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Foreword: A Symposium on Current Constitutional Problems

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A SYMPOSIUM ON CURRENT CONSTITUTIONAL PROBLEMS

FOREWORD

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The place of the Constitution in Ameriean life nowhere appears more clearly than in the form of our oaths of allegiance. These do not run to any personal sovereign, or to any nation or government by name. They pledge only the support of the Constitution of the United States, to which is sometimes added the promise to defend it against all enemies foreign and domestic. It must be and it is something more than a mere document which is sanctified by such oaths. It is the embodiment and symbol of nationhood, of a form of government and of a way of life.

The document in which these things are enshrined has now been in existence for more than a century and a half, in war and peace. It has survived many crises; it has undergone amendments and additions, and the shelves of many libraries are filled with writings and commentaries concerning it. And yet constitutional questions still persist and controversies continue to rage over the bearing of the Constitution on this or that set of facts.

In one of the articles in this Symposium the author (Mr. Curtis) speaks of the Constitution as an "ambulatory document." As a figure of speech the phrase is arresting. Yet the apparent movement is not so much in the Constitution itself as in the changing circumstances to which it is to be applied. There are changes, too, in the reasoning and sentiments of the men by whom it is to be interpreted. But the movement, real or apparent, has its limits. Innovation must halt, interpretation must pause, desire for change must be put aside, at the boundary set by an oath to support and defend the Constitution of the United States. Protected by such an oath the Constitution remains the Ark of the Covenant of our national life.

The *Vanderbilt Law Review* renders a distinct service in collecting and publishing this symposium of articles on Current Constitutional Problems. It is no part of a foreword to comment individually on these scholarly discussions by distinguished authors. It is enough to say that they are, each and all, of high character; and the Student, the Bench and Bar, and the Layman alike will profit by their perusal.

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COURT AND CONSTITUTION: THE PASSIVE PERIOD

BY JOHN P. FRANK*

We are at a mid-century mark in the Christian Era, and very little removed from a mid-century mark in the life of the Constitution of the United States and of the Court which is its principal expounder. We would not be Americans—indeed perhaps we would not be human—if we did not see in that concatenation of round numbers an invitation to stock taking. The essays following in this symposium will take stock of particulars. We may therefore begin with the extremely general: At these mid-century marks, what is the relevance of the Court and the Constitution to American life?

To be general is not necessarily to be all inclusive. The inquiry is to the consequences, the impact, the influence of the Court and the Constitution (Court-Constitution) *together*. What the Court may do aside from interpreting the Constitution, and the influence of the Constitution apart from the Court, are not considered.[1] The time period taken for immediate analysis is the four years just closed, the period of the Vinson Chief Justiceship and the Truman Court.

The affirmative influence of the Court and the Constitution on American life since 1946 has been very little. ("Affirmative influence" means the consequences of decisions actually made, as distinguished from the decisions which might have been made, but weren't.) This is not to say that the Court-Constitution's impact has been trivial. Even a dissenting Justice in a quiet time is a more significant public figure than, for example, the typical first term minority Congressman. A court of last resort, repeatedly interpreting a constitution, necessarily has some influence. There is a minimum of effect below which such a body with such a task can not fall. What is being said here is that this influence is fairly close to minimum: that compared either with the other contemporaneous institutions of government or with some past Courts, the influence on the actual conduct of affairs is small.

To say that the Court's influence is slight is not to suggest that it ought to be more. Whether a nonelective judiciary should be the dynamic force in a democratic society is highly debatable. Many would prefer virtual total judicial abdication to the judicial over-control of the Thirties. Others would prefer a Court aggressive at least in the protection of human liberty. But the debate on particular values may be left to the substantive essays which follow. The argument here is that at various times in its history the Court-Constitu-

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1. In the past four years, about half of the cases of greatest social importance have involved statutory interpretation. An example of the significance of the Constitution wholly apart from current judicial decisions is the contemporary debate over the powers of the President in respect to the military disposition of troops.

tion has had a sometimes more and sometimes less creative role in the formulation of policy, and that the recent past has been a noncreative period. There has been a vaguely conservative trend in the direction of the decisions, but the Court for the most part has been a benevolent neutral, an onlooker rather than a spirited participant in the controversies of the American scene.[2]

I. The Constitutional Decisions

There were 145 constitutional decisions in the four terms from October, 1946, to June, 1950. The two tables following give a quantitative breakdown.

Table I. Constitutional Decisions, 1946-50, by Political Categories

Federal powers unrelated to civil rights		8
State powers unrelated to civil rights		15
Interstate relations		25
Federal-state relations		8
Criminal procedure		47
Civil rights unrelated to criminal procedure		19
Federal civil procedures:		
a. Delegation problems	5	
b. Administrative law	4	
c. Eminent domain	7	
d. Other	7	
Total		23
Total		145

Certain facts stand out. The exposition of the powers of Congress, at times the *raison d'etre* of judicial review, has become, quantitatively at least, an unimportant branch of the Court's work. The Court-Constitution are primarily occupied with civil rights problems, half the cases being in criminal procedure and other civil rights categories. Aside from civil rights, controversies over the powers of the states over their own citizens (*i.e.*, state powers where interstate relations are not involved) are of small quantitative moment. Next, quantitatively, after civil rights cases are intergovernmental relations cases, particularly those involving burdens on commerce, full faith and credit, and federal-state relations. The civil rights and intergovernmental cases are 70% of the whole number.

2. Fuller accounts of each of the past four years than can be attempted here are contained in the series, Frank, *The Supreme Court at the 1946, 1947, 1948 and 1949 Terms*, in 15, 16, 17, and 18 U. of Chi. L. Rev. 1 (1947, 1948, 1949 and 1950 respectively). These articles will occasionally be cited below by the term dates, as *1946 Term Article* 1, 25.

Because the instant essay wanders over so large an area, comprehensive citations will not be attempted. The central theme of the article has been suggested by many others, including Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale L.J. 1319 (1941); and Rostow, Book Review, 56 Yale L.J. 1469, 1473 (1948).

Table II distributes the same group of 145 cases in terms of some of the major interests of the American people during these four years.

Table II. CONSTITUTIONAL DECISIONS, 1946-1950, BY NATIONAL PROBLEMS CATEGORIES

Effective maintenance of democratic political processes		12
Racial and religious group relations		10
Business regulations		18
Labor relations		9
General welfare (economic security, social legislation, conservation, housing)		9
Revenue problems		19
Techniques of government		
a. Law enforcement	45	
b. Other	7	
Total		52
International relations		
a. War	3	
b. Peace	2	
Total		5
Family relations		5
Miscellaneous		6
Total		145

Table II shows a small sprinkling of litigation concerning many of the great problems of our day. At the quantitative extremes, there is a large volume of cases turning upon the adjustment of effective law enforcement and civil liberty; and there are almost no cases directly concerned with international relations, now so largely preoccupying American attention.

Qualitative analysis of the decisions underlying Table II permits closer estimate of the consequences of the Court's work.

1. *Maintenance of Democratic Political Processes*

The long shadow of Oliver Wendell Holmes, Jr. lay even longer across the land in the twilight of his life and after his death than in his prime. As Holmes died physically, the bawdy humor and *Lochner,* the valiant moustaches and *Baldwin v. Missouri,* the wound at Ball's Bluff and *Abrams,* "form your battalions and fight" and *Hammer v. Dagenhart*—all blended into legend. As the legend grew, and was embellished, and increased in popular acceptance —and, most important, because the old man with the voice of youth did speak for what is best in the American tradition and the American conscience—there came to be fewer and fewer who were ready to take on the man and the legend in a head-on fight.[3]

Holmes had been the voice of the freedom of our institutions. Pent up law, like pent up water, seeks its path of least resistance. The recent years have

3. The task has recently been undertaken by that well-known expert in federal practice and jurisprudence, Mr. W. Pegler, who has distorted the subject in at least two columns. See, *e.g.,* New Haven Register, Dec. 18, 1950, p. 14. For masterful analysis, and, I think, destruction of more intelligent attacks on Holmes, see Howe, *The Positivism of Mr. Justice Holmes,* 64 HARV. L. REV. 529 (1951).

been years of repression in American life. The legal force of repression, unwilling or unable to take on Holmes directly, has been washing around the positions he held, moving toward goals he opposed, but seeking directions which he never had occasion to study.

To say the same thing in another way, the people of the United States between 1915 and 1930 evolved only the most primitive means of repressing their dissenters. The spirit to repress was strong, particularly from 1917 to 1925, but ingenuity was limited to the simple device of putting dissenters in jail. That was the problem with which Holmes (and Brandeis, of course) dealt. Between them they worked out the clear and present danger test. Holmes said that Benjamin Gitlow should not be put in jail for publishing his "redundant discourse" because, "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[4] Brandeis, in the case of Miss Whitney, said that persons should not go to jail for speech except where "immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[5]

Partly by putting a full time committee to work on the project, the Congresses of the late 1930's and more recent years evolved more sophisticated methods of achieving the same repressionist results which their predecessors had sought. The more recent Congresses perceived that by striking at the economic security of dissenters, enormously more widespread effects could be obtained than by the simple device of jailing a tome-writer or a red-flag waver.

