1948

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THE UNITED STATES SUPREME COURT: 1947-48*

JOHN P. FRANK†

COMPREHENSIVE study of a court requires analysis of the economic, social, and political world of which it is a part. So much cannot be attempted here, and yet the Supreme Court, 1947-48, must be seen as part of an America in oscillation. A democracy is not always sure of its bearings, and in the past year the country has traveled in a great many directions at once. So has the Court.

In last year's review of the October 1946 term, the writer said that the Court, as an institution of government, was "following" a new and distinctly conservative trend." But examination of the 1947 term cannot justify any definite conclusion as to the correctness of this post-1946 statement. There were certainly remnants of the glory of the late New Deal trailing a few of the 1947 term decisions, and the Court's left wing of Black, Douglas, Murphy, and Rutledge prevailed in a far higher proportion of the important cases than in 1946; but the volume of clear-cut holdings on significant issues at the 1947 term was too small to make the year more than an eddy in the social and economic history of the Supreme Court. Like America, the Supreme Court did not go anywhere very definitely in 1947-48.

But if lawyers and Justices were seldom at the barricades of social reform in 1947, they were often in the library. There were technical disputes

* This article purports to be as much a social survey as a legal analysis of the work of the Supreme Court at the last term. It is the second of a contemplated annual series and is written in part for the legal, social, and economic historians of the future who may find it useful to have a contemporary view of the last term's work. The preceding article, The United States Supreme Court: 1946-47, 15 Univ. Chi. L. Rev. 1 (1947), will hereafter be cited as 1946 Term Article.

† Assistant Professor of Law, Indiana University Law School. A troublesome feature in reporting about 10% of this year's cases is that the writer has been engaged in litigation either in the case itself, in a companion case, or in a case involving very similar questions. These contacts concededly cloud objectivity, though the writer's roles were minor.
of considerable significance, particularly in matters of jurisdiction and procedure; and there was a thorough reconsideration of some important matters of trade regulation and the anti-trust laws.

I. HIGH SPOTS OF THE YEAR

Nine cases of high importance marked the 1947 term. Of these the most significant was the group of restrictive covenant cases. Though, as will be shown below, the short-range consequences of the restrictive covenant cases may be slight, the potentialities of the doctrine there declared are tremendous; and even if they are never realized, the decisions remove a major deformity in the structure of Constitutional Law.

Three very important anti-trust cases, and a whole series of others in addition, gave new prospect of militant enforcement of the anti-trust laws. With the anti-trust cases may be linked the Cement case, which struck hard at the basing-point system for non-competitive pricing. Since Congress was proceeding Janus-like toward both the enforcement and the relaxation of the anti-trust laws, and since a change of administration may well be in the offing, it is impossible to guess whether the potentialities of these decisions will ever be realized. The upholding of the Renegotiation Act was also a decision of great economic importance.

Most of the civil rights cases followed predictable lines. Illinois ex rel. McCollum v. Board of Education invalidated an Illinois system of school-released time for religious education. The decision will require a review of all such released-time arrangements and doubtless invalidates most of them. Another significant civil rights case was Oyama v. California, which indirectly but effectively terminated an unusually flagrant system of discrimination against American citizens of Japanese ancestry. In another important case the government’s power of search and seizure, given broad scope in the preceding term, was once again restrained. Still another decision freed labor unions for renewed political activity through publication.

4 At the same time that Congress was giving the Anti-trust Division one of its largest appropriations, it passed the Bulwinkle Bill over President Truman’s veto, thus partially exempting railroads from the anti-trust laws, S. 110, 80th Cong. 2d Sess. (Pub. L. No. 662, June 17, 1948).
6 333 U.S. 203 (1948).
7 332 U.S. 633 (1948).
8 Trupiano v. United States, 68 S. Ct. 1229 (1948).
9 United States v. CIO, 68 S. Ct. 1349 (1948).
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If there were hard feelings among Justices in the year past, the opinions happily do not reveal them. The work of each individual Justice, the operation of the Court as an institution, and the most important of the decisions are discussed in the following sections.

