petitioner took the broad position that the statute was constitutional irrespective of anything decided in the Adkins case. And such statements as the sixth reason relied upon for the allowance of the writ, that "The circumstances prevailing under which the New York law was enacted call for a reconsideration of the Adkins case in light of the New York Act and conditions deemed to be remedied thereby ", raised the argumentative claim that the Adkins case should no longer be followed, expressed as euphemistically as the tactful language of advocacy would naturally convey it. For an illuminating
stantially foreclosed because the Supreme Court interpreted the decision below to establish an identity between the New York statute and the statute in the Adkins case and thereby to bar an examination by the Supreme Court of the fact of identity. But, despite these iron-clad procedural confinements, the Court deduced from the Adkins case the constitutional invalidity of any minimum wage regulation. The Adkins case was then approved, and the New York Act, and with it all minimum wage legislation, necessarily held outside constitutional bounds.

The Chief Justice challenged neither the limited scope of review nor the Adkins decision. But he denied the majority's construction of the state court's construction of the state statute. Free to differentiate the Adkins case, he did not find it controlling and sustained the new statute. In his dissent the Chief Justice had the concurrence of Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo. But these three Justices, speaking through a trenchant opinion by Mr. Justice Stone, denied the existence of any limitation of appellate practice which imprisoned the Court within its own ruling in the Adkins case. Having found that case, on full consideration, to be without reasonable foundation, they desired it overruled.

That a Justice who found technical barriers of appellate practice against even considering whether the specific objections to minimum wage legislation made by the Adkins case had been met by a later statute, should, within less than a year, make the ma-

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128 See 298 U. S. at 607-09.

129 The majority stated that the state court "held the Act repugnant to the due process clauses of the state and federal constitutions". See 298 U. S. 603. This statement was passed over in silence by the dissenting Justices. But if it was true, the Court would have been without jurisdiction to review the action of the state court. Lynch v. New York ex rel. Pierson, 293 U. S. 52 (1934).

130 See 298 U. S. at 621-22.

131 See 298 U. S. at 616.

132 The mystic doctrine whereby the House of Lords is disabled from overruling itself (London Street Transit Co. v. London County Council, 1898 A. C. 375) has never had the slightest tolerance in the Supreme Court of the United States. The history of the Supreme Court of the United States in no small measure is a process of doctrinal rejuvenation through explicit overruling of decisions which have lost the validity of reason. See Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 405 (1932).
majority necessary for overruling the Adkins case, cannot have many parallels in the history of the Supreme Court. But, within less than a year, the Adkins case was overruled.183

A veritable Nemesis seems to have pursued the litigation to test minimum wage laws. And the vicissitudes of procedure have played no inconsiderable role in the drama. Stettler v. O’Hara, the first minimum wage case, was argued on December 16 and 17, 1914. While the case was under advisement important changes in the composition of the Court had occurred, and, on June 12, 1916, it was restored to the docket for reargument. It was re-argued on June 18 and 19, 1917, and on April 9, 1917, affirmed by an equally divided Court.184 Minimum wage legislation in some dozen states was thus given a precarious lease of life. On June 6, 1921, a majority of the Court of Appeals of the District of Columbia sustained a congressional minimum wage statute for the District.185 But on July 1, 1921, by a strange rearrangement in the personnel of the Court of Appeals, a rehearing was granted. On November 6, 1922, a new majority of the Court of Appeals invalidated the legislation.186 In the year intervening between these last two decisions, the membership of the Supreme Court had again greatly changed. On April 9, 1923, the new majority of the Court affirmed the Court of Appeals; 187 Mr. Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissented; Mr. Justice Brandeis took no part.

Thus the span between the first argument on minimum wage laws in the Supreme Court and their sanction covers nearly a quarter century. This is only a partial accounting. For surely history will not gainsay the opinion of Mr. Chief Justice Taft that Muller v. Oregon188 really controlled the validity of minimum wage legislation.189 And the Parrish case came nearly thirty years after the then Mr. Louis D. Brandeis had, in the Muller case, won the Supreme Court to his view of the appropriate constitutional attitude toward industrial legislation. The end crowns all. But surely it would require the author of Bleak House to do justice —-

233 West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).
184 243 U. S. 629.
185 See 284 Fed. 613, 623.
186 See 284 Fed. 613.
188 268 U. S. 412 (1922).
189 See 261 U. S. at 566.
to a course of litigation whereby it took thirty years for the states to be allowed to deal through minimum wage legislation with some of the deep social problems created by the entry of women in large numbers into industry.

The Court has written its own comment on the wisdom behind its doctrines of abstention from needless expression of constitutional views. Less than a year after the Carter case the Chief Justice and Mr. Justice Roberts supported decisions sustaining the Wagner Act hardly reconcilable with some of the views they sponsored regarding the invalidity of the labor provisions under the Guffey Act. The circumstances which entered into a change of the Court's outlook and of its specific rulings between the 1935 and the 1936 terms are among the arcana of history. But one thing is patent to every informed reader of the Court's opinions. A disregard of settled doctrines of constitutional procedure dangerously borrows trouble. It adds excessive friction to the complicated workings of our government; it weakens the responsibility of Congress in shaping policy; it undermines vital confidence in the disinterested continuity of the judicial process.

Felix Frankfurter.
Adrian S. Fisher.

PERPETUITIES IN A NUTSHELL *

We school teachers have delighted to make a mystery of the Rule against Perpetuities. We love to tell the old, old story of its tangled history; we love to trace its development through English cases which deal with settlements of incredible complexity; we love to point the finger of scorn at the mistakes of courts on both sides of the Atlantic; and most of all we love to spin out our webs of theory on relatively obscure points. The result is a very highly elaborated field of the law — a great advantage to those who know their way around in it, but precious little help to the ordinary practitioner who has had no particular occasion to explore this terrain but who finds himself with a perpetuities problem to handle. Such a one needs a guide book to the law of perpetuities which will enable him to analyze his case and acquire a sound background without unreasonable expenditure of time and effort. This paper seeks to supply that need.

We teachers, moreover, have neglected sufficiently to notice that the greatest importance of the Rule in the practice of the profession does not lie in the argument of cases. It lies in the drafting of the instruments which must measure up to the requirements of the Rule or fail. And for this purpose it is less important that the law of perpetuities be elaborated in the magnificent detail of Gray's treatise (Did anyone ever read Gray through?) than that it be stated in so small a compass that the elements of the Rule can be grasped as a whole and retained as a background of knowledge against which effective dispositive instruments can be created. This paper seeks to perform this function of simplified statement.

And let us not forget the bedeviled law student. There are limits to the principle that that learning is best which he has to sweat most to obtain.

* If this paper fails of its purpose it has, at least, eminent company. Lord Thurlow undertook to put the Rule in Shelley's Case in a nutshell. "But", said Lord Macnaghten, "it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there." Van Grutten v. Foxwell, [1897] A. C. 656, 671.
1 I plead guilty on all counts. See Leach, Powers of Sale in Trustees and the Rule against Perpetuities (1934) 47 Harv. L. Rev. 948.
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GANNETT HOUSE

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Dear Kansas,

It seemed to be a great surprise because I did not hear of you or received any news of you. I heard terrible stories of your office, but today I have the chance to meet you twice to send Julian made a cheering note. But I do want to thank you for it - he wrote me of the very great.
it brought back joy. He seemed in such a golden-hearted mood that I went to see you this word of gratitude for bringing this warm it and so near now that he is in the valley of deep shadows.

my affectionate regards to you.

Ever faithfully,

L01
Dear Uncle,—

Arthur Morgan is not Swiney Walker, and I am greatly hoping that you will do another one of your Swiney Walker in certification of public education. Of course it is full of difficulties, but you will have done to take the country
to school on it. I don't have to tell you how confused every South folk are. I know much Confusion mingling with the Scheme is going on. pitch your lance to power of public education and Exposition. And Master Morgan will give you a real chance.
The line you are talking to just right - existence in specifications, see details, and opening the windows wide to let out the hot air.

I trust much of you here days, and rejoice in your serenity through it all. Maria joins me in affectionate regards, ever faithful.
Dear Mr. Bing

Please put this letter into the President's hands, and obey his wishes with warm regards.

[Signature]
Darling,

Please be good enough to send this letter into the President's hands, and oblige always with Cordial Regards. [Signature]
Dear Mr. President:

1. Now that I have read the stenographic minutes of your T. V. A. Hearing last Friday I can hardly express in words of moderation my admiration for the extraordinary, Lincoln-like patience which you showed to Arthur Morgan's contumacy, as well as for the skill with which you developed complicated issues under the most trying circumstances. I do not know when I have read the full text of a proceeding of inquiry which left me with anything like as much admiration for its conduct. If these minutes were fairly disseminated throughout the country and widely read, there would be nothing left of the matter, and people generally would feel as Frank Buxton of the Boston Herald felt after he and I talked about it at length, when he said, "After that hearing it's all over with Arthur Morgan."

2. But it's not all over because, in their present form, the Hearings will not be widely read, and a great deal of confusion and misrepresentation will remain in the air. Therefore the business raises very practical problems for the future. It would be very surprising indeed if the Chairman should change his attitude. The minutes make abundantly clear that Arthur Morgan is fanatically self-righteous and is altogether a pathological case. He will, therefore, be obstinate in his recalcitrancy, counting on vindication from Congress.

3. Bob La Follette was here yesterday and we had a long
talk canvassing the situation, the result of which he hopes to put before you in person. On the assumption that Bob is right in his conviction that a Congressional investigation is inevitable, I am sure you agree to the importance of maintaining the initiative which you now have, of having any further investigation come through you and not against your seeming wishes, and of having the issues framed by you so clearly that there can be no possibility of misunderstanding. In other words, the present situation can all be turned to your account.

4. This can easily be accomplished by a message from you to Congress, which in simple, lucid, and inescapable language will convey the substance of the facts and the atmosphere, which so clearly emanate from the stenographic minutes, together with the full text of the Hearing. If the record will substantially remain as it is now, as I assume it will be, it is easily susceptible of formulation to Congress by enumerating the specific issues that cut across all questions of T. V. A. policy—the "factual matters" that relate to elementary standards of honesty and honor—together with your conclusion that, on the record, the charges by the Chairman affecting the honor and honesty of his colleagues are wholly without foundation. That much vindication of the other two members of the Board is, of course, essential in order to enable them to carry on the work of T. V. A. In such a summary of the record I think it would be particularly well to emphasize the charge, in effect, of attempting to suborn perjury and John Lord O'Brian's letter to the Chairman regarding that charge.

5. I am sure such a message would so impregnate the atmos-
phere with the true situation that it would dominate opinion. Neither any hostile members of Congress nor Arthur Morgan would be able to change the atmosphere except by dealing specifically with those "factual matters" to which you so effectively kept the Hearing last Friday.

I am venturing to write as I have because I have thought a great deal about the matter.

With warm regards,

Faithfully yours,

[Signature]

The President
Dear Ruth,

Let me break in on your vacation just long enough to thank you from the bottom of my heart and head for the hope that your action and your words must be bringing to literally hundreds of thousands of victims of brute inhumanity. And, they won't find a haven of refuge, either here or elsewhere. But what you have done will self sustain their souls in the material accomplishment of your noble leadership as so essential for the spiritual well-being of this country.

Sincerest is sincerely yours,

[Signature]
FELIX FRANKFURTER
CAMBRIDGE, MASS.

fervor of the faith in which the
United States was founded in a
way that would make Franklin
and Emerson and Lincoln
feel that the American tradi-
tional American spirit-there
flourishes vigorously.

The enclosed poem, Emerson
Buckner will assure you is
bitter. Joe Knows better.

I feel about the matter with
which your guided not situa-
tion.

Mr. Know no wish for you
its best possible refresh-
ment at the oferee.

Ever devoted, your

Am. Franklin D. Roosevelt.
F. F.

"Now, Doctor, you say it was three o'clock when this happened and your co-directors deny this. Please tell me upon what you base your statement; what fact or series of facts cause you to think it was three o'clock?"

"With great respect, Mr. President, and thanking you for your consideration, I decline to state in this inquiry. I could tell it to a Congressional Committee."

"But Doctor, what possible difference can it make to a fact as to who asks the question? A fact is a fact, isn't it, whether I ask the question or a Congressional Committee or Tom Dewey or a traffic cop?"

"By no means, Mr. President, you see my facts are highly sensitive. They can only live and breathe in the life giving oxygen of a Republican interrogator. Your questions are monoxide gas to them."

"But listen, Doctor, did you look at your watch or hear the twon clock strike or meet a train or what? What impressed the time on your mind?"

"I am sorry Mr. President but I can only repeat my position."

"Then get the hell out of here!"

F. F. F.
Dr. Frank -

You much be getting many letters these days, to remind you of the one that Mr. Cole received and filed with the endorsement: "From a person known to have been in the war." I don't want to be among those correspondents - but I do want to say a word in confirmation of what seems best in your own advice. Find that it is the importance of having the people hear from you again directly, and here soon.