The great, over-arching issue of the last four years (and of the immediate future) has been whether the Court would (a) give Congress and particularly the Un-American Committee bloc, its head in these experiments, or (b) transfer the substance and spirit of the Holmes-Brandeis doctrines to these new fronts. For the most part, in this period the Court has demonstrated the aphorism that "courts love liberty most when it is under pressure least."[6]

This result has not been achieved in any group of dramatic decisions. That is the point. It has been the general tendency of a series of little leaks in the Holmes-Brandeis dike:

Government employees.—As this is written, the Court has heard but has not decided a flat challenge to the present practice of discharging govern-

4. Gitlow v. New York, 268 U.S. 652, 673, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).
5. Whitney v. California, 274 U.S. 357, 376, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927).
6. A theme developed in Frank, *1949 Term Article* 20.

ment employees for "disloyalty" without due process of law.[7] It seems safe to predict that the Court will reject this flat challenge, or escape it on some jurisdictional ground; and that it will not hold that such persons are entitled to the same due process of law when their careers and reputations are at stake that would need to be accorded some petty offender with a ten-day jail sentence in the offing.

The loyalty program gained great momentum four years ago when the Court denied certiorari in a similar flat challenge.[8] Subsequently, over strong dissents, the Court has, on very technical grounds, refused to hold government employees disqualified for jury service, even in "loyalty cases," though it was vigorously argued that a government employee juror could not be expected to cast a free vote when his own position might be prejudiced if his dossier should show that he had voted to acquit a suspected person.[9]

Labor union control.—In the Taft-Hartley Act, an innovating Congress attacked dissenters in two new ways: (1) it used the commerce power for the purpose; and (2) it substituted, in lieu of jail sentences on actual wrongdoers, heavy burdens on labor unions which allowed undesirables to continue in labor union offices.

In upholding the Taft-Hartley Act provision, the Court freed itself from some of the force of the Holmes-Brandeis position by beginning its discussion with the words, surely true, "The question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger."[10] The clear and present danger rule, said the Court, did not "lay down an absolutist test measured in terms of danger to the Nation."[11] (What *had* Brandeis been talking about when he spoke of "immediate serious violence?") Rather the Court must weigh the effects of the speech against the evil, and, particularly though not exclusively because "only a relative handful of persons" were restricted, the Act was upheld.

The subject under analysis here is not the pros and cons of any particular case, but rather the effect of the holding on the American scene. The Court may have dramatic consequences whether by upholding or invalidating an act. If the Act had been upheld on the theory of the concurring opinion of Justice Jackson, the opinion would have been the most dramatic and consequential of the 1940's; for the Jackson opinion, in the extent of its deference to legislative will, opened the floodgates to almost any kind of restrictive

7. Bailey v. Richardson, No. 49, Oct. Term. 1950.
8. Friedman v. Schwellenbach, 330 U.S. 838, 67 Sup. Ct. 979, 91 L. Ed. 1285 (1947), 331 U.S. 865, 67 Sup. Ct. 1302, 91 L. Ed. 1870 (1947) (Black and Douglas, JJ., dissenting).
9. Dennis v. United States, 339 U.S. 162, 70 Sup. Ct. 519, 94 L. Ed. 734 (1950).
10. American Communications Ass'n v. Douds, 339 U.S. 382, 396, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950).
11. 339 U.S. at 397.

legislation a legislature might pass.[12] If, at the opposite extreme, the Court had upheld the position of Justice Black and invalidated the Act, the event would have been equally dramatic; for Black contended that speech and advocacy were immune to punishment except where "overt acts" are committed by the individuals charged.

As it is, the Taft-Hartley case is the most important free speech decision in the period under review. We may some day see that an era dates from its decision. As it stands, however, we are still too close to it. The muddied qualities of its distinctions of Holmes and Brandeis, its reiterations of some of their concepts, mean that perhaps all the Court has done here is to acquiesce in the will of Congress, neither stopping its course nor spurring it on.

Campaigns and elections.—In the past four years, the Court took up the subject of proselyting by sound truck and put it down again; but it spoke in so many voices, and with such confusing tongues, that the prerogatives of this method of campaign by volume remain to be faced anew in the 1950's.[13] The principal consequence of the first of the two decisions may well have been the election of the present junior Senator from Tennessee.[14]

In recent years, Congress has enacted two measures aimed, one may suspect, both toward purer elections and toward reducing the political support of New Dealers. The Hatch Act was directed at the 2% clubs, at politicians subsidized on the federal payroll to do nothing but campaign, at all the shabby tricks by which good government is subordinated to party welfare. In its zeal it also reached almost every form of voluntary political participation by the millions of government employees, precluding them from "any active part in . . . political campaigns." Poole, an industrial worker in the United States mint, violated the Act by working for his party at the polls; Paris, a member of the Oklahoma State Highway Commission and Democratic State Chairman, violated by organizing a "Victory Dinner."[15]

12. Justice Jackson, who had previously adhered to the view that Congress needed more than a mere "rational basis" to restrict civil rights, West Va. State Board of Education v. Barnette, 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943), in this case went all the way over to the opposite view, saying that the judiciary had no right to review the "wisdom, effectiveness, or need for this legislation. Our 'inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts, either known or which could reasonably be assumed affords support for it.'" American Communications case, 339 U.S. at 423, n.1. The Jackson turn-about is the more startling because the passage quoted within his own quotation is taken from United States v. Carolene Products Co., 304 U.S. 144, 154, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938). The famous Stone footnote to that passage, excepting civil liberties legislation from its scope, is now not mentioned.

13. Saia v. New York, 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948), 2 VAND. L. REV. 113, holding that the right to use sound equipment could not be left to the unlimited discretion of an administrative official; Kovacs v. Cooper, 336 U.S. 77, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949). Who would be so assured as to attempt to reduce the latter opinion to a half-sentence synopsis?

14. Senator Kefauver credits the *Saia* decision with contributing to his eventual success in using sound equipment in Memphis.

15. United Pub. Workers v. Mitchell, 330 U.S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754 (1947).

The Hatch Act, in the most obvious way, is a restriction on freedom of communication. A part of State Chairman Paris' offense was the introduction of the toastmaster at the dinner. The most significant theoretical aspect of the case was that the Court, in approaching the problem, made no attempt either to distinguish the clear and present danger test or to apply it. This again, was not the problem Holmes and Brandeis had known and there was apparently no need to consider it according to their lights.

In terms of practical consequences, it is not yet clear how effective the Hatch Act will be. Its violations are so wide-spread, the subterfuges for its evasion so easy, and the effort to enforce it so negligible that its immediate effects are apparently not large.[16]

While the Hatch Act has many admirable features, in its less desirable aspects it drives out of active political life millions of citizens who may have a perfectly legitimate desire to be in it. So did the provision of the Taft-Hartley Act restricting labor union political contributions. As Mr. Justice Rutledge put it, concurring in the case considering that provision, the "object was . . . to force unions as such entirely out of political activity, including for presently pertinent purposes the expression of organized viewpoints concerning matters affecting their vital interests at the most crucial point where the expression would become effective."[17] By somewhat forced construction, a majority excluded union newspapers from the prohibitions of the Act, leaving such newspapers free to exhort their readers concerning political causes. The concurring Justices read the Act as covering the papers, but as invalid for that reason. The resultant freedom for labor may have had substantial effects on the 1948 political campaign.

One way to drain the vitality from the democratic process is to hamper communication among voters. Another is to count the votes dishonestly. In the American experience since 1787, the latter has probably been a more frequent menace than the former. A variation of dishonest counting of the votes, different morally but not practically, is gross maldistricting of the voters. The vice common to both dishonest counts and maldistricting is that by either method, a minority may prevail over a majority.

One hundred years ago the Court washed "political questions" out of its jurisdiction.[18] More recently, it has held that the problems of maldistricting are "political questions." In this four-year period, it held to that position.[19] In short, this may be one of the most serious problems of democracy; but it is not one which the Court will assist in solving.

16. The *Mitchell* case is the only judicial decision reported in the Federal Code Annotated on the Act.
17. United States v. C.I.O., 335 U.S. 106, 150, 66 Sup. Ct. 1349, 92 L. Ed. 1849 (1948).
18. Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1849).
19. South v. Peters, 339 U.S. 276, 70 Sup. Ct. 641, 94 L. Ed. 834 (1950); MacDougall v. Green, 335 U.S. 281, 69 Sup. Ct. 1, 93 L. Ed. 3 (1948).

Summary, political processes.—The practical consequences of the decisions, 1946-1950, concerning the political fundamentals of American democracy may be listed thus: The loyalty program continues unhampered, not materially affected by the few orders which have touched it. The control of "subversion" by restriction of the economic opportunities of the subversives was promoted by the most important opinion of recent years, that sanctioning the elimination of Communists from labor union membership. But the power to drive out of political life all with whom a dominant faction disagree does not go unlimited; for by tight construction verging on constitutional limitation, labor unions are left free to communicate with their own members through their own press. Though the Hatch Act was upheld in its farthest reaches, the remaining problems of campaigns and elections before the Court, the problems of sound trucks and maldistricting, were dealt with either inconclusively or not at all.