II. THE REGULATION OF LABOR AND BUSINESS

Two areas of law which had provided the major excitement in the preceding year showed slight development during 1947-48. The labor cases were of little general significance, and the power of the states to tax activities affecting commerce remained as clouded as it was at the close of the 1946 term. But the real economic tension of the 1947 term arose in the field of restraints of trade.

MONOPOLY AND FREE ENTERPRISE

Congress . . . did not condone “good trusts” and condemn “bad” ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small

10 Bakery Sales Drivers Local v. Wagshal, 333 U.S. 437 (1948), held that a quarrel over the debts of a delicatessen in which the union appeared as collection agent was not a “labor dispute” within the meaning of the Norris-La Guardia Act. Kennedy v. Silas Mason Co., 334 U.S. 249 (1948), held that as matter of discretion the Court would not permit the Fair Labor Standards Act coverage of workers producing munitions for sale to the government to be settled on a summary judgment proceeding. This case, like the Paramount decision, 334 U.S. 131 (1948), indicates the manner in which government legal policy shifts with administrations. The government took opposite stands on the competitive bidding issue in the trial court and Supreme Court in Paramount. The Department of the Army was permitted to oppose the claim in the Silas Mason case despite the fact that the Attorney General had conceded its validity during the war. Government’s brief, at 26–27 n. 11. The most important labor case was Bay Bridge Operating Co. v. Aaron, 68 S. Ct. 1186 (1948), holding five to three that employees in the longshore industry were entitled by the Fair Labor Standards Act to time and one-half for overtime hours in addition to the time and one-half the day rate they were already given by their contract for evening work. The employees thus get time and one-half on time and one-half, and the decision gives the longshoremen a multimillion dollar windfall, an amount so large that not even their own tough union thought they should have it. The Court held that the time and one-half night rate was not “overtime,” but was merely “night differential” and hence was the “regular rate” for night hours. The fact that the 50% bonus is two or three times larger than any “night differential” in American industry and was substantially the amount required by the statute for “overtime” did not trouble the majority.

11 The cases on the extent to which the Commerce Clause precludes state legislation were principally tax cases this year. Aero Mayflower Transit Co. v. Board of Railroad Com’rs, 332 U.S. 495 (1948), a state transportation tax case, restated the rule of the leading case, Interstate Transit Inc. v. Lindsey, 283 U.S. 183 (1931), by making the test of validity of carrier taxes whether the tax is “for the purpose of” charging for the use of highways rather than “for the privilege of doing the interstate business.” Since taxes are laid for the purpose of raising money and not for the sake of either verbalism, the test may prove hard to apply. Others were Central Greyhound Lines, Inc. v. Mealey, 68 S. Ct. 1260 (1948); Memphis Natural Gas Co. v. Stone, 68 S. Ct. 1475 (1948); Toomer v. Witsell, 68 S. Ct. 1156 (1948). Another “negative implication” case, dealing with non-tax matters, was Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), involving discrimination against Negroes in international transportation.
producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the directions of a few.\textsuperscript{23}

A great issue of our time is whether it is possible, by law, to make effective a preference for "a system of small producers." By 1948 the tide has become so heavy against that system that the battle for it may already be irrevocably lost. For against brave dicta are facts:

**ACQUISITIONS IN MANUFACTURING AND MINING, 1940-46\textsuperscript{23}**

<table>
<thead>
<tr>
<th>Size of Acquiring Concerns (Assets: Millions of Dollars)</th>
<th>Number of Acquiring Concerns</th>
<th>Number of Concerns Acquired</th>
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<tr>
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<td>140</td>
<td>524</td>
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<tr>
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<td>229</td>
<td>470</td>
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<td>5-9</td>
<td>130</td>
<td>273</td>
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<td>1-4</td>
<td>198</td>
<td>276</td>
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<tr>
<td>Under 1</td>
<td>123</td>
<td>175</td>
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The two great problems of enforcement of the trade laws are the determination of their substantive content and the application of remedies for their violation. Since judicial regard for substance has outrun judicial regard for remedy, the result is often a pronouncement of tremendous offense and minute penalty.\textsuperscript{4} In 1947 the Court slightly extended both substance and enforcement.