And I hope that you will give them a long, full, friendly talk, tell them all for them and their interest to listen. I hope for fifty minutes that it will allow to spell things out. If the matter is long and all the continuous case
Listen not long to canvass. 
And they [stead] have a renewed sense of communion with you, 
Of having been called into your confidence. Such a talk would revive happy old memories and would deepen their sense of identification with you. And it 
have you do this in your high, quiet, good spirits, full of 
cheer[fulness] and faith and 
good temper, despite the 
hostile action, would give them a 
new pride in their leader, 
for your gallantry and 
gaiety would communicate 
itself, in a contagious way, 
to them over the air. Let 
Cagelick light in face toward 
the Reorganization. Rice 
shall [be] war? When you wanted 
that out of the [way to get]
on to more essential things for the
national well-being, would
easily lead into an analogy
where we are and whether
you are tending. If you don't
mind my saying so, I have never
been more confident of the
rightness of anything than I
am of the importance of an
ample, warmhearted, explanatory
talk addressed to the plain
people, such as you are capable
of bringing to them and of the
engendering feeling that you
thereby induce. Can they
In the meantime, I thank the
mercy for your deep, quiet,
reservoir of sincerity - for
your own sake and for the
State.
As Marion wrote you, I
stayed down here for a few
weeks - here I praise to
see you. I am affectionately
your friend...
April 4, 1939.

Dear Felix:

It is good to get your cheery note in the middle of all kinds of weird doings by the boys in Washington while I was away. The trouble with the people in the country who keep crying "wolf, wolf" is that some day a wolf might appear from the opposite direction than they least expect it.

I do hope to see you and Marian soon. Is there any chance of your coming to Washington during the Easter vacation?

As ever yours,

Professor Felix Frankfurter,
125 Brattle Street,
Cambridge,
Massachusetts.
Dear Mr. President:

The following, which has just come to me from one of the most distinguished Republican editors in the land, will interest you:

"What has happened in Austria has distressed me profoundly and I am overjoyed that President Roosevelt has the imagination and courage to pledge this country to help in the one way that is possible. One point that I feel should be stressed by those who desire to help the President is the fact that the refugees from Austria are inevitably bound to be of a high type intellectually and regardless of financial status, highly unlikely to become a charge upon this country. I am thinking of people like the Stolpers from Berlin, for example. Such recruits to Americanism are precious, I feel. It would be an extraordinarily effective move, for example, if Freud could be persuaded to come to this country, assuming that he is strong enough to travel and can escape. Some sacrifice is involved in accepting immigration of any kind at the present time of national unemployment on a wide scale. I think it important, therefore, as a practical matter, to stress the riches of mind and imagination which must ultimately far outweigh any economic cost in the present."

Faithfully yours,

The President
Dear Mr. President:

The enclosed letter from Dr. Walter Cannon has just come. I don't have to tell you that Cannon is perhaps the most distinguished member of the Harvard Medical School Faculty and a physiologist of world-wide reputation. His account of the plight of Professor Loewi, a Nobel prize winner—"the plight of a great scholar, a man who has done to humanity an immeasurably great service"—is just a striking illustration of the hundreds of men and women who are among the finest flowers of our contemporary civilization, in whose behalf you are trying to lead the noblest traditions of this country and the civilized sentiment of the world. From numerous letters that I have had from non-Jews I have every confidence that our own people will respond to your noble efforts. More strength to your powers.

Faithfully yours,

The President
April 11, 1938

Professor Felix Frankfurter
Harvard Law School
Cambridge, Mass.

My dear Professor Frankfurter:

I am enclosing herewith a copy of the letter which I received from Dr. Hans J. Loewi, the son of Otto Loewi, Professor of Pharmacology at the University of Graz. There is no doubt that Otto Loewi is one of the most fruitful and eminent investigators in biology. His simple experiments performed in 1921 opened a new field of scientific investigation. The facts which have sprung from these experiments have already revolutionized our ideas of activities in the nervous system and the relations of the nervous system to muscles, and they promise to give us deep insight into the complex functioning of the brain. It was because of his classical and fundamental discoveries that Loewi was made a Nobel Laureate in 1936.

When I heard that Loewi had been arrested I was appalled because I knew of his extreme sensitiveness. Some years ago, as Chairman of the Dunham Lectureship Committee, I had the pleasure of inviting him here to give the Dunham Lectures. He told me that on his way to Graz he intended to spend two weeks visiting relatives in Frankfurt. On reaching home he wrote to me that he found conditions in Frankfurt so depressing that he was not able to stay more than a few days. I can imagine the distress which he experiences now while in prison.

Here you have presented the plight of a great scholar, a man who has done to humanity an immeasurably great service. Surely some action ought to be taken to relieve his present indignity and humiliation. If there is any influence which you can bring to bear that may have that effect, I most sincerely trust that you will use it.

Yours sincerely,

[Signature]

Enc.

P.S. I am sending a copy of these two letters to Alfred Cohn.

P.P.S. I have just been talking with one of my advanced students, Dr. Colman Lissak, of Hungary. He worked in Loewi's laboratory in 1936-37. Dr. Lissak testifies that Loewi expressed stern disapproval of the sending of Nazi professors away from Austrian universities into Germany and declared that scientific men should not suffer disturbance of their labors because of differences of political opinions. Furthermore, Dr. Loewi advised Dr. Lissak to go to Berlin for extension of his experience in learning physiological technique, which indicates an absence of animosity toward Germany under the Hitler regime.
Prof. W. B. Cannon  
Physiological Laboratory  
Harvard Medical School  
Boston, Mass., U.S.A.

Dear Sir,

I am the eldest son of Otto Loewi, Graz, and just by chance outside of the country, called Austria before. I remember that my father very often has spoken about you. I hope this will authorize me to call on you in this very moment my father being in distress.

My father has been arrested the 12th March. The authorities give as reason that they found communist material in a Jewish commonwealth society. I am sure that this can't be true and even if it would be, my father had no responsibility about, as he was a simple member of this society. Nevertheless I remember that jealous people tried to blame him for having taken part in the International Congress of Physiology in Russia, where you have been also, if I am right. My father was never interested in politics. An honest judge would be unable to find any fault with him. Although I hear now, that it is intentioned to keep him in prison for three months at least. These are the facts.

Being myself in a very bad situation in this moment I cannot do more in favor of my father, then to inform you and Sir Henry Dale. Therefore I would ask you, if you could do something for him. I only see one way. A carefully prepared action of the American Government, any attack by newspapers would surely be most dangerous and I think the only effective way to speak to the German authorities might be the American Embassy.

I thank you in advance for your kindness.

Yours very sincerely,

(Dr.) Hans J. Loewi
THE WHITE HOUSE
WASHINGTON

April 21, 1938.

MEMORANDUM FOR
F. F.

FOR YOUR INFORMATION

F. D. R.

Letter from Sumner Welles in re
the arrest of Professor Lowi.
DEPARTMENT OF STATE
WASHINGTON

April 19, 1938.

My dear Mr. President:

With reference to your memorandum to me of April 18 concerning the arrest of Professor Loewi, it would seem to me that there was little that we could do of a specific character.

I have, however, as a result of the facts contained in the correspondence you sent me with your memorandum under reference, sent a telegram to Hugh Wilson in Berlin asking him to seize an appropriate occasion to explain to the proper officials of the German Government the interest which is felt in this country with regard to distinguished scientists like Professor Loewi and to indicate his belief that the release with permission to leave German territory of such distinguished men would undoubtedly create a favorable impression on public opinion everywhere. Direct intervention on our part on behalf of persons like Professor Loewi would probably have the opposite effect from that desired.

If you think there is anything further that should

The President,

The White House.
properly be done, please let me know.
Believe me

Faithfully yours,

[Signature]
Dear [Name]:

1. The ultimate deposit in history, I suspect, of the work of a statesman, derives from the sheer humanness of his simple, unostentatious daily deeds. His letter to Mrs. Bixby reveals the true Lincoln, and history, I am sure, will see you in the same light through such spontaneous, compassionate responses as that which you made to Dr. Cannon's appeal on behalf of Professor Loewi. I sent it on to you merely because it furnished a striking glimpse of what Nazi rule means to the heritage of civilization. But, characteristically, you read it as a human appeal, and sought to help with the full reach of your powers. I am deeply grateful and you will, I hope, not disapprove the discretion that I exercised in letting your interest be known to a few dependable people like Dr. Cannon. Such interest as yours in these dark days, in matters dear to men like Dr. Cannon, means much.

2. Your remarks to the D. A. R. the other day did not constitute one of those half-hour speeches which it takes ten hours to prepare. What you said was much better than that—it was one of those deep summaries behind which was the preparation of a lifetime. For your "text" to the ladies put in one pithy sentence that which sets this nation apart from all others. It may have jolted them a little to have reminded them that you and they are descendants of "immigrants and revolutionists". But the implications of these
few words go to the heart of American history. In this connection
don't you think that the enclosed card from Borgese announcing his
American Citizenship is touching?

3. And your message on governmental tax immunities was
an admirably quiet but effective lesson in your continuous educa-
tional process on the proper place of the Supreme Court in our na-
tional life. It was all so deftly done, but its meaning will not
have been lost to the priests in the Temple of Karnak. Aren't you
a bit afraid though, that you are making some of the "lads", as
Holmes used to call them, jittery!? I certainly didn't expect to
live to see the day when the Court would announce, as they did on
Monday, that it itself has usurped power for nearly a hundred years.
And think of not a single New York paper—at least none that I saw
—having a nose for the significance of such a decision. How fluid
it all makes the Constitution!

4. Speaking of the Constitution, you will be interested
in the enclosure regarding your dismissal of Arthur Morgan. At
least the Harvard Law Review in its forthcoming number will announce
to the world the clear legality of your act. The note was written
by two pet students of mine. I think they've done a fine job.

I am very glad you are going off for a few days. Have a
good time.

Willard Bliss, Jr.
MORGAN v. UNITED STATES: 1 THE PRESIDENT'S POWER OF REMOVAL.

During the fall of 1933 differences of opinion concerning the proper disposition of Senator George Berry's damage claims against the Tennessee Valley Authority led to the first major public outburst of the antagonism which had long been festering within the TVA board. Charges of dishonesty were made and countered with charges of obstruction. Feeling that the TVA was imperiled by this dispute, President Roosevelt ordered the members of the board to appear before him personally and to substantiate their charges. Despite the presentation of evidence by Directors Lilienthal and H. A. Morgan to refute the charges made by Chairman Arthur E. Morgan and to support the charges which they had made, Chairman Morgan persistently refused to participate in the inquiry, claiming that the facts could adequately be brought out only by a congressional investigating committee. President Roosevelt thereupon told Chairman Morgan that his action in making charges against his colleagues, his obstruction of the work of the TVA and his refusal to take part in the hearing made it necessary that he be removed as a member and chairman of the board of the Tennessee Valley Authority. Only one more event need be added to necessitate an adjudication of the controversy by the Supreme Court. Claiming that the President had no power to remove him, Arthur E. Morgan sues in the Court of Claims for salary subsequently accrued. The possibility that this step will be taken and the wide range of conjecture as to the probable result renders appropriate an inquiry into the problems of statutory and constitutional construction which Dr. Morgan's suit would raise.

The location and distribution of the power to remove officers of the United States has seldom been adjudicated by the Supreme Court. In 1886, in United States v. Perkins, 1 the Court held that Congress could constitutionally deprive the Secretary of the Navy, in whom the appointing power was vested by statute, of the power to remove Naval Cadet-Engineers. In Blake v. United States, 2 a statute provided that an army chaplain could be removed only by court-martial. By a strained construction, the Court held that the statute did not limit the President's power where he obtained the advice and consent of the Senate, and consent to removal was implied from the Senate's confirmation of a successor. 3 Difficult constitutional questions as to the removal power were thereby avoided. Concurrence by the Senate was not relied upon in Parsons v. United States, 4 which involved the removal of a United States Attorney by the President in the face of a statute which established a four-year term for the office and contained no provision

1 For a compilation of the documents relating to this controversy, see Sen. Doc. No. 155, 73rd Cong., 3d Sess. (1935).
2 106 U. S. 484 (1886).
3 109 U. S. 217 (1886).
5 167 U. S. 374 (1897).
for removal. Instead the Court, obviously influenced by executive and legislative precedents in other situations which it interpreted as establishing the removal power in the President alone, construed the repeal of the Tenure of Office Act of 1867 to reestablish a prior statute of 1820 which provided that United States Attorneys should hold office at the pleasure of the President. Shurtleff v. United States 7 is an even stronger example of the tendency to construe statutes as allowing the President an unrestricted power of removal. The President's dismissal without cause of a general appraiser of merchandise, appointed by and with the advice and consent of the Senate, was held valid, although the statute contained a provision authorizing the President to remove the appraisers for "inefficiency, neglect of duty, or malfeasance in office." The Court stated that the removal power was in the President unless taken away by very clear and explicit language and that the restrictive inference from the express grant of a power to remove for cause was not sufficient to limit the President's power to remove without cause. 8