2. *Group Relations (Race and Religion)*

This was the foremost area of Supreme Court policy-making in the past four years. Congress made the policies as to political processes, and the Court merely echoed them; but in group relations, Congress, constantly urged to act, never acted. The Executive[20] and the Court itself formulated and declared the national policies.

In the midst of the War, the Court acquiesced in Congressional and military treatment of Japanese aliens and Japanese Americans.[21] Sober second sight made that treatment seem appalling to many Americans.[22] Since the War, some Justices have flatly denounced racism in California, and the Court as a whole has moved sharply against the continued application of race distinctions there. The alien land laws, barring Japanese aliens in our midst from owning agricultural land in California, were constitutionally discredited;[23] and the fishing limitations on the same group were invalidated outright.[24]

While filibusters have stopped racial equality legislation, they could not block the racial equality movement in the executive and judicial departments. Segregation has been under close Supreme Court scrutiny. A principal legal device for geographic segregation, or the separation of the races by physical

20. Two of the outstanding documents produced in the executive department in this period are, To SECURE THESE RIGHTS, the Report of the President's Committee on Civil Rights (1947); and FREEDOM TO SERVE, the Report of The President's Committee on Equality of Treatment and Opportunity in the Armed Services (1950).

21. The leading case is Hirabayashi v. United States, 320 U.S. 81, 63 Sup. Ct. 1375, 87 L. Ed. 1774 (1943).

22. See, *e.g.*, Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

23. Oyama v. California, 332 U.S. 633, 68 Sup. Ct. 269, 92 L. Ed. 249 (1948).

24. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 68 Sup. Ct. 1138, 92 L. Ed. 1478 (1948).

distances, has been the restrictive covenant, which has served as a paper stockade around "little Harlems." The restrictive covenant cases[25] make those covenants unenforcable at law. While the decision will not by itself greatly alter the housing situation for Negroes, it will probably have substantial effects in the long run; and in some "fringe areas," its effects have already been felt.[26]

Segregation in education and in transportation were also markedly affected by recent decisions. The decisions concerning the Texas and Oklahoma graduate school programs foreshadow the end of "separate but equal" in the higher reaches of education everywhere,[27] though their effects on primary and secondary education are still uncertain. (It should be noted that if the Court's first sound truck decision helped elect a Senator in Tennessee, as suggested above, its segregation decisions contributed greatly to the defeat of an incumbent Senator in North Carolina.)[28]

A quantitative measure of the relative affirmative significance of the three branches of government in race relations is of course impossible. Some suggestion of the relative activity of each may be found in the index of the current *Negro Handbook,* a reputable work which purports to summarize in some detail "current, factual information [on] the status of the Negro people in American life." The index contains a half column of entries on "Supreme Court, United States," a quarter column on the activities of "Truman, President Harry S.," and no entries at all on Congress.

Fully as important as the race group cases were the religious group cases. The relationship between America's Catholic and Protestant populations, though far less strained in these years than at many times in the past, are always touchy.[29] At no point in those relations is there more room for tangible irritation than in education, for the Catholic duplicate of the public school

25. Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948), 2 VAND. L. REV. 119.

26. Citations are collected in FRANK, CASES ON CONSTITUTIONAL LAW 951-52 (1950).

27. Sweatt v. Painter, 339 U.S. 629, 70 Sup. Ct. 848, 94 L. Ed. 1114 (1950) (education); McLaurin v. Oklahoma, 339 U.S. 637, 70 Sup. Ct. 851, 94 L. Ed. 1149 (1950) (same); Henderson v. United States, 339 U.S. 816, 70 Sup. Ct. 843, 94 L. Ed. 1302 (1950) (transportation).

28. Accounts of the second North Carolina primary in 1950, in which present Senator Smith unseated then Senator Graham, attribute the result largely to the furor raised over the decisions.

29. The tune changes, but the melody is the same. Consider this excerpt from the Resolution of the American Republican Party, 1843, a New York nativist faction: "That in the opinion of this party, based upon what appears to be very alarming fact, papal power is directly opposed in its end and aim to a republican form of government, inasmuch as the papist owes allegiance and fidelity to a power outside our government—that is, to the Pope of Rome—and that power has been exercised in this city to such an extent that our common school system, by party subserviency, has been bartered away as a price for the votes of the organized followers of Bishop Hughes. Through this school law there has been a preconceived determination, followed by an actual attempt in the Fourth Ward, to put out of our schools the Protestant Bible, and to put down the whole Protestant religion as being sectarian." FRANK, CASES OF CONSTITUTIONAL LAW 179 (1950).

system is frequently illy regarded by Protestants, and is extremely expensive to Catholics.

The two groups may have somewhat different demands on the public school system. Protestants have desired to use the schools as a vehicle for direct Protestant education; and at a minimum have sought direct approach to the "captive audience" of school children. Catholic desires have rather been for a sharing of public school funds.

Faced with one case on the use of public school busses for parochial schools, and by another on the "release time" system, the Court was precipitated squarely into these controversies.[30] It took an unequivocal position that the First Amendment bars any significant or substantial aid to parochial education, and bars the Protestant "captive audience" technique as well.[31] If these decisions are made to stick, they will bulk large in the history of religious relations in America.

3. *Labor Relations*

In the last decade, Congress and the state legislatures have passed a great deal of restrictive labor legislation. The push toward such legislation, and the resistance to it, has been one of the two or three dominant controversies of the American scene.

The Court has been a participant in the making of labor policy, but in a foreordained role. For the most part, it has had little to do but to inspect the legislative product and, inevitably, certify it as constitutionally sound. Unless the Court of the 40's were to repudiate everything done by the Court of the 30's, there could be no great difference over the power of legislatures to regulate closed shops or to control many other alleged abuses in labor relations.[32]

The Court's picketing decisions can not so lightly be dismissed. Some thought that virtually unlimited constitutional protection to nonviolent picketing had been given by the *Thornhill* case,[33] in 1940, and subsequent holdings.

30. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 648 (1948); Everson v. Board of Education, 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947).

31. There is room, of course, for endless qualification. For one of the excellent discussions see Symposium, *Religion and the State*, 14 LAW & CONTEMP. PROB. 1 (1949).

32. The Court found no difficulties in sustaining such legislation in Lincoln Federal Labor Union v. Northwestern I. & M. Co., 335 U.S. 525, 69 Sup. Ct. 251, 93 L. Ed. 212 (1948); American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 Sup. Ct. 258, 93 L. Ed. 222 (1948); and see United States v. Petrillo, 332 U.S. 1, 67 Sup. Ct. 1538, 91 L. Ed. 1877 (1947).

33. Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940). The general theme that "This Court has unequivocally stated time and time again that injury which results to industrial concerns and to nonunion workers as a result of peaceful picketing in labor disputes is not a substantive evil of such magnitude as to warrant prohibition of picketing," is developed in Brief for Appellants, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed. 834 (1949). The brief is the best exposition this writer has seen of the extreme position it takes.

Any such interpretation of due process would nullify much of the antilabor impulse. But it would take an extremely determined Court to use its power thus, a Court which could somehow overcome the fact that the legal materials for such a purpose are neither historically in the Constitution nor in the precedents.[34] *Thornhill's* case and subsequent decisions did not hold that peaceful picketing was beyond control, and labor lawyers who read the cases contrariwise were reading their hopes into the opinions. Most of the Court's recent decisions concerning restraints on picketing were as intellectually inevitable as its decisions on anti-closed-shop legislation.[35]

The one enormous bit of judicial labor law and policy making was the *Lewis* case.[36] In that situation an Administration and a Congress then bankrupt of a labor policy abdicated altogether, the Administration virtually asking the Court to concoct some law which would surmount the fuel crisis. The Court responded by supplying the Administration's need, and filling in where Congress had declined to legislate.[37] Most of the law then made was statutory and procedural, an implied reservation being discovered in the Norris-LaGuardia Act and some remarkable exceptions being found in a rule of criminal procedure.[38] The case well illustrates the subordination in importance of constitutional to nonconstitutional issues, the only large constitutional question in the case being a challenge to the size of the fine as a cruel and

34. The literature is omnipresent. One of the most stimulating analyses of the cases pre-*Giboney* is Armstrong, *Where Are We Going with Picketing?* 36 CALIF. L. REV. 1 (1948).

35. Building Service Employers Int. Union v. Gazzam, 339 U.S. 532, 70 Sup. Ct. 784, 94 L. Ed. 1045 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 70 Sup. Ct. 773, 94 L. Ed. 995 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed. 834 (1949). Reasons for thinking that the *Hanke* case is a serious departure both from *Thornhill* and from common sense are briefly suggested in Frank, *1949 Term Article* 8-10.