**a) Substantive Principles**

The most important substantive developments under the Sherman Act and related statutes were the reconsideration of the right of patent and copyright holders to fix the prices at which their licensees could sell products,\textsuperscript{12} the determination that many practices of the movie industry were

\textsuperscript{23} United States v. Aluminum Co. of America, 148 F. 2d 416, 427 (C.C.A. 2d, 1945).

\textsuperscript{12} Letter from Acting Chairman, FTC, S. Doc. 17, 80th Cong. 1st Sess. (1947), at 8. See also on the extremely rapid trend of monopolization in the United States: Staff Report of the Monopoly Subcommittee of the House of Representatives Committee on Small Business (Dec. 27, 1946); "Economic Concentration and World War II," Report of Smaller War Plants Corp. to Special Committee on Small Business, Senate Committee print, 70th Cong. 2d Sess., No. 6; "Maintaining Free Competitive Enterprise," Report of Chairman of Senate Small Business Committee, 70th Cong. 1st Sess., Committee print No. 3. An indication of how far we have moved from ancient moorings is columnist David Lawrence's denunciation of Rostow, A National Policy for the Oil Industry, as "socialistic." Washington Evening Star (Jan. 27, 1948). The book advocates enforcement of the anti-trust laws in the oil industry, but competition is apparently an equivalent of public ownership to such thinkers as Lawrence.

\textsuperscript{4} See also 1946 Term Article, at 14-16.

illegal, the extension of the Sherman Act to "local" practices, and the approval of the further expansion of United States Steel.

In 1926 United States v. General Electric Co. held that a patent holder licensing others to produce could condition his license on the licensee's agreement to charge fixed prices for the product. This year the Court withdrew a part of this broad-scale invitation to use patents as a front for industry-wide price fixing.

Justices Black, Douglas, Murphy, and Rutledge wished to overrule the General Electric decision for reasons expressed by Justice Douglas in a brief statement of extraordinary lucidity. No fifth member was willing to go quite so far, but two important qualifications of the rule were made in the Gypsum and Line Material cases.

The gypsum industry saw that the General Electric device enabled United States Gypsum "to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses." At a series of conferences the entire industry, which manufactures products used in substantially all building construction, devised a license system which stifled all price competition.

All the Justices participating agreed with Justice Reed that the General Electric case "gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

But not all these circumstances are necessary to create an exception to General Electric. In the Paramount decision later in the term the Court compressed the Gypsum modification of the price-fixing right to this: Patentees and copyright holders may "not regiment an entire industry by licenses containing price-fixing agreements."

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16 Motion pictures cases cited note 15 supra.
19 272 U.S. 476 (1926).
How much less than the entire industry may validly be "regimented" is not yet known. But in the *Line Material* decision it was held that the patent holder who would "regiment" some permitted fragment of an industry must do so on his own. He cannot collaborate with another patent holder and devise a cross-licensing system for any price-fixing purpose.

Price fixing was a small part of the misdeeds of the movie industry, and the Court in the *Paramount*\(^2\) and companion cases considered the other violations of the anti-trust laws as well. While the trial was long and the facts are many, the gist of the problem may be stated briefly: The five "majors" of the motion picture industry both produce and exhibit. In the ninety-two cities of over 100,000 population, 70% of the first-run theaters are affiliated with a major. In the cities of 25,000 to 100,000 the majors have interests in 60% of the first-run theaters. In about 300 smaller towns they have interests in all theaters. They also own many theaters other than those showing first runs.