The constitutionality of limitations placed by Congress upon the President's power of removal was first involved in the famous case of Myers v. United States, 9 decided in 1926. The President was held to have authority to dismiss a third-class postmaster despite a statute providing that "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." 10 The seventy-one page majority opinion written by Mr. Chief Justice Taft did not confine itself to the narrow holding that it was unconstitutional for Congress to provide for participation by the Senate in the removal of officers. 11 The Court went upon the broad ground that inherent in the President's power of appointment and in his duty to take care that the laws be faithfully executed was a power of removal over all appointive officers, which legislative action could not in any way qualify. But even upon the narrow ground necessary for the decision, Justices Holmes, McReynolds and Brandeis wrote strong dissenting opinions, relying on the fact that a third-class postmaster was an "inferior officer." 12 The President's removal power received its first setback in Humphrey's Executor v. United States, 13 in which the President's dis-

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8 See id. at 337-44.
9 260 U. S. 211 (1923).
10 See id. at 871-88.
11 270 U. S. 255 (1926).
12 243 U. S. 28 (1917).
13 For a thorough analysis and criticism of the reasoning of the majority opinion see CONWAY, THE PRESIDENT'S REMOVAL POWER (1917).
14 It was argued that, since Congress under U. S. CONG. ACT. II $ 3 could transfer the power to appoint such officers from the President to the heads of departments or the courts of law, and after such transfer could limit the power of removal [United States v. Perkins, 115 U. S. 467 (1885)], the restriction imposed upon the President's power involved no undue encroachment on the executive power.
15 291 U. S. 602 (1933).
misregulation of a Federal Trade Commissioner before the expiration of his term of office was held unauthorized. A statutory provision, identical with the one involved in the Shurtleff case, provided that the President could remove a Commissioner "for insufficiency, neglect of duty or maladministration in office." The quasi-legislative and quasi-judicial nature of the Federal Trade Commission's duties, and the desire found expressed in its legislative background to free it from the threat of political domination, were regarded as sufficient grounds for distinguishing the Shurtleff case and holding that the statute limited the President's power of removal to the grounds specifically enumerated. 14 So construed, the statute was held constitutional. A unanimous Court, 15 including four Justices who had concurred in the majority opinion of the Myers case, 16 felt called upon to limit the broad language of that opinion concerning the absolute power of the President to remove his appointees, at least as applied to officers whose functions were not strictly "executive" but "quasi-judicial and quasi-legislative." 17

The Tennessee Valley Authority Act 18 provides that the directors shall be appointed by the President, by and with the advice and consent of the Senate, but contains no provision which expressly deals with the President's general power of removal. Despite the shadow cast upon it by Humble's case, the Shurtleff case still stands for the proposition that the President has a power of removal unless it is shown by the legislative background of the statute, or by inferences from its provisions, that Congress intended to take it away. There are two sections which bear on this point. Section 4 provides for removal of members of the board by concurrent resolution of Congress. Section 6 requires the President to remove any member of the board who establishes political qualifications in the appointment of employees. An argument, based upon the familiar maxim expressio unius est exclusio alterius, could be made to the effect that Congress intended these two methods of removal to be exclusive. But an examination into the origins of Section 6 indicates an intention to impose a duty, albeit of imperfect obligation, to remove for making political appointments, 19 and thereby negatives any

14 See id. at 526-27.
15 Mr. Justice McReynolds concurred specially on the grounds contained in his dissenting opinion in the Myers case.
16 Justice Van Devanter, Sutherland, Butler and Stone.
17 See 288 U. S. at 606-12.
19 This provision was first introduced in the House Bill, H. R. 5832, 73rd Cong., 1st Ses. (1934). It applied not only to the President but also to the members of the board with relation to the managers who, under the scheme set up by the House Bill, were to be appointed and removed by the members of the board and were to be the active directors of the TVA. The committee report on the House Bill says:
20 But as a further guaranty against the employment of unfit and incompetent persons it is provided that no political tests shall ever be applied by any member of the board in connection with the employment of any person not by the manager
inference of an intention to restrict the power of removal. The provision for removal by concurrent resolution is not so easily disposed of. The purpose which motivated its inclusion in the bill is swathed in doubt. Hence no light is cast which might aid in a decision as to whether Congress intended by this provision to assume to itself the entire general removal power or merely to reserve in itself a supplemental power. The legislative history of the Tennessee Valley Authority Act, unlike that relied upon by the Court in *Humphrey*s case, does not reveal a considered purpose on the part of Congress to free the Authority from presidential control. Rather, a contrary inference may be drawn from the numerous and important duties imposed on the President in the administration of the Act. In view of this background the *Skartleff* case would require that any doubts created by the existence of congressional power to remove a member of the board by concurrent resolution should be resolved against limiting the President's power. And while the existence of a single thirty-five year old precedent might seem to afford a slender basis for prediction, recent events in the Court's history, marking a trend toward avoiding constitutional issues, indicate a likelihood of adherence to the doctrine of the *Skartleff* case in order to

nor anybody acting for him. Any person violating this provision will be summarily discharged. This provision was originally contained in the Senate Bill introduced by Senator Norris. S. 1672, 73rd Cong., 1st Sess. (1933). No reference was made to it in the committee report. Sen. Rep. No. 13, 73rd Cong., 1st Sess. (1933). No reference was made to it in the debates in either house nor in the report of the managers of the House of Representatives in the conference committee. H. R. Rep. No. 120, 73rd Cong., 1st Sess. (1933).

The President, with the advice and consent of the Senate, is authorized to appoint the members of the board, designate the Chairman and affix the original tenures of office. § 1(a), (b). The President designates the dwelling houses, owned by the government in the vicinity of Muscle Shoals, to be used by the members of the board. § 1(d). The President's approval is required for the disposal of real property deemed unnecessary for the execution of the Act. § 1(k). The President is empowered to direct other government agencies to render assistance to the TVA. § 1(l). The President is authorized to lease nitrate plant number 2 and Waco quarry for a term not to exceed 90 years to be used for the manufacture of fertilizers. § 1(m). The President is directed to discharge those members of the board found lacking in the fulfillment of their duties. § 1(n). The President is authorized to transfer such governmental property to the TVA as he deems necessary to enable him to execute its purposes. § 1(b). The TVA is required to file a financial statement each year with the President. § 1(a). The Controller General is to report the result of his audit of the TVA to the President. § 1(b). The President may prescribe the form and manner in which the net receipts from the sale of the mortgaged property are to be paid to Alabama and Tennessee in lieu of taxes. § 1(l). The President is empowered to disburse the cost of government properties for the purposes of accounting between flood control, navigation, fertilization, national defense and power. § 14. The President is authorized to direct the board to install additional equipment at Muscle Shoals. § 16. The President was authorized to direct the construction of Cove Creek Dam (Norris Dam). § 17. The President is authorized to investigate into the management and control of government property in the Tennessee River Basin. § 17. The President is directed to recommend legislation to Congress relating to flood control, navigation, generation of power, use of marginal lands, reforestation, and economic well-being of the people in the valley. § 18. The President was authorized to acquire title to lands owned by private persons for the TVA. § 14.
prevent the precipitate consideration of a vexatious constitutional question. But even if the statute be construed to deprive the President of his inherent general removal power, his action in the instant case finds support in Section 17 of the Act. This section authorises the President to conduct an investigation for the purpose of determining whether, in the management and control of any of the property owned by the Government in the Tennessee River Basin, any undue advantage has been given to private persons or the Government has been injured or unjustly deprived of its rights. Since most of the charges made by Dr. Morgan against his colleagues related to matters within the language of this section, the President had ample authority to institute the investigation. And there is no balance enough strength left in the mere decision under which the Court will hold that the President retains the power to remove for a cause closely connected with the execution of powers vested in him by the statute.

If, however, Section 4 is construed to deprive the President of all power of removal except that recognised by Section 6, a decision upon constitutional grounds will be necessary. It is highly probable that if Congress had set up the Tennessee Valley Authority as an independent agency, concerning which the President was given no special powers or duties, it could have established security of tenure for the members of the board as one of the incidents of such freedom from executive control. This proposition is not authoritatively determined by Hambleton's case; the category of quasi-judicial and quasi-legislative agencies there laid down would seem to include only bodies which declare and administer rules governing the conduct of private individuals and the litigation of private rights. Thus, technically, even an independent Tennessee Valley Authority would come within the broad reasoning of the Myers case. But here, no less than in Hambleton's case, there would be good reasons for making further inroads upon that broad reasoning. The growing extent of governmental activity in fields formerly recognized as the exclusive domain of private business has made the liberation of these governmental enterprises from political manipulation a matter

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12 The three main charges made by Chairman Morgan against his associates were lack of honesty in handling the Berry claims against the government arising out of the flooding of marble deposits by the construction of Norris Dam, insertion of a "licker" in the contract with the Arkansas Power & Light Co., and failure to protect the public interest in negotiations with the Aluminum Company of America. See Sec. Doc. No. 795, 75th Cong., 3d Sess. (1938) 6, 21-22.

13 Moreover, in view of the political nature of the controversy, the close vote in the Myers case, and the changed personnel of the Court, the Myers case might well be overruled on its facts. The probability of such a result is further strengthened by the prior intellectual commitments of Mr. Justice Brandeis.
of vital concern to the social order. The very controversies over matters of policy which have taken place within the TVA illustrate the broad discretion given it in making economic decisions of a "legislative" character. Had Congress established a completely independent TVA, a provision placing the members of the board under civil service rules would probably have been an appropriate congressional regulation of tenure. And while a concurrent resolution would be somewhat more difficult, it might still be held a valid exercise of the congressional power.

The fact remains, however, that Congress has not set up a TVA unfettered by executive control; on the contrary, it has placed in the hands of the President large responsibilities in the supervision and direction of the entire TVA project. Despite this fact and despite the increased relevance which it gives to the language of the Myers case emphasizing executive responsibility, Congress might be able to take away the President's general power of removal or even his power of removal for cause if this were done as part of the scheme which the Court deemed to be a reasonable regulation of official tenure. But, reduced to an irreducible minimum, the Myers case holds that a requirement of senatorial participation in the President's power to remove an inferior executive officer does not constitute such a reasonable regulation. And Dr. Morgan's case would present an attempt to make a concurrent resolution by Congress the sole means of removal, thereby depriving the President of any participation in the removal process. Particularly as applied to removal for a cause arising out of presidential responsibilities in the administration of the Act, this would require the Court to go not only beyond the irreducible minimum set by the majority in the Myers case but also beyond the considerations which motivated the dissenters. This does not seem likely.

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**PRIMARY JURISDICTION — EFFECT OF ADMINISTRATIVE REMEDIES ON THE JURISDICTION OF COURTS. —** Keystone of the arch of administrative regulation is the "primary jurisdiction" rule. With its requirement that controversies calling for administrative discretion be determined by commissions rather than by courts, following from the formula that these questions are primarily within the jurisdiction of the administrative commission charged with that particular field of regulation, the doctrine of primary jurisdiction has pervaded the entire realm of

1. See *Springer v. Philippine Islands*, 267 U. S. 156 (1925) (Separation of powers considered inherent in Organic Act of Philippine Islands; held to prevent legislature from restricting executive control of National Coal Co. and Philippine National Bank. Justices Holmes and Brandeis dissented; Justice McReynolds limited his concurrence to language of Organic Act.)

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1. First and foremost, I want to tell you what deep joy Marjorie and I carried away in finding you so fit. I wish I could put into adequate words the sense of serenity that everything about you conveyed. With some knowledge of American History, I had the feeling that not since Lincoln has the White House had an occupant with such imperturbability of soul. It cannot be mere accident that not since Lincoln has there been a President who possessed in equal measure such a combination of the democratic faith, antiseptic humor, and largeness of view. Somehow or other, those qualities manage to convey themselves to the common understanding of ordinary folk, if they are given frequent enough opportunities through sight and speech to feel the radiations of those qualities.

2. I saw four of the Justices and not a little of both the Blacks. She is an altogether grand person, with a keen realization of the psychological aspects of the situation, and with unusual talents for mitigating difficulties and softening hard feelings. Various experiences of his life have calculated to make him a bit of an Ishmaelite—to expect every hand to be raised against him, and, therefore, at times to be unwarrantedly suspicious when nothing but friendliness is intended. Certainly
Isaiah, Stone, and Reed have the friendliest disposition toward him. I know, because I talked with all three rather intimately. I took the bull by the horn and told Stanley Reed that he must not allow Black to interpose the barrier of formality between them, and that, as a matter of fact, Black will gradually soften to influences of friendliness and affection. Marion and I had tea with the Blacks out at Alexandria, and later dined with them at the Reeds. Altogether a very good time was had, and I have high hopes for the future.

3. You asked me to remind you of a few things about which we talked:

(a) Monte Lemann is just past fifty-four, and I do not believe any informed person would gainsay Stanley Reed’s opinion that “Lemann is about the best lawyer south of the Mason and Dixon line.” He is just past fifty-four, has independent means (though not very rich), and I am confident that he would go on the Circuit Court of Appeals. He is that very rare thing at the contemporary American bar, a lawyer highly equipped technically, but not made narrow or unprogressive by his professional and business associations. He has, as you know, really cared about the social reforms of the New Deal, and has been not a little influential in securing the effective sympathy of his client, Zemurray, for your Administration.