A professor of Constitutional Law to whom this manuscript was submitted for comment sent the following pungent observations: "I disagree with your observations on the inevitability of some of the peaceful picketing decisions. It was not inevitable that the Court should condone prior and subsequent restraints on peaceful picketing merely because a state court has declared the purpose of the picketing against the public policy of the state. I can see no justification whatsoever for Hughes v. Superior Court, 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950) [upholding an injunction against picketing of a store by Negroes seeking an increase in the number of Negro clerks employed]. To assume, as Justices Black and Minton did in special concurrence in that case, that the mere citation of the *Giboney* decision somehow solves this quite unrelated problem seems to me question begging, and a mere statement of conclusion. What would the Court have done if the Negroes had been propagandizing a religious faith? I think that the Court is hopelessly fuzzy and confused in its picketing cases."

36. United States v. United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947).

37. In May, 1946, the administration asked for legislation which would permit it to break by injunction strikes which imperilled the public interest. The bill passed the House but died in the Senate. H.R. 6578, 79th Cong., 2d Sess. (1946).

38. The bill referred to in note 37 had made the Norris-LaGuardia Act inapplicable in such cases. The Court found that the Act was, at least in the special circumstances of the coal situation, already inapplicable to the Government. Rule 42(b) of the Rules of Criminal Procedure gives an elaborate specification of the notice to which defendants in criminal contempt proceedings are entitled. The rule was not complied with. The majority was obliged to find this not prejudicial.

unusual punishment. Needless to say, a Court which could overcome the nonconstitutional obstacles to its result in this case had little difficulty with this narrow Eighth Amendment question.

4. *Regulation of Business*

The Constitution made its mark as a significant factor in American life as a restraint on the regulation of business. *Dartmouth College, Gibbons v. Ogden, Lochner v. New York, Hammer v. Dagenhart*—these classics restrained governments. They are counterbalanced of course, and in some instances overruled, by decisions which wrestled hard with the obstacles of those decisions before waving governments ahead.[39]

In recent years problems of business regulation have concerned the American people at least as much as ever. We have just come through an election in which, with the customary hyperbole of politics, the issues were "socialism" versus "Wall Street tyranny."

In these disputes, the Court-Constitution have been largely observers. The Public Utility Holding Company Act was upheld, but it was inconceivable that it should not be.[40] Otherwise there is scarcely a case worth mentioning as presenting a serious dispute of broad-gauge potentialities.[41] The classic disputes over the commerce power, the contract clause and the due process clauses were settled, for the time at least, in the late 30's and early 40's, and no one has stirred them up again. The people of Puerto Rico appealed to due process for relief from their status at the bottom of our mercantile sugar policy, but were summarily dismissed with the advice that due process is dead.[42] Two eminent domain decisions have some implications to public power,[43] but there is no sign of the development under any clause either of important new restraints or important new powers of government.

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39. *Compare* Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819) *with* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413 (1934); Lochner v. New York, 198 U.S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (1905) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937); and Hammer v. Dagenhart, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918) *with* United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).

40. Electric Power & Light Co. v. SEC, 329 U.S. 90, 67 Sup. Ct. 133, 91 L. Ed. 103 (1946).

41. While there are 18 cases in this category, the bulk of them are of trifling social significance. Examples are the cases on very small points of constitutional aspects of administrative procedure, such as Federal Reserve System v. Agnew, 329 U.S. 441, 67 Sup. Ct. 411, 91 L. Ed. 408 (1946); Champlin Refining Co. v. United States, 329 U.S. 29, 67 Sup. Ct. 1, 91 L. Ed. 22 (1946); Federal Communications Comm'n v. WJR, 337 U.S. 265, 69 Sup. Ct. 1097, 93 L. Ed. 1353 (1949); and others.

42. Secretary of Agriculture v. Central Roig Ref. Co., 338 U.S. 604, 70 Sup. Ct. 403, 94 L. Ed. 381 (1950).

43. United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950); United States v. Kansas City Life Ins. Co., 339 U.S. 799, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950). The problems of these cases are briefly discussed in Frank, *1948 Term Article* 13-18; and *1949 Term Article* 14-18.

5. *Economic Security, Social Welfare, Housing and Conservation*

The areas in this catch-all include some of the major interests of the American people. "Full employment," "social security," and "valley authorities" are among the commonest phrases in public discussion; and from 1946 to 1950 the single problem of obtaining adequate housing, at practicable prices, has presented the most perplexing issue of life to an enormous number of Americans.

These vital questions have scarcely been in the orbit of the Court-Constitution. There have been a few details of rent control to settle, the most important of which was the not unexpected decision that the program might continue for a time after the cessation of hostilities.[44] The *Tidelands* cases, establishing national sovereignty over the minerals beneath the coastal waters, are important and could have broad consequences in the conservation of oil.[45] Important dicta in one decision make somewhat clearer than before the unimpeded extent of the power of the federal government to develop river valleys;[46] but while the opinion improves the logic of the subject, it leaves the results about as they were before.

6. *National and State Fiscal Policy*

The important fact about the relation of the Court and the Constitution to federal fiscal policy is the lack of relation. With the exception of the validation of the Renegotiation Act, discussed below in another connection, there have been no decisions, important or unimportant, concerning the constitutional power of the government to obtain its income. Federal financial policy may involve some of the most important questions of our day, but they are not constitutional questions.[47]

The point at which the Court and the Constitution become involved in financial problems is at the state level. Because one state's income-getting

44. Woods v. Cloyd W. Miller Co., 333 U.S. 178, 68 Sup. Ct. 421, 92 L. Ed. 596 (1947). Other housing decisions include Fahey v. Mallonee, 332 U.S. 245, 67 Sup. Ct. 1552, 91 L. Ed. 2030 (1947); Fleming v. Rhodes, 331 U.S. 100, 67 Sup. Ct. 1140, 91 L. Ed. 1368 (1947).

45. United States v. Louisiana, 339 U.S. 699, 70 Sup. Ct. 914, 94 L. Ed. 1216 (1950); United States v. Texas, 339 U.S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 (1950); United States v. California, 332 U.S. 19, 67 Sup. Ct. 1658, 91 L. Ed. 1889 (1947).

46. United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950). Other, almost trifling, social welfare problems arose in Goessart v. Cleart, 335 U.S. 464, 69 Sup. Ct. 198, 93 L. Ed. 163 (1948) (legislation controlling employment of barmaids); Railway Express Agency v. New York, 336 U.S. 106, 69 Sup. Ct. 463, 93 L. Ed. 533 (1949) (limitation on truck advertising, allegedly for safety purposes). Included in this category is Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 69 Sup. Ct. 550, 93 L. Ed. 632 (1949), upholding a statute aimed at protecting the poor from excessive funeral costs by separating burial insurance from the undertaking business.

47. The most serious constitutional dispute over a federal revenue matter in the last decade was Helvering v. Griffiths, 318 U.S. 371, 63 Sup. Ct. 636, 87 L. Ed. 843 (1943), in which the majority managed to avoid the question of the validity of an income tax on stock dividends.

activities may interfere with the prerogatives of citizens of other states, the Court of necessity deals with state taxes.

If the Court were divided into administrative divisions, as it is not, we might assume that the state tax cases of recent years had been sent to the "Chaos Division" rather than to the "Tax Planning Division," if such there were. Bodies of constitutional doctrine seldom spring in full perfection from the judicial brain in any short period of time. A writer describing the scope of the contract clause in 1830 would have had a difficult task. So also with a writer on due process in 1904, or a writer on the federal commerce power in 1935. One writing in 1951 on the commerce clause as a limitation on the state taxing power can only note that while in 1971 it may prove possible to wrap up the subject in a neat package, it is not today.[48]

Basically the modern Court thinks that any given state tax problem is unimportant: "revenue serves as well no matter what its source."[49] Because the Court regards the problem as of no great importance, it can luxuriate in the niceties of verbal distinctions, ignoring the actual incidence of a tax, and letting results depend upon the way the taxing act is worded.[50]

The result is that while there have been a substantial number of state tax cases in the past four years, their direction has not been sufficiently consistent to have had marked revenue consequences. On the one hand, no important new doors have been pushed open for the tax gatherer to enter; there has been no vast issue decided such as the validity or invalidity of state sales taxes on goods purchased from interstate commerce.[51] Justice Rutledge did offer a basically new formula for the distribution of state taxing powers; but it remained a one-man remedy and may have disappeared altogether with his death.[52]

On the other hand, there was no decision which completely shut doors on the tax gatherer. The general effect of the Court's decisions is probably to strengthen the appeal to state revenue officials of sales taxes, and the Court has thus to a slight extent put its weight on the side of the most regressive form of taxation in the transactions field. There is, however, no evidence

48. This is not a prediction. Of all the basic, recurrent constitutional problems before the Court fairly constantly from the beginning, there is historically less clarity on this one than any other. With a record of 125 years of false starts and circular reasonings, the extent of the commerce clause as a state limitation is very probably doomed to remain an everlasting puzzle.

49. The phrase is Justice Frankfurter's in Freeman v. Hewit, 329 U.S. 249, 253, 67 Sup. Ct. 274, 91 L. Ed. 265 (1947), and has been rephrased by Professor Dunham as "Let them eat cake." Dunham, *Gross Receipts Taxes on Interstate Transactions,* 47 COL. L. REV. 211, 216 (1947).

50. *Compare* Freeman v. Hewit, *supra* note 49, *with* International Harvester Co. v. Evatt, 329 U.S. 416, 67 Sup. Ct. 444, 91 L. Ed. 390 (1947).

51. In other words, there was during this period nothing really fundamental, like McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940), the definitive discussion of sales taxes.

52. In Freeman v. Hewit, 329 U.S. 249, 259, 67 Sup. Ct. 274, 91 L. Ed. 265 (1947), Justice Rutledge proposed a system for apportionment of taxes on interstate transactions.

that any state has fundamentally changed its tax program because of the decisions.[53]

7. *Techniques of Government*

One third of the constitutional cases of the past four years have sought to achieve the elusive goal of effective law enforcement without sacrifice of individual liberty. When all the cases are put together the effect is to leave the general practices of law enforcement almost, though not quite, as they were before the cases were decided.

It is in this body of law that the Court's sophistication becomes the worst enemy of its effectiveness. In criminal procedure, the Court is making the law of the billy club and of the trial court. That law must be simple and plain if it is not to be ignored.

Take, for example, the question of the right to counsel. When the Court swings a broadsword, and asserts that all persons charged with capital offenses in state courts and all federal defendants must have counsel or their convictions will be reversed,[54] the rule can be understood, obeyed and enforced. When, as in the case of noncapital offenses in state courts, the right to counsel depends upon a melange of factors such as defendant's age, degree of education, knowledge of English, nature of the offense and previous courtroom experience,[55] as well as the degree of respect of the Supreme Court for the particular state judge involved,[56] state trial judges conclude by conducting themselves about as they would if they were subject to no instructions at all.[57] Many of the cases of the past four years have simply added to the mist which surrounds the right to counsel.[58]

53. The text is worked cautiously in terms of "no evidence that," because of the difficulty of knowing what moves the mind of the tax assessor. In Indiana, a prime victim of gross income tax decisions, the first impulse among responsible leaders was to give up and switch to the sales tax; but that state finally determined to avoid, if possible, the force of *Freeman v. Hewit* by interpreting it so narrowly in its tax regulations as to reduce to negligible effect. Note, 53 IND. L.J. 252 (1947).

54. Johnson v. Zerbst, 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938); Powell v. Alabama, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

55. Bute v. Illinois, 333 U.S. 640, 68 Sup. Ct. 763, 92 L. Ed. 986 (1948); Betts v. Brady, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942); and similar cases.

56. Professor Freund offers the perfectly appalling, though completely justified, speculation: "One may be permitted to wonder whether the decision in *Betts v. Brady*, holding the appointment of counsel for indigent criminal defendants in state courts not to be an invariable constitutional requirement, would have been the same had the opinion of the court below been written by someone less highly esteemed than Chief Judge Bond of Maryland, who is referred to by name in Mr. Justice Robert's opinion no less than fifteen times." FREUND, ON UNDERSTANDING THE SUPREME COURT 79 (1949). Could the ingenuity of man devise a more senseless method of trial administration than that of letting trial court rights be affected by the chance of which appellate judge may later happen to be assigned the case on appeal, and upon the later chance of the attitude the Supreme Court may take toward that judge?

57. This is hard to demonstrate, giving the usual problems of proving a negative. If there have been any fundamental changes in practice in any jurisdiction concerning the right to counsel, I and several persons consulted are unaware of them. The Court has, however, had greater effect in forcing post-trial review procedures, particularly in Illinois; the material is summarized with citations, Frank, *1948 Term Article* 29-30.

58. Uveges v. Pennsylvania, 335 U.S. 437, 69 Sup. Ct. 184, 93 L. Ed. 127 1948);

On no subject have the Court's wheels spun more with less progress than in searches and seizures. At the beginning of the period, *Harris v. United States* [59] appeared to open the way to a vast new freedom to the police to search without warrants. *Trupiano v. United States*[60] to an appreciable extent then undid the *Harris* case; and at the end of the period *Rabinowitz v. United States* overruled *Trupiano,* leaving the Court about where it was when the period began.[61]

In the hegira from *Harris* to *Rabinowitz,* doctrine marched a circle in three cases, with a few way stops. In *Wolf v. Colorado,*[62] the Court made a similar trip all in one case. The issues were (a) whether the states were bound by the Fourteenth Amendment to observe the principles of the Fourth Amendment in respect to searches and seizures, and (b) if so, whether evidence illegally seized by state police was admissible in state proceedings. Under the federal practice, the Fourth Amendment is protected by the non-admissibility rule, without which, as Justice Holmes put it, the Amendment is merely a "form of words." In the *Wolf* case, the Court held that the state "could not" indulge in illegal searches and seizures, except that if they did, the products of their illegal searches were admissible in evidence! It is unlikely that any policeman will change his practices in any way as a result of such a decision.

The Court has walked a straighter line in the forced confession cases, though it seems safe to predict that the course of that line is due for fundamental change. Frequently by 5-4 margins, and with multiple divisions in the majority, the Court has ordered reversals where suspicious confessions were entered.[63] This course had been vigorously resisted by a bloc of four which, while it of course does not approve of confessions obtained by violence, does

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Gryger v. Burke, 334 U.S. 728, 68 Sup. Ct. 1256, 92 L. Ed. 1683 (1948); Bute v. Illinois, 333 U.S. 640, 68 Sup. Ct. 763, 92 L. Ed. 986 (1948); Gayes v. New York, 332 U.S. 145, 67 Sup. Ct. 1711, 91 L. Ed. 1962 (1947); Foster v. Illinois, 332 U.S. 134, 67 Sup. Ct. 1716, 91 L. Ed. 1955 (1947) are some of the more interesting.

59. 331 U.S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947), 1 VAND. L. REV. 60.

60. 334 U.S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1663 (1948), 2 VAND. L. REV. 116. For one of the several excellent reviews of this subject see Reynard, Freedom from Unreasonable Searches, 25 IND. L.J. 259 (1950).

61. United States v. Rabinowitz, 339 U.S. 56, 70 Sup. Ct. 430, 94 L. Ed. 653 (1950). One cannot with assurance restate the *Harris* rule, but it seems to be a holding that a warrantless search in connection with an arrest can search into every part of or object in a man's home, and that a resultant seizure of property will be valid where the possession of the property is in itself a crime. *Trupiano* in effect undercut this by holding that warrants must be obtained when there was opportunity to obtain them; and *Rabinowitz,* while overruling that holding, very carefully reached its own result on conventional grounds and did not attempt to invoke the farther reaches of the *Harris* doctrine.

62. 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

63. Haley v. Ohio, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1947); and see the bloc of cases beginning with Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949).

not feel the same emotional repugnance to such confessions as did the majority.[64]

There are no known statistics as to whether third degree practices are on the wane. The replacement of Justices Murphy and Rutledge in any case makes it probable that the Court will largely abandon its efforts to control this practice; and it may even reverse the decisions which had construed the Federal Rules of Criminal Procedure to handicap the related practice of detention incommunicado.[65]

8. *International Relations*

The great questions of peace or of war in all the shades of temperature in which it has become fashionable to refer to them are largely entrusted by the Constitution to the branches of the Government other than the Court. In an era in which the gravest questions confronting the country have been how to make the peace after the last War, and how far to be involved in the next one, the Court has had five war-born cases. While at least four are of considerable importance, they are certainly far removed from the most vital areas.

Two of the cases concern wartime procurement. Two days after Pearl Harbor, the Court heard argument in the *Bethlehem Steel* case.[66] The decision of that case soon after was of profound importance to procurement, because it precipitated Congress into the use of the device of "renegotiation" as one of the controls of war profits. Because Congress was precipitated into that program, and compelled to act almost without thought, the original Renegotiation Acts of 1942 were slovenly in their standards of delegation of power and, for a few months of their coverage, were retroactive.[67] In *Lichter v. United States,*[68] decided in the four-year period immediately under consideration, the Court upheld the early Acts against the charge of unconstitutional delegation

64. A good exposition of this view is the opinion of Justice Jackson in the *Watts* case, *supra* note 63.

65. The most recent such case is Upshaw v. United States, 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), a 5-4 decision which looks ephemeral indeed. "The most important fact about the five criminal procedure cases, four of which were decided against the defendant, was that in four of the five, the certioraris were granted *last* year. . . . In other words, the former Court had an interest in criminal procedure. . . . Since January 1, 1950, certiorari has been granted in only two cases involving constitutional aspects of criminal law. It seems safe to predict that this branch of the law will for a time be swept under the rug of certiorari denied." Frank, *1949 Term Article* 25 (1950); and see Harper and Rosenthal, *What the Supreme Court Did Not Do,* 99 U. OF PA. L. REV. 293 (1950).

66. United States v. Bethlehem Steel Corp., 315 U.S. 289, 62 Sup. Ct. 581, 86 L. Ed. 855 (1942), which upheld a judgment for Bethlehem under World War I contracts in such terms as to make very clear that if the Government wished to avoid excessive profiteering in World War II, it must move at once.