It would really be a great thing to put Lemann on the C. C. A. By a few such appointments you would not only prevent
judicial obstructions but perpetuate your social outlook in the administration of law for the next twenty years. With men like Monte Lemann in the Fifth Circuit, Stuart Guthrie in the District, Francis Biddle in the Third, and Charlie Wyzanski here, you would be creating judges mindful of the basic function of law as the body of arrangements for realizing social needs. Such men have not only a progressive outlook now, but they would be open-minded to needful changes ten and fifteen years hence.

(b) You also wanted me to put on paper the suggestion of a really able committee to inquire thoroughly into technological unemployment. This would fit into your so-called monopoly studies, and could be launched so as to expose the present baffling ignorance of the critics of the New Deal on what are really fundamental economic issues. Not only the statement in which the purposes of such a committee would be explained, but also its personnel, would carry great assurance to the country and give further indication of your long-range planning. The committee ought to be a real directing body, even though the technical work would be done by technicians. The kind of people that suggest themselves—and it should be a smallish committee—are Zemurray for industry, Averill Harriman for the railroads, Sidney Hillman for the C. I. O., and some very good man for the A. F. of L., Wesley Mitchell as a professional economist, and Dr. Alice Hamilton who would be a distinguished representative of the scientific and social aspects of women in industry.
(c) Finally, you asked me to give you Julius Rosenwald's remark about money-making. I don't know whether he ever put it on paper, but I myself heard him say: "Money-making is a special knack. The fact that a man has made a lot of money doesn't mean that his opinions on any other subject are worth anything."

We had an altogether delightful time. It wasn't until we got back that Marion confessed to me, what she had already confessed to you, namely, that when the guard tried to stop her from entering the White House, she said, "Why, I am living here." That's the way you made her feel. Incidentally, she says it was perfectly wonderful the way you roared with enjoyment when she told you about it.

Best love to you.

[Signature]

The President
Dear Bauer:

This must have been a breath-holding weekend for you, for I suspect it was pregnant with more real cause for alarm than any period since 1914. Happily the Czechs were true to the will and wisdom symbolized by their two great statesmen, Masaryk and Benes—one of my profoundest post-War memories was a two hour talk with Masaryk at Prague—and thereby they proved anew that the way to deal with a bully is not to yield to him. It is at once mortifying and inspiring that this small nation should teach a lesson to both Great Britain and France in not feeding the bully's strength by showing weakness. But, of course, all the elements of the difficulty remain, and, I suspect, the price that will inevitably be asked of the Czechs will be ultimate separation. I should be more than surprised if they yielded.

But I started to write this letter about two matters not touching world affairs.

In response to the interest you expressed when I was down, I have made further inquiries about the Boston Transcript. People who ought to know tell me it could be bought for $100,000. It has an A. P. franchise.

Since writing you about Monte Lemann I have very good
reasons for believing that Claude Pepper would be agreeable to
the appointment of Monte Lemann. He recognizes, as I think ev-
everyone in the south would, the rare combination of qualities of
Lemann.

The tide generally seems to be running the right way.
I hope you get out of Congress during the rest of the session
all you want and prevent from being done what should not be done.

With our warmest regards,

[Signature]

The President
July 5, 1939.

Dear Felix,-

Many thanks for letting me see these letters. That list of scientists is amusing and I fear the dinosaurs have not ended yet.

To there some way in which the mental feelings of a large group of people can be div- erged from stock market fluctuations? I might almost say physical feelings as well, because when the market goes up these people actually feel physically better, as well as mentally.

I had to have to admit it but the market of the past two weeks seems to have brought a coincide psychological change in the political situation — and, as you have perceived, I am capitalizing on it and intend to do so on the trip across the country.

If there is no war in Europe before July sixteenth, I hope to leave San Diego on the S.S. MAUREEN, visit lower California, Gliperton Island, the Galapagos, Galapagos Island, the Panama Canal, Old Providence Island and land at Peninsola on August ninth.

Meanwhile, I hope Marion will see to it that you behave yourself and that she will bring you to Hyde Park sometime in August, after I got back.
By the way, Dr. Conner, the Archivist, made an interesting suggestion yesterday — that Justice Holmes' house be leased or given to the American Historical Association, which, as you know, has a national charter and is, as a whole, a pretty decent and useful body. His idea is that they would use it as national headquarters — a rendezvous for their many members who visit Washington or do research work here. What is your slant on this?

As ever yours,

Professor Felix Frankfurter,
132 Brattle Street,
Cambridge,
Massachusetts.

(Enclosures)
Dear friend,

Please pass this on, and extend your best wishes for a happy Christmas. For yourself,

Most sincerely,

[Signature]
July 1, 1938

FELIX FRANKFURTER
CAMBRIDGE, MASS.

Mr. Samuel —

These two enclosures may come in useful. Samuel Beer is one of the brightest Law Scholars, a Rhodes scholar. He made an outstanding record at Oxford. This came from a very Republican Ohio sect. His wife's [place] is in the northeast. He is the son of former Governor [of place]. I think you will be interested in the paragraph I quote. It is a very interesting letter from a legal mind that does not understand the legal facts of the case. He did not want to hear but could not help doing so.

You certainly have been scoring some points. The first one confused the opposition, bunched your friends, and lured them to speak badly of you. And your ringing words
to the W. E. Q. will be heard round the world. They need to be said by no other than the voice that now speaks. (In this connection, you may also care to see the ideas on this subject by distinguished scientists, which have just appeared in a leading British scientific journal.)

What heavy days ahead have been for you and how splendid and with what confidence you have borne them. The modern type is still ahead of you—and even then I hope, will be found to capture and their peak freedom, for a tenure from the daily press of a thorough and even de f|$\text{f}$ the whole base—holding it Mercury. The beat of the sea was$\text{?}$

You, dear friend, strangely
Law School of Harvard University,
Cambridge, Mass.

Re: BUSY

Re: good enough to

Dear [Name],

Thank you for your warmest congratulations on your marriage. The cream tea, and that you caught both fish and pleasure. Best wishes.

Yours sincerely,

[Signature]
To Dr. Alfred E. Cohn,
New Haven, Conn.
18 August 1938.

PS Frankfurter

Dear Frank:

The best letter that has come over way for a long time were the photo graphs of you in last Sunday's Times. They gave visual proof of all that Mr. McFrate said about your well being and the extraordinary feeling of fitness that breathed through every thing that came from you, since your return. There is great to it your resilience and the serene fighting spirit - the firmly tempered sword blade - of the real leader.

It is always dangerous to tell an author what particular product of his brain one likes, but I cannot withhold poking your article ahead to other days as one of my favorites. You packed an economy, told into a few hundred words - formulated a basic analysis of your political philosophy as well as of its concrete expression. That speech, as well
Law School of Harvard University, Cambridge, Mass.

...to breathe to continuity that you move from the North West Territory does worse over - on your way back - will be living in the order fifty and a hundred years hence, because they are in the order of speech, that at these heart events and give the declining insight.

I enclose some tid-bits that in their various ways being interested in:

1. The piece from The Economist shows real understanding of what your fight against the George, Sydney 0.7, Canada, really means.  
2. The cause you lead;
3. The news about the Prime Minister from any concerned source will not be news to you - but accumulating, first hand in detail is something to which you prefer;
4. The rewards of France, and inform an uplifting contrast.

In your own words, shortly before
Since writing to you last night I spent several hours with the Arthurs, Sulzberger and Rock. The situation is not altogether "healthy" and I am eager to discuss it with you when we meet in September. Arthur Rock was on the boat with me returning to New York. His social climbing, cynicism, conservatism and poisonous dirt-slate for everything connected with Roosevelt and his administration can be very harmful. I expect to spend a week-end with Sulzberger very soon and hope to do what I can, but you may have a suggestion. The prospect of his becoming the "Crown Prince" of the New York Times is a horrible one.
left, you asked me about the suggestion of the Archives for the use of the
Hollersen house by the American Historical Association. That idea
has real possibilities—and I’d be very glad, of course, to concave
it with you at your convenience.

Don Kirtland said that they put
Tobin through the real process and
didn’t like him at all. His attitude
very much. The details of how it’s
tall with Tobin was spread—and
one of these days you haven’t have
it.

Marcon Jones are as warm
regards.

Your truly,
[Signature]
August 8, 1939.

Dear Felix,—As George Meredith or some other brow has said, the dog returns to his vault, which is to say that I now have a typewriter, thanks to my youngest who ran up to town for it. (Once again, buy Standard Oil stock!) So, I reply immediately to your note. I have written to Justice Brandeis, asking him if and when F.C.D. and I may call.

Enclosed is a note from Bill White which should make you feel ashamed of yourself. Please accept it with my compliments and lay it aside for your biographer. I have asked Bill whether he wishes to have me try to get him a speaking engagement with the Boston Chamber of Commerce. I assume that Charlie Jenkins wouldn’t take another chance with him—or with Jackson B.U.

Late last night, as a gesture to the filmy eyed sleep, I took a lone stroll down toward the waterfront and the house where the stricken young Roosevelt lived for awhile during his days of misery. My wife had shown me the house earlier in the day but I wanted to walk around it and get a good eyeful of it. It’s a modest little place, on a corner, a short distance from the warm waters in the rear. It’s as unpretentious as the man himself, and close to the other houses, as he is to other human beings. As smoked and strolled, I couldn’t help thinking of the extraordinary triumph of his mind over his body, the agony which he underwent, the temptation to bewail his lot and thumb his nose at whatever God may be. Doesn’t it make you feel like a puny soul when you consider how little you and all of us who have free movement have accomplished in comparison with the victory of this indomitable gentleman over himself? I don’t mean his political glories, but his ability to keep his mind unwarped, his heart sweet, his ideals unimpaired, his ambition for an active career unmodified in spite of the savage wallop he got from fate? Some day, the people will put a tablet on that unobtrusive little house where he not only bore his cross but took it to bed with him night after night. Fortunately the haters of F.D.R. have not
yet burned or razed or wrecked the cottage. This is one of the
hatangest periods of modern times: how some that the Roose-
veltphobes have overlooked an easy opportunity for additional
desecration?

Have you had a chance to read Eugene Lyons' "Assignment in
Utopia"? I suppose that we ought to turn on the suspicious light
of the mind when reading the books of converts, but the facts
set out in the Lyons book impressed me deeply, even without his
interpretation of them. I haven't finished the book yet, but I'm
three quarters through it and probably the last part, the ex-
planation of the resignation, is not so tragic as the earlier
chapters. He writes extremely well.

White and Fuss say that they found the letter of Leonard
Warre in regard to Coolidge and Roosevelt valuable. How dumb I
was not to realize what Fuss wrote--that on the night when
Wilson spoke, a 'resident was in the company of two 'Residents
to be.

I am returning the letter from your friend McNair of the
URf. Can't I do something for him? Friend Sir Frederick Mar-
quise? I impose only one condition: Merriman must not be a part
of the proceedings. As you made no reference to the McNair note
in your letter to me, I can't sure just what you would like to
have me do, if anything. Anyway, I'll do it.

Schlesinger has sent me an editorial about you in the St.
Louis Post. Probably the writer has relayed you a clipping, but
as he may have forgotten to, I'm enclosing the piece. Will you
return it to me ultimately, please?

As to Bob Bradford: I am going to send him a check for $25
and I'm also writing to F.C.B. requesting him to loosen up. Ano-
ther candidate, L. Salome Stall, made a speech here a week ago, and
the introducing gentleman, the head selectman forget Leverett's
name, consulted his notes and finally introduced Mr. Salome Stall
to the amusement of the little crowd and the amusement of Le-
verett, who took in good part, stripped off his coat and made
an as good speech. This is a headquarters of Republicans, but the
attendance was only 50 or 70. And Burton, the poor boob, stayed
late in Marion---this was two weeks ago---just to add one more
Overseas Correspondence

From Our Special Correspondents

United States

Relief and Politics

WASHINGTON, July 15.—Future historians of the New Deal are likely to devote much study to the dominant part played in politics by Federal relief. Roosevelt won in 1936, because he "bought" the money, and is about to do so again.

Since 1934 the country has suffered the steepest business decline in its history, which it would be easy to win the election but the new depressions. Federal relief and, so this political head, "Nobody will vote for a man who has been proved that explained the Roosevelt victory two years ago.

"You can't beat five billion dollars," is already the Republican reply for the hour that Roosevelt is in the November campaign has not been finally clarified. It may consist of little more than a protest against the influence of politics. The charge is outright corruption, the vote to get the polls at election day, by spending large sums on relief projects in districts where there would be a close. The public does not express their gratitude on election day. In some regions the Progress Works Administration workers are said to understand quite well that their jobs are "political," and that they are of service for them. The late Huey Long used to say about Louisiana that one State employee is "good for" ten votes, and the ratio holds good for the entire country.

To what extent more immediate policy pressure is brought into play, and how far less the needs of a party affiliation or appeal to the emotions of which the evidence is scarce. In some districts the actual administration of relief has slipped into the hands of men who makes the political. Unquestionably, relief is political in all the areas used in such districts, but where the administration has been failing to reach the needs to vote right, then plenty of evidence would be forthcoming to prove it.

The complaint that relief is not enough, or that the amounts have been used politically applies to an extent in which the actual spending. When the Federal Government is ponies aims. The local viewpoint, is one that money to his district. It pays a Congressman to stand the question of the plausibility of a campaign issue for himself if he has sacrificed his New Deal and its works.