67. The first Act did not define "excessive profits" at all. An amendment a few months later added the following jewel to legal literature: "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." 56 STAT. 982 (1942).

68. 334 U.S. 742, 68 Sup. Ct. 1294, 92 L. Ed. 1694 (1948).

and of violation, by retroactivity, of the principles against impairment of contracts. The decisions on the vital points were by no means open and shut, and the *Lichter* case is thus as important as renegotiation itself for the few months period of 1942 principally involved. Since a more carefully drawn statute should in any case have been valid, the significance of *Lichter* for the future is comparatively little. Another decision important to war procurement was the holding that property condemned by the government in war time should be valued by courts with a close eye on the prevailing price control standards, thus reducing the likelihood that price control might be weakened by refusals to sell goods to the government except at prices over ceiling levels.[69]

A principal novelty of the peacemaking process after World War II was the large scale trial and punishment by the victors of captured enemies. Some of these trials have been conducted by American military commissions, some by international tribunals. Public opinion in the United States has divided very sharply on the general principles of this method of peacemaking, which to some is vindication of the principles of justice, and to others a reversion to barbaric practices of executing captured enemies after displaying them in a triumph.[70] Public opinion has also been sharply divided on the merits of particular cases.[71]

These are exciting issues; but the Court left resolution of them entirely to others (unless a refusal to take jurisdiction is to be construed more affirmatively as oblique approval of the post-War practices). The disposition of the captured enemy thus was made, by jurisdictional decision, into a type of "political question."[72]

9. *Family Relations*

The Court can do comparatively little about the disintegration of the fabric of the family in America. But because divorce can, and often does, involve more states than one, the Court has the responsibility of working out the rules by which persons may know whether they are or are not married as they move about the country.

The Truman Court inherited the simple question, "married or single?" in an impossible mess. The rules were in such complete confusion that persons married in one state and divorced in another had no way of knowing

69. United States v. Commodities Corp., 339 U.S. 121, 70 Sup. Ct. 547, 94 L. Ed. 707 (1950).

70. Enthusiastic about the Nuremberg trials: JACKSON, THE NUREMBERG CASE (1946). Critical: Ireland, Ex Post Facto *Frome Rome to Tokyo,* 21 TEMPLE L.Q. 27 (1947).

71. See, *e.g.,* REEL, THE CASE OF GENERAL YAMASHITA (1949).

72. See, *e.g.,* Johnson v. Eisentrager, 339 U.S. 763, 70 Sup. Ct. 936, 94 L. Ed. 1255 (1950).

whether they faced freedom and possible improved marital bliss, or jail for either desertion or bigamy.[73]

One of the real triumphs of the Truman Court has been its start toward introduction of workable clarity into this situation. The new rules may or may not be good ones, but they are at least comprehensible. If the parties agree and collaborate, they can obtain an effective out-of-state divorce, at least as between themselves.[74] If they do not agree, and only one seeks the divorce, that party acts at his peril. The effect of collaborative divorces on third parties is currently in dispute.[75]

The Court has thus put its weight in behalf of making marriage a consenual status.

10. *The Total*

If an historian were to do a one-volume study of American life in the 1940's, he might very well omit any reference to the Court-Constitution, 1946-1950. But if that historian had the breadth of vision to perceive that the marble pillars and white pile behind the capitol could hide treasure for his discovering, he might mention the segregation and the church-and-state cases. If his hobby were social history, he would write of marriage and divorce, and hence perhaps of the divorce cases. If his interests were predominantly in business regulation, social welfare programs or international relations, he would pass the marble palace by. If, like other decade historians Allen, the Beards and Slosson, he were concerned with human liberty, the clerk might advise him to come back in a term or two.

II. THE POTENTIAL

The small consequence of the Court-Constitution, 1946-1950, was a matter of the choice of the Justices, rather than their necessity. The docket turned up opportunities which, had the Court chosen, might have resulted in striking developments, and this without absurd stretchings of doctrine.[76]

73. Williams v. North Carolina, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942), as confused by Williams v. North Carolina, 325 U.S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945).

74. The leading cases are Sherrer v. Sherrer, 334 U.S. 343, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948); Coe v. Coe, 334 U.S. 378, 68 Sup. Ct. 1094, 92 L. Ed. 1451 (1948). Other family law cases of the period are Rice v. Rice, 336 U.S. 674, 69 Sup. Ct. 751, 93 L. Ed. 957 (1949); Estin v. Estin, 334 U.S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948); Halvey v. Halvey, 330 U.S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947).

75. As this article is completed, Johnson v. Muelberger, No. 296, Oct. Term 1950, involving the effect of a quickie divorce on third parties, has been argued but not decided. For summary of argument before the Court see 19 U.S.L. WEEK 3187-89 (1951). [In an opionion rendered March 12, 1951 (71 Sup. Ct. 474), the Court held that the divorce is not subject to collateral attack by third parties in other states if it cannot be so attacked in the state where rendered.]

76. This goes only to the cases which the Court chose to hear. The possibilities for action were quantitatively far, far greater among the cases on which certiorari was denied. See Harper and Rosenthal, *supra* note 65.

For examples: (1) If *Adamson v. California*[77] had been decided as the minority seemed to desire, the states would have been required to conform all of their criminal and perhaps some of their civil procedures to the standards of the Bill of Rights. Perhaps the Constitution itself would have needed amendment to permit small claims courts to continue to function without juries. (2) The Hatch Act cases[78] might have reached their same result on the theory that Congress had unlimited right to condition continuity in government employment on absolutely any basis it chose, thus putting the entire loyalty program outside the scope of judicial review; or it might have been decided the other way, and the rights of government employees upheld on grounds so broad that the loyalty program would almost automatically have been invalid.

(3) *United States v. Petrillo,*[79] and other labor cases, might conceivably have held that interferences with strikes for any purposes can not be allowed either under the Thirteenth Amendment or the First Amendment, thus neutralizing antilabor legislation. Or the Court might have upheld the Act there involved on far broader grounds, so as almost to invite new restrictions. (4) The *Lewis* case[80] could have reached its result on a theory of absolute presidential power to obtain injunctions in emergencies (a possibility which would have seemed too bizarre to mention here except that Justice Clark, as Attorney General, apparently subscribed to it);[81] or the Court might have held for Lewis on the ground that the punishment was excessive, or on some other ground, and thus might have precipitated more extreme legislation than any yet passed.

(5) In *Takahashi v. Fish & Game Comm'n,*[82] the Court might have upheld California's legislation against fishing by resident Japanese, and thus encouraged anti-Japanese measures on the West Coast; in *Oyama v. California*[83] it might have done the same in respect to Japanese landholding. On the other hand in both these cases it could have gone farther in putting Japanese on a plane of equality with all other "persons" in the United States.

(6) In *Bute v. Illinois,*[84] and similar cases, the Court might have extended the right to counsel to all criminal defendants in state courts. (7) In *United States v. C.I.O.,*[85] if the Court had upheld the Taft-Hartley Act's restrictions on labor publications with political messages, the Congress would

77. 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947), holding that California need not, at least in the circumstances of the case, afford criminal defendants a privilege against self-incrimination.
78. *Supra* notes 15 and 16, and text.
79. *Supra* note 32.
80. *Supra* note 36, and text.
81. Statement, Attorney General Clark, New York Times, Feb. 3, 1949, p. 1.
82. *Supra* note 24.
83. *Supra* note 23.
84. *Supra* note 55.
85. *Supra* note 17.

doubtless have proceeded to go still further to reduce the effective participation of labor in national life. (8) In the sound-truck cases, if the Court had either unequivocally immunized these machines from any control except that of volume, or had given the communities a completely free hand to suppress them altogether, it would materially have affected the methods of political campaigning in the United States.[86] (9) If in the various cases involving maldistricting in elections the Court had intervened to enforce equality among voters, the control of some state governments as well as the distribution of membership in Congress might have been markedly affected.[87] (10) *Terminiello v. Chicago*[88] might have been decided for the city on the ground that police have a right to arrest speakers who insist on giving addresses in the presence of mobs which will commit violence if the speech is heard. Such a precedent could have been a long move toward making the institution of "protective custody" common.

(11) The Puerto Rican sugar case[89] could have been decided on the ground that the United States may not exploit voteless territories for the economic benefit of the mainland. If such a principle had ever been worked into our fundamental law, Puerto Rico would have infinitely more hope for its economic future than is now warranted.

(12) If the minority views had been adopted in the case challenging the trial of a group of Germans by an American military commission, it would have been the law that the "mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. . . . [O]ur courts [could] exercise [habeas corpus] whenever any United States official illegally imprisons any person in any land we govern."[90] If that view had prevailed, America might actually have exported democratic institutions as an aftermath of military victory!