The Republican charge is not so much that relief has been dishonestly administered as it is a form of political patronage. It is so powerful that the party in power never ceases. In past times the party in power kept the economy in like by withholding or extending patronage; but this was a beggar in competition with million dollar relief projects and billion dollar spending programmes.

Dissections in Both Parties

President Roosevelt's purge of disloyal Democrats has aroused great interest, and is being both exaggerated and distorted. The President holds a dual position, one which the New Deal's success has. He is the American chief executive and therefore the servant of all the people, but he is also the head of his party's news detections, it is sound politics to try to prevent the re-nomination of the rebels. But the Republicans would deny this privilege to Mr. Roosevelt.

"In the United States, it is one of the fundamental rules of politics that the head of the party should not be overruled by a faction. It is therefore a partisan question whether Mr. Roosevelt is willing to modify his plans. The public seems to dislike the idea of anyone being punished because he differed from the party line on the issue of the Supreme Court or the reorganisation of government.

The public is not party-minded in national affairs. This is natural, since in the past the two parties have not been clearly divided on fundamental national questions. Mr. Roosevelt would like to create a genuine New Deal party. He has expressed his desire to have the "liberals" on one side and the "conservatives" on the other. But the political executions and bitter battles which such a reformation would entail are too expensive to be risked in a campaign year. One or two conservatives may be defected, and others. But the chief conservative Democrats will oppose the New Deal. Notwithstanding the fact that they were yesteryear two years ago, and will re-appear in Congress as triumphant Democrats but potential conspirators against the Roosevelt programme.

It is clear that the Republicans have not recovered from their defeat of 1936. Mr. Roosevelt is still hoping to gain party control for the liberal wing of his party, but he is not a leader for the underprivileged, he lacks the magnetism to win the majorities in Congress, or the considerations of the business type, or the ability of the party to unite the delegates. It would be worth while for Mr. Roosevelt to come out in support of the William Jennings Bryan the candidate of the conservative wing of the party, and to try to "repeal a law each day."

The combination of advertising with party in the Republican line, the unusually charismatic Americanism of the business type, and by no means shuns him out as a candidate. Roosevelt's tour across the country and the world-flight of Mr. Hughes. The President was not relegated to the inside pages, but the main headlines and the larger headlines and more readers. Mr. Roosevelt, however, has acquired enough of the people who favour his leadership. The President's popularity is the chief asset of the Democratic party in the campaign, and it is difficult to see how the Republicans are going to contest one that can begin to offset it before November.

Wall Street as a Barometer

NEW YORK, July 20.—One month has now elapsed since the memorable Monday morning when the stock market began its meteoric advance to new records. Rarely, if ever, has so great a revival of the industrial equipment of a country occurred in so short a time; in two weeks, the industrial share indices rose about 30 per cent. From the low point of the year, approximately at the end of March, it is the exceptional share which has not risen at least 50 per cent; and advances of 100 per cent are by no means uncommon, especially among the low-priced, multi-million-dollar-paying equities.

Not only was the remarkable change in appraisal not preceded by any visible upturn in general business; even now, a month after the stock market recovery, visible signs of recovery is still relatively rare. This, of course, is far from saying that no reason exists for anticipating a substantial revival. It is rather a reminder of the extreme instability of the American markets and of the American economy in general.

In July, 1929, stock market prices rose some 30 points (say 20 per cent.), apparently on the discovery that mid-summer business was holding up better than had been expected. There were those who foresaw a further advance. Prices plunged downwards some 60 or 70 points between
Dear Judge:

This is by way of a P.S.

For I had hardly sent off my letter when furnace fires and other causes, and there was not any way up high, in celebration of it. You said it all to excessive, namely that not the bluest-colored blue-colored bag in the whole Department could find itself. Anable found it, and yet it was said to simply and certifiably true. What was the street canal and its significance. My writing is.

[Signature]

[Date]
TELEGRAM

The White House
Washington

New Milford Conn 509pm Sept 5 1938

The President

At Denton you had almost to square the circle and you certainly did it.

Felix Frankfurter

335pmd
Dear Frank:

1. First, foremost and last, I am terribly sorry that that plan of yours to kick me out of here and do justice to the people during the time I will be away seems to you.

2. The letter to (letter to) shows, Judge, that I can follow good diplomatic advice - I knew that can make great progress!

3. The pencilled notes are not offered as definitive stories, but they are calculated to produce sleep.

4. It will interest you to
Received that year been librarians of complete to the given a said 1st. Oct. by Yale at its next commencement.

Mar. 9 left for
on Wednesday 20th

gay and equivocated
confirmation of that a

fully civilized man it
as head of state

[Signature]
SUPREME COURT OF THE UNITED STATES.

No. 449 and 456.—October Term, 1938.

Newark Fire Insurance Company, Appellant,

449

vs.

State Board of Tax Appeals and The City of Newark.

Universal Insurance Company and Universal Indemnity Insurance Company, Appellants,

456

vs.

State Board of Tax Appeals of the State of New Jersey and the City of Newark.

[May 29, 1939.]

Mr. Justice Reed announced an opinion in which the Chief Justice, Mr. Justice Butler and Mr. Justice Robertsconcurred.

The controversy in No. 449 relates to the jurisdiction of New Jersey to tax the appellant upon the full amount of its capital stock paid in and accumulated surplus. The case is here by appeal under Section 237(a) of the Judicial Code.1

Chapter 336 of the Laws of 19182 is a general act for the assessment and collection of taxes. Section 202 subjects all real and personal property within the jurisdiction of New Jersey to taxation annually at its true value. By Section 301 the tax on other than tangible personal property is assessed on each inhabitant in the taxing district of his residence on the first day of October in each year. Section 305 deals with domestic corporations as residents of the district in which their chief office is located and renders their personal property taxable in the same manner as that of

individuals, except as otherwise provided. Section 207, the most vital in the case, provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

The appellant is a stock fire insurance corporation organized under the laws of New Jersey which at the time of this assessment required it to locate its principal office and to conduct its general business in the state. It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law requires to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's "executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of $6,425.33 on deposit in New Jersey banks. All of the general affairs of the company are conducted in the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago." No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums.

The Board of Assessment of the City of Newark made an assessment, as of October 1, 1934, upon the capital stock paid in and accumulated surplus of the appellant, with deductions for debts and exemptions allowed by law. The assessment was sustained, in succession, by the Essex County Board of Taxation, by the New Jersey State Board of Tax Appeals, now an appellate, by the

Supreme Court, and by the Court of Errors and Appeals; the highest court in the state. Throughout the proceedings below the appellant resisted the jurisdiction of New Jersey to tax on the ground that its intangibles had acquired a business situs and the corporation a tax domicile in New York. Throughout, the state tribunals treated the assessment as upon personal property with a business situs in the sister state. The Supreme Court characterized the exaction as a personal property tax and discussed its validity "in the light of the proofs . . . upon the inescapable premise that . . . the securities, the personality involved, have become an integral part of [appellant's] business situs in New York . . . ."

It held that the state of domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state and added that, in the absence of a New York personal property tax, multiple taxation was impossible. The Court of Errors and Appeals of New Jersey, per curiam, affirmed the judgment for the reasons expressed in the opinion of the Supreme Court.

Appellant urges error in sustaining the assessment in the face of the conclusion that the tax is a property tax upon intangibles with a business situs in New York, the commercial domicile of the corporation. Such approval, it is claimed, violates the due process clause of the 14th Amendment.

The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets. The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax.

When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the

3 N. J. Laws 1929, c. 124, section 3, second, 608; N. J. Laws 1929, c. 6, section 3, second, p. 14, and c. 47, section 1, p. 82. By c. 164 of N. J. Laws 1937, this was amended to read that the certificate of incorporation must set forth "the place where the principal office of the said company in this State is to be located."

4 118 N. J. L. 525.
5 120 N. J. L. 185.
6 118 N. J. L. 526.
7 120 N. J. L. 185.
8 Fidelity Trust Co. v. Board of Equalisation, 77 N. J. L. 128, 130.
Newark Fire Ins. Co. vs. State Board of Tax Appeals.

jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete.10 In accordance with the ordinary recognition of the rule of mobilia sequuntur personam to determine the taxable situs of intangible personality,11 the presumption is that such property is taxable by the state of the corporation's origin. This power of New Jersey to tax is made effective by section 207 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type, as the franchise tax, at one time levied,12 was repealed by the Act of April 8, 1903.13

There are occasions, however, when the use of intangible personality in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state.14 The carrying on of the business of the corporation in New York, it is urged, has withdrawn its intangibles completely from the tax jurisdiction of New Jersey. With the assumption of a business situs and commercial domicile in New York, that state, under the authorities cited, would have the right to tax intangibles with this relation to its sovereignty. Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been

9 Lafayette Insurance Co. v. French, 18 How. 604; St. Louis v. Virginian


12 Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 88; Blodgett v. Silberman, 277 U. S. 1, 9.

13 Cream of Wheat v. Grand Forks, 253 U. S. 325, 329; Virginia v. Imperial


15 N. J. Laws 1903, c. 208, p. 394.

16 New Orleans v. Steamp, 175 U. S. 309; Bristol v. Washington County,


Newark Fire Ins. Co. vs. State Board of Tax Appeals.

heretofore reserved.17 We do not find it necessary to answer it in this case.

Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court.18

In the Steimpel, Bristol, Comptoir National, Metropolitan and Liverpool cases, cited in note 16, supra, the integration of the foreign-owned intangibles with local activities was evident from the continued course of business. The presence or absence of the evidence of the credits from the jurisdiction was immaterial.19 The non-resident individuals and corporations carried on continuously a course of lending money or granting credits within the taxing states. The taxed intangibles grew out of these transactions. They were, in fact, a part of them. In the Wheeling Steel case, the same type of amalgamation occurred. West Virginia sought to tax a Delaware corporation on accounts receivable and bank deposits. The opinion points out, pages 212 and 213, that these choses in action were the indebtedness for or the proceeds of sales confirmed in West Virginia, attributable "to the place where they arise in the course of the business of making contracts of sale." In First Bank Stock Corporation v. Minnesota another Delaware corporation was found to have established a commercial domicile for itself and given a business situs to certain of its intangibles. The intangibles in question were stocks of Montana and North Dakota state banks, purchased and held as part of the corporation's assets in its Minnesota business of holding the shares and managing, through stock ownership, the business of numerous banks, trust companies and other financial institutions of the Ninth Federal Reserve District. As this business was localized in Minnesota, the stocks of these banks were an essential factor of that business and therefore had a taxable situs in Minnesota.


The conception of a business situs for intangibles enables the tax

gathering entity to distribute the burden of its support equitably
among those receiving its protection. It makes the notion of a tax

situs for particular intangibles more definite. It is not the sub-
stitution of a new fiction as to the mass of choses in action for the

established fiction of a tax situs at the place of incorporation. To
overcome the presumption of domiciliary location, the proof of bus-

iness situs must definitely connect the intangibles as an integral
part of the local activity. The facts presented by this record fall
far short of this requirement.

The tax is upon "the full amount of capital stock and surplus"
less certain allowed deductions of real estate and exempt securities.
The evidence gives no explanation of the amount or source of the
assets making up the amount $3,270,080.66 which balances with the
capital stock and surplus less these deductions. The stipulation
shows "agreed" figures, $8,107,901.83 presumably of capital and
surplus, as shown below.9

Agreed deductions are $4,737,821.17.

But the assessment is $1,069,000. From the stipulation, we learn
the "general accounts" are kept in New York City and all cash
except $6,429.23 and all securities are located at the New York
office or in banks outside of New Jersey. If we assume that the
"general accounts" mentioned are the company's claims against
agents, other insurance companies, and similar bills receivable, no
progress is made towards their identification with New York busi-
ness. Nothing is shown as to the volume of New York business in
comparison with New Jersey or the other states. We are not told

9 n. (a) The following figure have been agreed upon. In the first column
appears the designation of what the fund represents; opposite each designation
appearing the amount of the fund in question:

1. Capital stock ........................................ $2,000,000.00
2. Surplus (as set forth in the books of the company) 3,948,940.39
3. Reserve for unearned premiums 3,001,025.46
4. Reserve for taxes 71,765.65
5. Reserve for contingencies 68,915.35
6. Reserve for reinsurance 4,228.23
7. Agency balances over 90 days old 119,109.72
8. Furniture and fixtures (in Newark office) 1,200.00

Total ........................................... $8,350,082.83

Reserves for unearned premiums and for reinsurance are a taxable asset in
65. The Board of Tax Appeals held the agency balances an asset, and the
reserve for taxes a liability which is deductible. Nothing was said about the
reserve for contingencies. Addition of the items known to constitute assets-
capital stock, surplus, reserve for unearned premiums, reserve for reinsurance,
agency balances—equals $8,107,901.83.