The cases mentioned are only a sampling. The difference between the passive quality of most of the Court's deeds, and the dynamic quality of its opportunities illustrates that the Court-Constitution could, if so minded, have exercised far greater influence on American life than they did. It illustrates also the limits of the Court's potential. Assuming that it had taken every opportunity for action which came before it, it could not even attempt to offer a solution to many of the perplexities of Americans. There was nothing of very great significance which the Court might have done, no matter what its desires, in the fields of business regulation; economic security; housing (unless it

86. *Supra* note 13.
87. *Supra* note 19, and text.
88. 337 U.S. 1, 68 Sup. Ct. 894, 93 L. Ed. 1131 (1949). But see Feiner v. New York, 71 Sup. Ct. 303 (1951).
89. *Supra* note 42.
90. Eisentrager v. Johnson, 339 U.S. 763, 798, 70 Sup. Ct. 936, 94 L. Ed. 1255 (1950) (dissent of Justice Black).

had invalidated rent control); national fiscal policy; stabilization of the institution of the family; or, with the limited exceptions mentioned, war and peace.

III. From Taney to Truman

The relevance of the Court-Constitution to American life varies from time to time. It would be misleading to compare the years 1946-1950 with a four-year span deliberately chosen for the very reason of its special excitement. 1946-1950 in the life of the Court-Constitution was certainly placid if compared with 1934 to 1938, with its Old Deal dying and its New Deal being born.

But some sense of proportion is obtained by comparing the quadrennium 1946-50 with four other four year periods, chosen solely because they are spaced at 25 year intervals before the current time. The resulting time units (1846-50, 1871-75, 1896-1900, 1921-25) have in common that each stands in close proximity to a war (Admiral Farragut's suit for prize money for storming Mobile Bay and Admiral Dewey's for taking Manila fall in the 1871-75 and 1896-1900 periods respectively),[91] with war or post-war issues decided in each.[92] There is particularly marked similarity in the eminent domain disputes wars bring.[93] Each period except that of the Mexican War presented serious questions concerning rights of aliens, and particularly Orientals.[94] But the differences are more striking than the similarities.

91. United States v. Farragut, 22 Wall. 406, 22 L. Ed. 879 (1875); Dewey v. United States, 178 U.S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170 (1900).

92. 1876-80: White v. Hart, 13 Wall. 646, 20 L. Ed. 685 (1872) (effect of pre-emancipation contracts concerning slaves); Osborn v. Nicholson, 13 Wall. 654, 20 L. Ed. 689 (1872) (similar); Delman v. Merchants' Mutual Ins. Co., 14 Wall. 661, 20 L. Ed. 757 (1872) (effect of contracts for payment in Confederate money); Pierce v. Carskadon, 16 Wall. 234, 21 L. Ed. 276 (1873) (effect of statute putting "pains and penalties" on Confederates); Mechanics' and Traders' Bank v. Union Bank, 22 Wall. 276, 22 L. Ed. 871 (1875) (power of Union general in New Orleans).

1896-1900: The major post-Spanish War cases of course did not come up so early; but the Court did have wartime revenue cases involving constitutional issues: Nicol v. Ames, 173 U.S. 509, 19 Sup. Ct. 522, 45 L. Ed. 786 (1899); Knowlton v. Moore, 178 U.S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900); Plumber v. Coler, 178 U.S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998 (1900).

1921-1925: Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595 (1922) (validity of rent control); and see Chastleton Corp. v. Sinclair, 264 U.S. 543, 44 Sup. Ct. 405, 68 L. Ed. 841 (1924).

93. Military procurement problems: United States v. Russell, 13 Wall. 623, 20 L. Ed. 474 (1871) (compensation for steamboats pressed into service); Russell Motor Car Co. v. United States, 261 U.S. 514, 43 Sup. Ct. 428, 67 L. Ed. 778 (1923) (damages for cancellation of contract); United States v. New River Collieries, 262 U.S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014 (1923) (effect of "market value" on price government must pay for coal under highly inflationary circumstances); United States v. Commodities Trading Corp., 339 U.S. 121, 70 Sup. Ct. 547, 94 L. Ed. 707 (1950) (effect of price ceilings on "just compensation").

94. A year after the 1871-1875 period the Court decided Chy Lung v. Freeman, 92 U.S. 275, 23 L. Ed. 550 (1876), invalidating a remarkable California statute under which a state immigration officer was enabled to determine, apparently by a glance, that Chinese immigrants were "lewd and debauched women," subject to certain penalties. In United States v. Wong Kim Ark, 169 U.S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890 (1898), the Court announced the profoundly important decision that children born in the United States of

First, the quantitative differences:

Table III. NUMBER OF CONSTITUTIONAL DECISIONS, FIVE PERIODS[95]

1946-1950	145
1946	34
1947	42
1948	37
1949	32
1921-1925	227
1921	48
1922	68
1923	56
1924	55
1896-1900	148
1896	33
1897	35
1898	34
1899	46
1871-1875	52
1871	14
1872	15
1873	11
1874	12
1846-1849	13
1846	0
1847	6
1848	4
1849	3

The differences of substance are more illuminating. The earlier discussion in this essay has surveyed the major cases of the past four years. They may be compared with the squibs which follow:

1. *1846-1849.* The constitutional decisions of 100 years ago were short on quantity but, with due regard for the limited nature of governmental

alien Chinese parents were themselves citizens. Ng Fung Ho v. White, 259 U.S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938 (1922), is a leading case on the rights of aliens to hearing before deportation. Other deportation problems arose in United States *ex rel.* Bilumsky v. Tod, 263 U.S. 149, 44 Sup. Ct. 54, 68 L. Ed. 221 (1923); Mahler v. Eby, 264 U.S. 32, 44 Sup. Ct. 283, 68 L. Ed. 549 (1924). Terrace v. Thompson, 263 U.S. 197, 44 Sup. Ct. 15, 68 L. Ed. 255 (1923); Porterfield v. Webb, 263 U.S. 225, 44 Sup. Ct. 21, 68 L. Ed. 278 (1923); Webb v. O'Brien, 263 U.S. 313, 44 Sup. Ct. 112, 68 L. Ed. 318 (1923), and related cases were the leading decisions upholding California's restrictions on Japanese land-holding—until they were distinguished away to the point of being overruled in the two cases of the recent period. Oyama v. California, 332 U.S. 633, 68 Sup. Ct. 269, 92 L. Ed. 249 (1948); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 68 Sup. Ct. 1138, 92 L. Ed. 1478 (1948).

95. For the three most recent periods, each date represents the October term. The system of sitting in October was inaugurated in 1873, and therefore for 1871 and 1872, the cases studied were those which, without reference to term name, were decided between October and the rising of the Court the next spring. For the 1846-1849 period, calendar years were studied.

For an unusually interesting comparison of Then and Now, see Lowry, *The Supreme Court in 1848 and 1948: A Review of Two Terms*, 23 So. CALIF. L. REV. 459 (1950). Mr. Lowry presents the thesis that the Jackson, Van Buren, Polk appointments were "outside the spoils system," while the Roosevelt appointments were part of "the patronage

activities at that time, they were long on significance. *Waring v. Clarke*[96] and *New Jersey Steam Navigation Co. v. Merchants Bank*[97] are two decisions which revolutionized the scope of the law of admiralty. *West River Bridge Co. v. Dix*,[98] equally with the *Charles River Bridge* case[99] of a few years before, sets the foundation for the modern law of the contract clause. *Luther v. Borden*[100] needs no panegyric. The *License Cases*[101] and the *Passenger Cases*[102] were the most voluminous constitutional decisions of the period; and their present day significance is largely lost due principally to the fact that two terms after this period the Court decided *Cooley v. Board of Wardens*[103] and began its modern career as watchman of the freedom of interstate boundaries.

2. *1871-1875.* After the Civil War the negative side of the commerce clause and the contract clause furnished the largest quantitative bases of constitutional decisions, about 20% of the cases falling in each of these categories. The Court was also mopping up after the War, deciding what to do about contracts for slaves; considering contracts payable in Confederate money; upholding an application of the Civil War income tax; and reaffirming the national power to establish military courts in the South.[104]

Just before the beginning of this period, the Court had decided *Knox v. Lee,* [105] finally upholding the legal tender acts. The most important decision within the four years was the *Slaughterhouse Cases.*[106]

3. *1896-1900.* In this period the negative implication and contract clause cases were each about 10% of the Court's constitutional business. These were the formative years for due process of law. *Allgeyer v. Louisiana*[107] began the bizarre career of liberty of contract, though *Holden v. Hardy*[108] at the same

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idea." I believe, on the contrary, that a more political and more meritless run of the appointments never occurred than between Taney (1835) and Curtis (1851). But Mr. Lowry's article is provocative and illuminating.

96. 5 How. 441, 12 L. Ed. 226 (1847).

97. 6 How. 344, 12 L. Ed. 465 (1848). The first case greatly increased the tort, and the latter the contract, jurisdiction of admiralty.

98. 6 How. 507, 12 L. Ed. 535 (1848), holding that some sovereign powers cannot be contracted away, and that therefore, if a state made a contract involving one of those powers, its subsequent abrogation did not violate the contract clause.

99. 11 Pet. 420, 9 L. Ed. 773 (1837).

100. 7 How. 1, 12 L. Ed. 581 (1849), holding the determination of the legitimate government of Rhode Island to be a political question.

101. 5 How. 504, 12 L. Ed. 256 (1847).