Newark Fire Ins. Co. v. State Board of Tax Appeals. 7

where business is accepted, monies collected or insurance contracts
made. The securities may represent local loans or investments in
New Jersey or elsewhere made from funds derived from similar
insurance contracts with a business situs at those points.21 They
may be the result of insurance activities of many kinds, taking
place far from New York. If we were to assume that the intangi-
bles of a corporation may have only one taxable situs, the mere

fact that general affairs of a foreign corporation are conducted by
general officers in New York without further evidence of the source
and character of the intangibles does not destroy the taxability of a
part of those intangibles by the state of the corporation's legal domi-
cile. The presumption of a taxable situs solely in New Jersey is not
overturned.

Universal Insurance Company and Universal Indemnity Insur-
ance Company have appeals involving the same questions. By
stipulation these cases were consolidated for review below and
appeal here.

These appellants are New Jersey insurance corporations, assed by
the City of Newark in the same way, under the same statute and
with the same result in the state courts as the appellant in No. 449.

There are no significant distinctions between the cases. A man-
gegment corporation handles these companies at a New York office,
where accounts are payable. Seven per cent of the business of
Universal Insurance Company originates in New Jersey. The cor-
responding percentage for the other company is not shown. As
in No. 449, the record is silent as to the character, source and use
of the securities and credits.

The judgments in both cases are

 affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—October Term, 1938.

Newark Fire Insurance Company, Appellant,

449

vs.

State Board of Tax Appeals and The City of Newark.

Universal Insurance Company and Universal Indemnity Insurance Company, Appellants,

456

vs.

State Board of Tax Appeals of the State of New Jersey and the City of Newark.

[May 29, 1939.]

Mr. Justice FRANKFURTER announced the following opinion, concur-
red in by Mr. Justice STONE, Mr. Justice BLACK, and Mr. Justice DOUGLAS.

Wise tax policy is one thing; constitutional prohibition quite
another. The task of devising means for distributing the burdens
of taxation equitably has always challenged the wisdom of the
wisest financial statesmen. Never has this been more true than
today when wealth has so largely become the capitalization of ex-
pectancies derived from a complicated network of human relations.
The adjustment of such relationships, with due regard to the pro-
motion of enterprise and to the fiscal needs of different govern-
ments with which these relations are entwined, is peculiarly a phase
of empirical legislation. It belongs to that range of the experi-
mental activities of government which should not be constrained by

1 Compare Anderson v. Dunn, 6 Wheat. 204, 229: "The science of govern-
ment is the most abstruse of all sciences; if, indeed, that can be called a
science which has but few fixed principles, and practically consists in little
more than the exercise of a sound discretion, applied to the exigencies of the
state as they arise. It is the science of experiment."
rigid and artificial legal concepts. Especially important is it to
abstain from intervention within the autonomous area of the legis-
latively taxing power where there is no claim of encroachment by
the states upon powers granted to the national government. It
is not for us to sit in judgment on attempts by the states to evolve
fair tax policies. When a tax appropriately challenged before us
is not found to be in plain violation of the Constitution our task
is ended.

Chapter 236 of the New Jersey Laws of 1918, as applied to the
circumstances of these two cases, clearly does not offend the Con-
stitution. In substance, such legislation has heretofore been found
free from constitutional infirmity. Cream of Wheat Co. v. Grand
Forks, 253 U. S. 325, affirming 41 N. Dak. 330. During all the
vicissitudes which the so-called "jurisdiction-to-tax" doctrine has
encountered since that case was decided, the extent of a state's
taxing power over a corporation of its own creation, recognized in
the Cream of Wheat case, has neither been restricted nor impaired.
That case has not been cited otherwise than with approval.2 Questions affecting the factional "situs" of intangibles, which received
full consideration in Curry v. McGeehan, decided this day, do not
concern the present controversies. Cream of Wheat Co. v. Grand
Forks, supra, and the cases that have followed it, afford a wholly
adequate basis for affirming the judgments below.

son, 253 U. S. 88, 93; Baker v. Brumelow, 263 U. S. 137, 141; Swiss Oil Corp.
v. Shank, 273 U. S. 697, 714; Holland v. Hallman, 276 U. S. 266, 271; Montana-
grove Ward & Co. v. Bemerson, 277 U. S. 573; Educational Films Corp. v.
Ward, 282 U. S. 379, 383; Nebraska ex rel. Bostic Canning Co. v. Marsh,
SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1938.

I. W. Lane, Petitioner, vs. Marlon Parks.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 22, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here on certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit affirming that of the United States District Court for the Eastern District of Oklahoma, entered upon a directed verdict in favor of the defendants. The action was one for $5,000 damages brought under Section 1979 of the Revised Statutes (42 U. S. C. § 1983), by a colored citizen claiming discriminatory treatment resulting from electoral legislation of Oklahoma, in violation of the Fifteenth Amendment. Certiorari was granted, 306 U. S. —, because of the importance of the question and an asserted conflict with the decision in Guion v. United States, 238 U. S. 347.

The constitution under which Oklahoma was admitted into the Union regulated the suffrage by Article III, whereby its “qualified electors” were to be “citizens of the State . . . who are over the age of twenty-one years” with disqualifications in the case of felons, paupers and lunatics. Soon after its admission the suffrage provisions of the Oklahoma Constitution were radically amended by the addition of a literacy test from which white voters were in effect relieved through the operation of a “grandfather clause.” The clause was stricken down by this Court as violative of the prohibition against discrimination “on account of race, color or previous condition of servitude” of the Fifteenth Amendment. This outlawry occurred on June 21, 1915. In the meantime the Oklahoma general election of 1914 had been based on the offending “grandfather clause.” After the invalidation of that clause a special session of the Oklahoma legislature enacted a new scheme
for registration as a prerequisite to voting. Oklahoma Laws of 1916, Act of February 26, 1916, c. 34. Section 4 of this statute (now Section 5654, Oklahoma Statutes 1931, 26 Okla. St. Ann. 74) was obviously directed towards the consequences of the decision in Guinn v. United States, supra. Those who had voted in the general election of 1914, automatically returned qualified voters. The new registration requirements affected only others. Those had to apply for registration between April 30, 1916 and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those "absent from the county . . . during such period of time, or . . . prevented by sickness or unavoidable misfortune from registering . . . within such time". The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the "grandfather clause" immunity prior to Guinn v. United States, supra, and citizens who were outside it, and the not more than 12 days of the normal period of registration for the theretofore prescribed class.

1 It shall be the duty of the precinct registrar to register each qualified voter of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such persons applying shall at the time he applies to register be a qualified voter in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified voter to register within such time; provided, if any voter should be absent from the county of his residence during such period of time, or prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirty-first day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county of was prevented from registering by sickness or unavoidable misfortune, as hereinbefore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified voter who voted in the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said voter for registration, and, to deliver such certificate to such voter if he is still a qualified voter in such precinct and the failure to so register each voter who voted in such election held in November, 1914, shall not preclude or prevent such voter from voting in any election in this state; and provided further, that wherever any voter is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved voter by his filing within ten days a petition with the Clerk of said court, wherein summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted in the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote.

3 See also, In re Sawyer, 124 U. S. 300; Walnut v. House of Rep., 565 U. S. 487; & Poullon, 324 U.S. 1743 et seq.; Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARP. L. REW. 640, 681.
strietion upon the exercise of equitable jurisdiction there was
another difficulty in Giles v. Harris. The plaintiff there was in
effect asking for specific performance of his right under Alabama
electoral legislation. This presupposed the validity of the legisla-
tion under which he was claiming. But the whole theory of his
bill was the invalidity of this legislation. Naturally enough, this
Court took his claim at its face value and found no legislation on
the basis of which specific performance could be deemed. 9

This case is very different from Giles v. Harris—the difference
having been explicitly foreshadowed by Giles v. Harris itself. In
that case this Court declared "we are not prepared to say that an
action at law could not be maintained on the facts alleged in the
bill." 189 U. S. at 485. That is precisely the basis of the present
action, brought under the following "appropriate legislation" of
Congress to enforce the Fifteenth Amendment:

"Every person who, under color of any statute, ... of any
State, subjects, or causes to be subjected, any citizen of the United
States ... within the jurisdiction thereof to the deprivation
of any rights, privileges, or immunities secured by the Constitution
and laws, shall be liable to the party injured in an action at law.

The Fifteenth Amendment secures freedom from discrimination on
account of race in matters affecting the franchise. Whosoever
"under color of any statute" subjects another to such discrimina-
tion thereby deprives him of what the Fifteenth Amendment se-
cures and, under Section 1979 becomes "liable to the party injured
in an action at law." 4 The theory of the plaintiff's action is that
the defendants, acting under color of Section 5564, did discriminate
against him because that Section inherently operates discrimina-
torily. If this claim is sustained his right to sue under R. S. Sec-

8. "If the sections of the constitution concerning registration were illegal
in their inception, it would be a new doctrine in constitutional law that the
original invalidity could be cured by an administration which defeated their
intendment. We express no opinion as to the alleged fact of their unconstitu-
tionality beyond saying that we are not willing to assume that they are valid, in
the face of the allegations and main object of the bill, for the purpose of
granting the relief which it was necessary to pray in order that that object
should be secured." 189 U. S. at 487. Recognition of the difference between
an action for damages and the equitable relief prayed for in Giles v. Harris
was repeated at the close of the opinion. See 169 U. S. at 488. Justice
Harlan, Brewer, and Brown were of the opinion that it was competent for a
federal court to grant even the equitable relief asked for in Giles v. Harris.

4 The Act of April 30, 1871, c. 22, § 17, which became Section 1979
of the Revised Statutes, and is now 8 U. S. C. § 41.
Section 5659 of the Oklahoma statutes makes registration a prerequisite to voting. By Sections 5654 and 5659 all citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were permanently disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the Guion case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional "grandfather clause" had sheltered while subjecting colored citizens to a new burden. The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the Guion case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cobbled and confused. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in exceptional cases a supplemental period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes

8 "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member. " Section 9, Oklahoma Laws of 1916, c. 24.

9 "Any person who may become a qualified elector in any precinct in this state after the tenth day of May, 1916, or after the closing of any other registration period, may register as an elector by making application to the registrar of the precinct in which he is a qualified voter, not more than twenty nor less than ten days before the day of holding any election and upon complying with all the terms and provisions of this Act, and it shall be the duty of precinct registrars to register such qualified electors in their precinct under the terms and provisions of this Act, beginning twenty days before the date of holding any election and continuing for a period of ten days. Precinct registrars shall have no authority to register electors at any time except as provided in this Act and no registration certificate issued by any precinct registrar at any other time except as herein provided shall be valid. " Section 9, Oklahoma Laws of 1916, c. 24.
SUPREME COURT OF THE UNITED STATES.

No. 810.—October Term, 1938.

George W. O'Malley, Individually and
as Collector of Internal Revenue,
Appellant,

vs.

Joseph W. Woodrough and Ella B.
Woodrough.

On Appeal from the District Court of the United States for the District of
Nebraska.

[MAY 22, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here under Section 2 of the Act of August 24, 1937
(50 Stat. 751), as a direct appeal from a judgment of a district
court whose "decision was against the constitutionality" of an Act
of Congress. The suit below, an action at law to recover a tax on
income claimed to have been illegally exacted, was disposed of upon
the pleadings and turned on the single question now before us, to
wit: Is the provision of Section 22 of the Revenue Act of 1932 (47
Stat. 169, 178), re-enacted by Section 22(a) of the Revenue Act of
1936 (49 Stat. 1648, 1657), constitutional insofar as it included in
the "gross income", on the basis of which taxes were to be paid,
the compensation of "judges of courts of the United States taking
office after June 6, 1932"?

That this is the sole issue will emerge from a simple statement of
the facts and of the governing legislation. Joseph W. Woodrough
was appointed a United States circuit judge on April 12, 1933, and
qualified as such on May 1, 1933. For the calendar year of 1936 a
joint income tax return of Judge Woodrough and his wife disclosed
his judicial salary of $12,500, but claimed it to be constitutionally
immune from taxation. Since it was not included in "gross in-
come" no tax was payable. Subsequently a deficiency of $631.60
was assessed on the basis of that item, which, with interest, was paid
under protest. Claim for refund having been rejected, the present
suit was brought, and judgment went against the Collector. The
assessment of the present tax was technically under the Act of
By means of Section 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of *Evans v. Gore*, 253 U. S. 245. That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the "gross income" from which the net income is to be computed, although merely part of a taxing measure of general, non-discriminatory application to all earners of income, is contrary to Article III, § 1 of the Constitution which provides that the "Compensation" of the "Judges" "shall not be diminished during their Continuance in Office." See also the separate opinion of Mr. Justice Field in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 604 et seq. To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views. In doing so, he merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated. Chief Justice Taney's vigorous views were shared by At-
O’Malley vs. Woodrough.

charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by Section 3 of the Public Salary Tax Act of 1939, amended Section 22(a) so as to make it applicable to “judges of courts of the United States who took office on or before June 6, 1932.” That Section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in Miles v. Graham, 288 U. S. 501, the latter cannot survive.

Judgment reversed.

Mr. Justice McReynolds did not hear the argument in this case and took no part in its consideration or decision.

A true copy.

Test:

Clerk, Supreme Court, U. S.
ficiency assessment of §531.00. Plaintiffs paid under protest and filed claim for refund; it was denied. Claiming the tax that they were so compelled to pay diminished the judge's compensation and that therefore § 22(a) of the Act of 1936 violates § 1, Art. III, of the Constitution, plaintiffs sued to recover the amount of the tax. The collector moved to dismiss. The court held the Act unconstitutional, overruled the motion and, defendant having elected not to plead further, gave plaintiff's judgment as prayed. Defendant appealed. 6

Article III, § 1, declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." It safeguards the independence of the judiciary. The abuse against which it was intended to be a barrier is included in the list of reasons for our Declaration of Independence. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judicial powers.—He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Alexander Hamilton, explaining the reasons for and the purpose of § 1 of Art. III, said:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment . . . ."

"This simple view of the matter . . . proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks . . . ."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no


bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing . . . ." (The Federalist, No. 78.)

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will . . . . The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that permanent salaries should be established for the judges, but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges." (The Federalist, No. 79.)

Mr. Justice Story declared that "Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery . . . ." 2 Story, § 1628. Chancellor Kent said: "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions." 1 Kent Com. 294.

The first judicial construction of the clause was by the circuit court of the District of Columbia in 1803 in the case of United States v. More. 7 The court was composed of Chief Justice Marshall, Chief Judge Kitty, and Circuit Judge Cranch. The opinion was written by Judge Cranch. The court sustained a demurrer to an indictment charging that More, a justice of the peace, under color of his office, exacted an illegal fee, 12 cents, for giving judg-
O'Malley vs. Woodruff.

The power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments."

Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it."

The letter of the Chief Justice was not answered and, at his request, the Court, May 10, 1863, ordered the letter entered on its records. In 1869, the Secretary of the Treasury requested the opinion of Attorney General Ebenezer Rockwood Hoar as to the constitutionality of the Act construed to extend to judges' salaries. He rendered an opinion in substantial accord with the views expressed in Chief Justice Taney's protest. 13 Op. A. G. 361. Accordingly, the tax on the compensation of the President and of judges was discontinued and the amounts theretofore collected from them were refunded—some through administrative channels; others through action of the court of claims and ensuring appropriations by Congress. See Wayne v. United States, 26 C. C. 274, 290; 27 Stat. 306.

In 1889, Mr. Justice Miller, a member of the Court since 1862, said:

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even..."
The Constitution of the United States has placed several limitations upon the general power of taxation, and some of them are implied. One of its provisions is that neither the President of the United States (Art. II, sec. 1, par. 6), nor a judge of the Supreme or inferior courts (Art. III, sec. 1), shall have his salary diminished during the period for which he shall have been elected, or during his continuance in office. It is very clear that when Congress, during the late [Civil] war, levied an income tax, and placed it as well upon the salaries of the President and the judges of the courts as those of other people, that it was a diminution of them to just that extent."

Although the Income Tax Act of 1894 said nothing about the compensation of the judges, Mr. Justice Field construed § 2366 to tax that compensation and assigned that ground among others for joining in the decision that the Act was unconstitutional. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 604-606. Mr. Justice Field, who was confirmed the day this Court ordered Chief Justice Taney's letter entered on its records, had taken his place upon this bench at the beginning of the following term. His opinion recited the facts of that incident and quoted extensively from the letter, which was printed as an appendix to the volume of the reports containing the opinions in the Pollock case. 157 U. S. 701. The Justice ended his discussion of the matter by stating his belief, based on information, that the opinion of Attorney General Hoar had been followed ever since without question by the Treasury. And, upon reargument of the case, Attorney General Olney said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt."

The Revenue Acts of 191314 and 191615, being the first two after adoption of the Sixteenth Amendment, expressly excluded from gross income the compensation of judges then in office. But after this country engaged in the War, the Revenue Act of 1918, approved February 24, 1919, defined gross income to include "in the case of the President . . . and the judges of the Supreme and inferior courts . . . the compensation received as such."16 The reports of the congressional committees having the measure in charge indicate that the Congress was in doubt as to the constitutional validity of that provision and intended to have the question decided by the courts.17 The question was raised and presented for decision in Evans v. Gore, 253 U. S. 245. The Collector included the salary for 1918 of Judge Evans, appointed before enactment of the taxing statute, in gross income. Had it been excluded, he would have had no taxable income. He paid the tax and brought suit to recover the amount so exacted. The United States district court for the western district of Kentucky held him not entitled to recover. But, after argument by eminent counsel including the Solicitor General, this Court held that the clause declaring that compensation of judges "shall not be diminished during their continuance in office" prevents diminution by taxation and that it has been construed in the actual practice of the government.

For the purpose of disclosing the reasons for and true meaning of the clause forbidding diminution of compensation of judges, the opinion of the Court, written by Mr. Justice Van Devanter, brought forward statements of Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Chief Justice Taney, Justice Field, Attorneys General Hoar and Olney and others.

Speaking for the Court, he said:
"With what purpose does the Constitution provide that the compensation of the judges shall not be diminished during their continuance in office? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?"

". . . The primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and prevailing
principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

" Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished ."

"The prohibition in general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. . ."

"When we consider . . . what is comprehended in the congressional power to tax—where its exertion is not directly or impliedly interdicted—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forebear to tax another'; and may be applied in different ways to different objects as long as there is 'geographical uniformity' in the duties, imposts and excises imposed. [Citing.] Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on se-
The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of Evans v. Gore.

The taxing Act became a law [February 24, 1919] prior to the statute providing salaries for judges of the Court of Claims [approved February 25, 1919] but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of 'gross income', the compensation received as such from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income', and to tax this as other salaries. This is forbidden by the Constitution.

The arguments upon which McCreight v. Maryland, 4 Wheat. 316, rested have been distorted by sterile refinements unrelated to affairs. Those refinements derived authority from an unfortunate remark in the opinion in the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy,' but the web of unreality spun from Marshall's famous dictum was brusquely swept away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits.' Panhandle Oil Co. v. Mississippi, 277 U. S. 257, 577 (dissent).

But, in the Gillete case, Mr. Justice Holmes, speaking for the Court, had definitely applied the doctrine that the power to tax does involve the power to destroy.

In the Panhandle case neither the Court, nor indeed another justice dissenting, was impressed by the 'the power to tax is not the power to destroy while this Court sits.' The statement is vague and may be read to imply a power that this Court never possessed. If taken to mean that we are empowered to regulate or to limit the taxation by Congress of its power of taxation, it justly may be regarded as hyperbole; if taken to mean that this Court has power to prevent imposition by Congress of taxes laid to discourage, to destroy, or to protect, then it is in the teeth of the law. See, e.g., Venable Bank v. Venable, 9 Wall. 552, 545; McCray v. United States, 195 U. S. 573, et seq.; Magnano Co. v. Hamilton, 99 U. S. 40, 44 et seq.; Cincinnati Soap Co. v. United States, 301 U. S. 305.

The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.

In O'Donohue v. United States (1933), 289 U. S. 516, we construed the Act of June 30, 1922 reducing the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." We there held that the supreme court and court of appeals of the District of Columbia were constitutional courts and therefore that the judges of those courts were excepted from the salary reduction. We cited the authorities, adopted the reasoning, and reaffirmed the conclusions on which rest the Court's judgments in Evans v. Gore and Miles v. Graham. And see Booth v. United States, 291 U. S. 339.

Evidently the Court intends to destroy the decision in Evans v. Gore. Without suggesting that there is any distinction between that case and Miles v. Graham, it declares that the latter "cannot survive." But the decision of today fails to deal with, much less to detract from the reasoning of those cases. The opinion would imply that the letter of Chief Justice Taft to the Secretary of the Treasury, and the separate opinion of Mr. Justice Field in the Pollock case were treated as having weight as judicial decisions. But nowhere has that ever been suggested. However, all who are familiar with our judicial history know that entitled to great respect are the reasoned conclusions of these eminent American jurists as to the true intent and meaning of the Constitution of the United States. And similarly worthy of attention are the opinions of the Attorneys General and other public officials following the reasoning of Chief Justice Taft.

Now the Court cites, as if entitled to prevail against those well-sustained opinions and the deliberate judgments of this Court, opposing views—if indeed upon examination they reasonably may be so deemed—of English speaking judges in foreign countries.

It refers, footnote 6, to the decision of the Privy Council in Judges v. Attorney-General of Saskatchewan (1937), 2 D. L. R. 200, constraining income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legis-
O'Malley vs. Woodrough.

The present day enactments and subject to authoritative interpretation or change by the local or British Parliament. They shed no light upon the issue in this case.

The opinion claims no support from any state court decision. The one it cites, footnote 8, that of the Maryland Court of Appeals in Gordy v. Dennis, 5 A. 2d 69, held that under a clause in the Constitution of Maryland like that in Art. III, § 1, the compensation of state judges may not be taxed.

The opinion also cites, footnote 7, selected gain saying writings of professors—some are lawyers and some are not—but without specification or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students.

The suggestion that, as citizens, judges are not immune from taxation begs the question here presented. The Constitution itself puts judges in a separate class, declaring that at stated times they shall receive for their services compensation which "shall not be diminished." And so their salaries are distinguished from income of others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved.

Admittedly the Court now repudiates its earlier decisions upon the point here in issue. The provision defining tenure and providing for undiminishable compensation was adopted with unusual accord. There has been unanimity of opinion that, because in comparison with the legislative and executive the judicial department is weak, its independence is essential to our system of government. These safeguards go far to insure that independence.

And, from the beginning, statesmen and jurists have agreed that the clause forbids diminution of judges' compensation by any form of legislation. The clause in question is plain: no exception is expressed; none may be implied. Its unqualified command should be given effect.

For one convinced that the judgment now given is wrong, it is impossible to acquiesce or merely to note dissent. And so this opinion is written to indicate the grounds of opposition and to evidence regret that another landmark has been removed.

I am of opinion that the judgment of the district court should be affirmed.
MANY THANKS WE SHALL BE DELIGHTED TO RUN UP SATURDAY AFTERNOON

FELIX FRANKFURTER.
Cambridge, Nov. 18, 1938

Dear Miss de Winder,

I am in haste.

This note to you? The contents are so startling I would like to have it sent into the wrong hands. Many thanks, and warm regards.

Frankfurter
126

Mr. Mund

192, Prince St.
Cambridge, Nov. 15 [1938]

Dear Mr. President,

It gives me great pleasure to announce that I voted for Mr. Galbraith. I won't say the choice was easy, but I
Don't tell me they had a dike. He says the caller is secret!

We told him you are here.

Dannion Bank Parker

Chian and marshmen.

Being both, I take great pains to tell all my friends. They

other by sailbile to go stringing they had a shoot in turn.

Felix. The cow...

...
Dear Mr. President:

At Hyde Park you asked me to look into the work of Circuit Judge Stephens of California, Circuit Judge Healy of Idaho, and of a judge in Montana whose name at the moment had escaped you.

Having examined the reported opinions of Judge Stephens and Judge Healy, as well as the decisions in which they participated without writing, I now enclose two memoranda, I hope sufficiently brief, giving the results of this survey.

But I am sorry to say that I am not able to spot your Montana judge, for I can hardly believe that you had either Judge Baldwin or Judge Pray in mind. If, however, it should be either, I can send you a memorandum very quickly, for I have examined the opinions of both.

Faithfully yours,

Felix Frankfurter

The President
CIRCUIT JUDGE WILLIAM HEALY

Judge Healy has been on the court less than a year and a half, and neither his reported opinions nor the cases in which he participated but did not write, afford an adequate judgment upon the bent of Judge Healy's mind or his constitutional outlook upon politico-economic issues. So far as his voting record indicates trends, it is one of liberality. The style of his opinions is lucid, less weighed down with dreary quotations and legal jargon than is the way of so many judges. But he has no radium-like quality; there is no real distinction of utterance and no manifestation of learning in the service of wisdom.

1. Constitutional Cases.

He has written in only two cases which come within this general field. Parramore Lumber Co. v. Marshall, 95 F. (2d) 205, was a rather simple case, easily governed by the Supreme Court's decision in Myers v. Bethlehem Shipbuilding Co. The other, Carrizo Gun Club v. Hall, 96 F. (2d) 620, arose under the Migratory Bird Treaty Act in which Judge Healy dealt with some procedural problems.

2. Administrative Agencies.

Judge Healy has written and participated in a number of cases in which he has shown hospitality towards the administrative process both of the Securities and Exchange Commission and of the National Labor Relations Board. But these cases were not challenging because in the S. E. C. cases (Moody v. United States, 97 F. (2d) 258, and Consolidated Mines v. S. E. C., 97 F. (2d) 704, ) Judge Healy followed the lead of the Circuit Court of Appeals for the Second Circuit, while in the Labor Board case (T. I. R. E. v. Oregon Worsted Co., 96 F. (2d) 195, ) he had the benefit of Stone's opinion in the Greyhound case.
3. Taxation.