102. 7 How. 1, 12 L. Ed. 581 (1849). These two decisions defy brief summary; but for a time they pointed in the direction that the Court should not review the validity of state laws affecting commerce.

103. 12 How. 299, 13 L. Ed. 996 (1851).

104. These cases are collected in note 92, *supra.*

105. 12 Wall. 457, 20 L. Ed. 287 (1871).

106. 16 Wall. 36, 21 L. Ed. 394 (1873). These cases, too, defy capsulated statement. Arising in the context of a dispute over the power of the City of New Orleans to grant a slaughtering monopoly, they narrowly construed the 13th and 14th Amendments and virtually read the privileges and immunities clause out of the 14th Amendment.

107. 165 U.S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1897), holding invalid a state insurance regulation on the theory of interference with liberty of contract.

108. 169 U.S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (1898), upholding a Utah hours of labor regulation against the contention of interference with liberty of contract.

time laid the stumbling block over which that notion eventually fell back into oblivion. *Chicago, Burlington & Quincy R.R. v. Chicago*[109] brought state eminent domain proceedings at least theoretically under federal supervision. *Smyth v. Ames*[110] began the course of "fair value" in utility rate regulation.

These years saw about as many constitutional decisions as 1946-1950. Some of them were trifling, as the dispute over the power of New Orleans to designate a red light area.[111] But some of them, for the first time in the eras under study, required interpretations of the federal commerce power. The *Trans-Missouri Freight* case[112] and the *Addyston Pipe & Steel* case[113] are noted examples arising from the Sherman Act.

A new grist of civil rights business also appears for the first time on the Court's docket. One case presented almost the same issue as a 1946-1950 case; each challenged the legality of an execution of a person who became insane after conviction.[114] Cases of more general interest arose over the claimed right to speak on the village green;[115] the status of Orientals born in this country;[116] rights of Negroes to jury service;[117] school segregation;[118] and whether the states are bound by the criminal procedure sections of the Bill of Rights.[119] The latter three of these issues were, in only slightly different shapes, again up for consideration in the last four years.[120]

4. *1921-1925.* In this four-year period, both the volume and the importance of the cases decided far outstripped the period 1946-1950. The volume was 50% more. The largest groups were the negative implication cases, about 10% of the whole number; and the due process cases having to do with

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109. 166 U.S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897), holding state court judgment as to amount of valuation subject to review under due process. 1 NICHOLS, EMINENT DOMAIN c.4 (esp. p. 313) (3d ed., Sackman & Van Brunt, 1950).

110. 169 U.S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898).

111. L'Hote v. New Orleans, 177 U.S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899 (1900).

112. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897).

113. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 Ct. 96, 44 L. Ed. 136 (1899).

114. Solesbee v. Balkcom, 339 U.S. 9, 70 Sup. Ct. 457, 94 L. Ed. 604 (1950); Nobles v. Georgia, 168 U.S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515 (1897). The *Solesbee* case follows the *Nobles* case, and both arose from situations in Georgia.

115. Davis v. Massachusetts, 167 U.S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71 (1897), virtually overruled by Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).

116. United States v. Wong Kim Ark, 169 U.S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890 (1898).

117. Williams v. Mississippi, 170 U.S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898); *cf. e.g.,* Patton v. Mississippi, 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 76 (1947) (also a Mississippi case).

118. Cumming v. Board of Education, 175 U.S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 (1899); *cf.* Sweatt v. Painter, 339 U.S. 629, 70 Sup. Ct. 848, 94 L. Ed. 1114 (1950).

119. Maxwell v. Dow, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 622 (1900) (jury trial); *cf.* Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947) (accused's privilege not to testify).

120. See cases cited, notes 114-19, *supra.* The Court also confronted the religious establishment problem in both periods. Bradfield v. Roberts, 175 U.S. 291, 20 Sup. Ct. 121, 44 L. Ed. 168 (1899) (payment to hospital of religious order); and Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 648 (1948).

business regulation and rates, about 20% of the whole number. The contract clause cases, though substantial in number, were fewer proportionately than in previous years.

The great cases of these years were *Truax v. Corrigan;*[121] *Stafford v. Wallace;*[122] *Bailey v. Drexel Furniture Co.,*[123] *Levy Leasing Co. v. Siegel,*[124] and *Chastleton Corp. v. Sinclair;*[125] *Balzac v. Puerto Rico;*[126] *Pennsylvania Coal Co. v. Mahon;* [127] *Missouri* ex rel. *Southwestern Bell Tel. Co. v. Public Service Comm'n,*[128] and *Dayton-Goose Creek Ry. v. United States;*[129] *Massachusetts v. Mellon;*[130] *Adkins v. Children's Hospital;*[131] and *Charles Wolf Packing Co. v. Court of Industrial Relations.*[132]

There were famous civil liberties decisions, too. Basic rights of aliens,[133] fair trial in state courts,[134] freedom of speech in relation to states,[135] and foreigu languages in the schools were among the topics reviewed.[136] In this era of normalcy in the White House and Teapot Dome on the Hill, the Court was by far the most creative institution of American government.

IV. Conclusion

The voice of man is the voice of his experiences, and the Constitution speaks through the voice of a majority of nine men. The great traumatic experience of the life time of those men, in relation to the Constitution, was the excess of judicial supervision of American affairs before 1937. Vinson, Black and Minton were in Congress at the time of the Court fight; Reed was at the

121. 257 U.S. 312, 43 Sup. Ct. 124, 66 L. Ed. 254 (1921) (restrictions on injunctions in labor disputes).

122. 258 U.S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735 (1922) (extension of commerce power to stockyards).

123. 259 U.S. 20, 42 Sup. Ct. 449, 66 L. Ed. 817 (1922) (the child labor tax case).

124. 258 U.S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595 (1922).

125. 264 U.S. 543, 44 Sup. Ct. 405, 68 L. Ed. 841 (1924). These are World War I rent control cases.

126. 258 U.S. 298, 42 Sup. Ct. 343, 66 L. Ed. 627 (1922) (a leading modern case on territorial status).

127. 260 U.S. 393, 43 Sup. Ct. 158, 67 L. Ed. 322 (1922) (validity of regulations relating to preservation of surface structures jeopardized by coal mining).

128. 262 U.S. 276, 48 Sup. Ct. 544, 67 L. Ed. 981 (1923).

129. 263 U.S. 456, 44 Sup. Ct. 169, 68 L. Ed. 388 (1924). These are the leading rate cases.

130. 262 U.S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923) (concerning the standing of taxpayers to challenge federal expenditures).

131. 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923) (invalidity of minimum wage legislation for women).

132. 262 U.S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103 (1923) (reviewing state compulsory arbitration statute).

133. See particularly the Japanese cases for the period cited, in note 94, *supra.*

134. There were numerous cases of this sort, one of the best known being Moore v. Dempsey, 261 U.S. 86, 43 Sup. Ct. 265, 67 L. Ed. 543 (1923), a case in which a lynching atmosphere penetrated the trial court room.

135. Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925) (alleged state denial of free speech held subject to review under 14th Amendment).

136. Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923).

heart of the Administration's struggle; and Frankfurter, Douglas and Jackson were very close to it.

But while reaction against McReynolds-ism accounts for some of the modern apathy of the Constitution, it by no means accounts for it all. The effects of the Court fight are different on different Justices. That experience has contributed to Justice Minton's dominating urge to stick close to the precedents, leaving so nearly as he can the "making of law" to the other branches of government. On the other hand, Justice Black stood with Minton in 1937. Today he would restrict the judicial hands-off policy to those economic areas which precipitated the earlier struggle; at the same time he wants a Constitution endlessly dynamic in the protection of civil liberty. So does Justice Douglas. Justice Frankfurter is a leading constitutional "non-actionist," a philosophy which, one may suspect, is drawn both from a lifetime of contemplation of the futility of judging, and from a personal instinct to avoid any form of concrete action as well.

However we account for it, the Court-Constitution is at the moment, and perhaps only for the moment, an institution of dwindling significance in American life. This is so whether the measure is quantitative or qualitative, in comparison with earlier years. It is particularly so when the measure is relative to the other institutions of the federal government. John Marshall wrote a fairly small number of profoundly significant constitutional decisions; but the Congresses and Presidents of 1801 to 1835 had almost insignificant participation in the daily lives of Americans as compared with President Truman and the 80th and 81st Congresses. As government generally more and more moves *in* on American life, the Court-Constitution more and more move *out*.

It would take at least the aggressiveness of a Marshall to keep the Court in the relative status in government which he gave it, and even then the task might prove impossible. For the very reason of the vast expanse in the activities of the Federal Government, today's Court is overwhelmed as Marshall's was not by sheer volume; the Court finds itself institutionally incapable of bringing into obedience to its commands a single bulk-producing agency such as the Patent Office.

This essay is a report. It is not meant as applause or criticism. But more than either, it is not meant as a requiem. There is power latent in passivity. A half-century passed between the first two great exercises of judicial review of acts of Congress. If, between *Marbury v. Madison* and *Dred Scott* (say, in 1850), a commentator had predicted that the Court and the Constitution had no important future in American life, he would have been reasonable; but he would have been wrong.