Nor have the tax cases that have thus far come before Judge Healy furnished the proper litmus paper for a test of his mind on more fundamental legal issues affecting taxation. *Commissioner v. Gerspach*, 95 F.2d 587; *Hend v. Welch*, 95 F.2d 617; *Regnell v. Commissioner*, 96 F.2d 956; and *Straus v. Commissioner*, 97 F.2d 549, are either conventional decisions or opinions which, however lucid, do not touch the nerve center of constitutional controversies in the domain of taxation.
GIRCTJUIDE ALBENT L. STEPHKNS

While all of Judge Stephens' reported opinions have been canvassed, it is assumed that the qualities of his mind and his outlook upon politico-legal questions are to be gleaned from his opinions in public law controversies. This memorandum, therefore, restricts itself to these, and, is not concerned with ordinary private law litigation.


It is fair to say that during his short tenure Judge Stephens has not been adequately tested in the domain of Constitutional Law. He seems to have written no opinions dealing with powers of government, excepting Gum Club v. Hall, 96 F. (2nd) 620, arising under the Migratory Bird Treaty Act, and Fosmer v. Juneau, 97 F. (2nd) 640, dealing with a city's implied power to lease a wharf. Both these opinions reached sound enough conclusions. In the light of the authorities, they were not difficult to reach, and give no indications as to his general constitutional outlook nor his ability to meet more complicated constitutional problems.

2. Administrative Agencies.

a. National Labor Relations Board

He has written no majority but only two concurring opinions. In N. L. R. B. v. Carlisle Lumber Co., 94 F. (2nd) 158, he added some commonsensical observations to Judge Haney's majority opinion, which incidentally indicates that he has probably a liberal attitude toward the rights of workers. In N. L. R. B. v. Star Publishing Co., 97 F. (2nd) 465, he again appended concurring remarks to Judge Haney's majority opinion sustaining the Board in its order against the Seattle
Star. That paper found itself involved in a controversy between the Newspaper Guild and the A. F. of L., and Stephens' concurrence was a statement that he deemed it just to the Star to say that it endeavored to live up to the purposes of the Wagner Act, and that its violation was due to the dilemma presented to the newspaper by internal labor strife.

b. Immigration

In two cases Judge Stephens upheld the rulings of the Department of Labor, although in one case real hardship was entailed: Ex parte Nunez, 93 F (2nd) 41; Sing v. Director, 96 F (2nd) 969.

3. Taxation.

His opinions dealing with taxation show no marked trend. Several were on the record inevitable decisions for the Government. Others were rulings against the Government. In Commissioner v. Lyon, 97 F (2nd) 70, is a decision against the Government based on the interpretation of a lease. In U. S. v. Southwestern Cement Co., 97 F (2nd) 413, Judge Stephens dissented from a decision in favor of the Government which turned on the interpretation of a resolution declaring a continuing dividend. Here Judge Stephens construed the resolution rather stiffly against the Government's contention.


In two cases, Bowen v. Johnson, 97 F (2nd) 860, and Royalty Service Corp. v. Los Angeles, 98 F (2nd) 551, Judge Stephens wrote lucid opinions confining the jurisdiction of the federal courts to appropriate limits. In both cases prior Supreme Court decisions easily paved the way for his opinions.

5. General Observations as to style and sympathies.

On the whole the opinions of Judge Stephens are well conceived
and lucidly expressed, but devoid of distinction. Nor do they give evidence of learning.

The materials are insufficient for decisive judgment as to his sympathies. The Carlisle Lumber opinion manifests recognition of the place of the worker in the law, while the Star Publishing opinion not unnaturally sympathizes with an employer caught between two unions. His dissent in the Southwestern Portland Cement Co. case strains a point in favor of the taxpayer, while his opinion for the majority in Fireman's Fund Co. v. Kennedy, 97 F (2nd) 842, refused to avail itself of the legal reasoning advanced by Judge Haney's dissent, leading to recovery for an injured party under a liability insurance policy.
Dr. F.,

Let me break in on your holiday just long enough to thank you for the courage and resourcefulness with which you are meeting the dangers that surround you. It is a duty that we owe to the memory and to the service of the later and largest Nazi barbarities. So much of recent British policy resembles one of Atticus Finch’s sayings in his patriotic devotion, to offer up his wife’s relations on the altar of patriotism. Palestine is here and now — that and the Tracer forteza — as an obligation of action by all who believe in the sacred mission of the Jews. And if you have driven away your whole effort with a desire to see it come fully, with your
FELIX FRANKFURTER
CAMBRIDGE, MASS.

I statement of hope at waren
upheavals. I desire not it un-
nercible merely as a piece
of art.

I spent long by the rivers
of ancient peace with
people of

I have been reading
Haeckel—among the
scholar

I have been reading
Baldwin and
Harlow

Bryce and

I hope and

I wish well upon

I love and

I hope and

I wish well upon

Peter Enckeler, May 1930.
MEMORANDUM FOR
THE UNDERSECRETARY OF STATE

Will you read the enclosed and speak to me about it on my return?

F. D. R.
Did you really mean to include me among the Council of scholars where you have been moved to consider your proposal for establishing a fit home and organization, as it de dire for your unparalleled archival material? In any event, your kind invitation says you want me and so I shall be there on Saturday. If you think that I ought to be present at any place or the meeting, beyond what your recent memorial booklet sets forth and our talks in the past have given me, as to be helped at the meeting, please send me word, perhaps through
Tempre, We can give it more orally.

I could not listen in your chapel this speech. I asked a beaver at the fur. But it reads alike to utterance of a stream in mily high spirit who has with good harness and a keep on mind, just begun to fight. There is no doubt about it. The U.S. are the terror hope of all that has been accord freedom in Western civilization. And does it not feel the forunate civil. nation in what you are.

Felix

[Signature]
Dear Saul,

I wish I had a piece of

paper on Saturday. It seems

true that it was an enlivening

gathering at your place. The

talk was good, because free

at lunch, and your place

was pleasant. Because in

particular, patriotic and in

particular, patriotic and imagi

native. Such minor suggestions,

complementary to your

personal, merely confirmed

and strengthened what you

said. I did enjoy eating your

food, which I find interesting. I

of course, should work away

from the door, I loved it from

being close at hand.

Have you the enclosed notices

that we by a friend, was to how
Hilles did not like her face and so recalled her name. It was pleasant seeing you so fit and I had a good time — even to I heard that music they play a dirty degenerate regarde.

Dear affectionate regard for you, dear dearest.
Dear [Name],

When I left the other day, after your archival luncheon, you said that you would like some one in two or three weeks to talk about lower Court appointments. This is just a word to say that I am at your disposal at any time— and
shall be free from any engagements here until January 9th.

I had a most intimate talk with Roosevelt, first from London, then it was not against Hitler as any war, and said had done. Mr. Caine had rescue his appearance feeling it a complete flop as to Hitler back that he - Chamberlain -
I hope to hear Morello from Hitler. Old Joe Chamberlain would have been as naive as all hell.

I hope that you are having some joyous days. At least on our being hearing and speech with one voice - the wishing you our warmest good wishes. Bestly yours.
A LETTER TO HITLER

By

HOWARD MUMFORD JONES

With the dedic.

Addressed by

Marcuine de Largente

Reprinted from

The Boston Evening Transcript, December 3, 1938
Feeling that this letter is worthy of wider circulation, a small group of citizens of Boston and Cambridge have provided the funds necessary to reprint it.

A LETTER TO HITLER

SIR:

As I sit at my desk meditating on a Christmas book article for the Boston Evening Transcript, I find that, like King Charles's head in "David Copperfield," you constantly intrude into whatever I am about to write. The American Christmas season is an offspring in large measure of the German Christmas — that jolly and comfortable celebration which you, more than anyone else in the world, have ruined; and your hostility towards the doctrine of the Prince of Peace will not down. It is a period when we like to think of the birth of a Jewish baby in Bethlehem of Judaea; but the unspeakable obscenities which have characterized the German treatment of that proud and unhappy race are the product of your book and are carried out at the instigation, explicit or implicit, of your ministers.

The capital of the Christian world is Rome; but nowadays Rome mainly suggests the policy of your
ally, whose warriors have horribly mangled men, women and children in Ethiopia and Spain, and who is now blindly following you in excluding from his nation those who, like Jesus of Nazareth, are of Jew-

ish blood.

At this season of the year it is customary in our country to give toys to the children. In the past many of these toys have come from Czechoslovakia and many of them have come from Japan. You have destroyed the first of these countries and your party has instigated in what is left of it the same bigoted persecutions which have characterized your regime in Germany. The second of these countries is your ally and is prosecuting a war against the Chinese distinguished by the callous indifference to suffering which seems to be the policy of Fascist nations.

The Christmas period is also a period in which men turn naturally to the Christian church. The most distinguished Protestant minister in Germany is, so far as I can learn, either in a concentration camp or otherwise obscurely imprisoned for saying that God has some rights, even in Germany; and a Catholic cardinal in your city of Vienna was recently mobbed without rebuke by a body of your followers.

That the German people have suffered many un-

merited injuries in the last quarter of a century is freely allowed by all thoughtful men. In correcting these injuries, however, you, more than any other single person in the world, are responsible for un-

loosing a torrent of hate, of bigotry, of persecution, of violence, of fear. I do not know what Christmas will be like in Germany. In my own country it will not be a happy time because you and your party have injured all those concepts of brotherhood, of gentleness, of tolerance, of respect for the personali-
ties of others which we in this country like to think that Christmas represents.

It has been customary on this paper, I am in-
formed, to draw up lists of books which can be recommended to readers who desire to give suit-
able presents to their friends. My associates, better informed than I am about current fiction and con-
temporary poetry, in other columns of the Trans-
script will make their recommendations of novels and books of verse. My task is to draw up a list of general books suitable for this purpose. The reason I find the task difficult is that your shadow falls over the pages of these works, devoted as they mainly are to the analysis of a world of violence and blood-

shed which must apparently continue its mad course until you are one with Attila and Napoleon.

Possibly this will flatter you, if you happen to know that it is true. You can say that like Charle-
magne or Julius Caesar or Alexander you changed the course of world history. Men for a thousand years to come will be studying your character, probing your policies, and endeavoring to learn why, from dark, unfathomable caverns in your own nature, you let loose upon the world the instruments of your power. It is not surprising therefore that men have already begun this quest; that, outside the field of science (and yet not altogether excluding that field), I find few volumes published this year, dealing with current events, in which you and your policies do not figure. Even the philosophers have had to re-examine their premises since you came into being. But somehow I cannot feel that these books are appropriate at Christmas.

There is, however, an old book which I gather you have not read; or, if you have read it, I am quite certain you have not understood what it says. Indeed, it would be difficult for you to appreciate either its beauty or its wisdom, for the sufficient reason that it is a product of the genius of the Jewish race. This book is called the Bible, and it was beautifully translated into German by a distinguished predecessor of yours among the great men of Germany, one Martin Luther. I have read parts of that translation, and I find it has something of the literary dignity which distinguishes our version of the same book, the so-called King James Bible. It is a book, or rather collection of books, divided into two parts — the Old Testament and the New.

Should you read it, or read it again, I am certain you will find in the older portions of this book many passages which will confirm you in your dislike of the Jewish race. The most ancient parts reflect the life of relatively primitive times. The savagery there portrayed is curiously like the savagery portrayed in the Nibelungenlied; and some of us are inclined to think that in either case it is savagery that is, or ought to be, out of date.

The later portions of this volume, called the New Testament, tell of course a different story. As I open this portion of the volume, my eye falls upon several familiar passages. One, for example, is this:

Then Herod, when he saw that he was mocked of the wise men, was exceedingly wroth, and sent forth and slew all the children that were in Bethlehem, and in all the coasts thereof, from two years old and under, according to the time which he had diligently inquired of the wise men.

Then was fulfilled that which was spoken by Jeremy the prophet, saying,

In Rama was there a voice heard, lamentation, and weeping, and great mourning, Rachel weeping for her children, and would not be comforted, because they are not.
I find, however, that Herod was unsuccessful in destroying the Prince of Peace:

But when Herod was dead, behold, an angel of the Lord appeareth in a dream to Joseph in Egypt,

Saying, Arise and take the young child and his mother, and go into the land of Israel: for they are dead which sought the young child's life.

The young child grew into manhood. He proved to be a powerful and fascinating orator like yourself. One of his orations has been preserved in full. I quote a portion of it:

Our Father which art in heaven, Hallowed be thy name. Thy kingdom come. Thy will be done in earth, as it is in heaven.

Give us this day our daily bread. And forgive us our debts, as we forgive our debtors. And lead us not into temptation, but deliver us from evil.

Like you the young man was chancellor of a kingdom. It was a kingdom, he thought, which had been invaded by a powerful prince, one Beelzebub. Regarding methods of repelling the invasion, he had a policy somewhat different from your own, which he thus enunciated:

And if Satan cast out Satan, he is divided against himself; how shall then his kingdom stand?

This seems to mean that when violence is used to repress violence, only violence results.

We do not feel, here in the United States, any immense moral superiority to you or anybody else. We have, God knows, our own unhappy record of violence to mourn over. But the young man whom I have quoted was likewise of the opinion that they that take the sword shall also perish by the sword, and we are trying not to perish in this way. Our Christmas season is not as cheerful as it might be, largely because of the history of Europe in 1918. And we are wondering, some of us, whether you are going to make the Christmas season of 1939 equally tragic.

Very truly but not (thank God) yours,

HOWARD MUMFORD JONES