The dominance of these and other large exhibitors is ruthlessly achieved, and the profits flowing from the system are protected by elaborate controls. For example, second-, third-, and later-run theaters are classified; each is allowed to exhibit only after a "clearance" period has elapsed since the prior showing. Theaters of different exhibitors were pooled and their profits divided, thus ending competition. Special opportunities offered to comparatively large independents were denied their smaller competitors. The majors established the system of block booking, requiring exhibitors to take a group of pictures or none at all. The pattern of trade practices has been one of the most vicious in American commerce. Most of these practices were outlawed by the district court and the Supreme Court: Only "reasonable" clearances will be allowed, and the other practices listed must stop.

A third anti-trust decision, *Mandeville Island Farms v. American Crystal Sugar Co.*,\(^2\) restored a sensible symmetry to the Commerce Clause. In 1937 a chastened Supreme Court, compelled to reconsider some constitutional doctrine, retained an understandable desire to save as much face as possible. The result was the renewed device of "affecting commerce," as distinguished from "in commerce," as a method for defining constitutional power.\(^2\) In substance, the Court held that Congress had two virtually distinct powers, one to regulate commerce and the other to regulate

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\(^{26}\) 334 U.S. 219 (1948).

that which affects commerce; and the enormous expansion of federal power after 1937 was pinned to the latter theory.

This expanded doctrine was rarely applied to the Sherman Act, since the Act had been phrased in terms of "commerce" rather than "affecting commerce" long before the distinction acquired significance. It was therefore argued that the Sherman Act did not have the same scope as other exercises of the Commerce power. Thus, as recently as four years ago, the Court held that the insurance industry was covered by the Wagner Act ("affecting commerce"), but a minority contended in the *Southeastern Underwriters* case that the industry was not covered by the Sherman Act.

Changes in the personnel of the Court since 1937 made possible the obliteration of the distinction. In the *Mandeville Farms* case the issue was whether the Sherman Act covered restraints of trade between California sugar-beet growers and California refiners. Justice Rutledge's majority opinion merged the two lines of theory by relying on the broadest of both the "in commerce" and the "affecting commerce" cases.

Another case involving monopoly in industry was characterized by dissenting Justices Black, Douglas, Murphy, and Rutledge, speaking through Justice Douglas, as "the most important anti-trust case which has been before the Court in years." The action in the *Columbia Steel* case was brought by the government to enjoin the United States Steel Corporation and its subsidiaries from buying the Consolidated Steel Corporation, the largest steel fabricator on the West Coast. The majority opinion by Justice Reed held that the sale could not be restrained.

The Consolidated story begins with the Geneva purchase. During the recent war, the government had spent nearly $200,000,000 developing the Geneva, Utah, steel plant. In 1946 United States Steel, its war-time operator, bought the Geneva plant from the Surplus Property Administrator on a bid of $47,500,000. At that time the Attorney General filed an opinion, as required under the Surplus Property Act, that the Geneva sale did not violate the anti-trust laws. United States Steel then sought to buy Consolidated to use part of its Geneva product.

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30 The *Southeastern* case, for "in commerce"; *Wickard v. Filburn*, 317 U.S. 111 (1942), for "affecting commerce." Presumably the distinction now loses all utility except for interpretation of post-1937 legislation, such as the Fair Labor Standards Act, which was passed in reliance on a difference between the terms. See, for example, *McLeod v. Threlkeld*, 319 U.S. 491, 493 (1943), and cases cited therein.

The essence of the government's objection to the Consolidated purchase was that it would suppress competition for Consolidated's rolled steel requirements, since United States Steel would thereafter control this market; that it would eliminate competition between Consolidated and United States Steel in the sale of fabricated steel products and would further the vertical integration of the entire steel industry from production to fabrication under United States Steel; and that even if monopoly had not in fact resulted, the purchase was made with an intent to monopolize. The Court responded in substance that the elimination of Consolidated's business of several million dollars per year was too small to be of consequence; that the extension of integration was not per se improper; and that the intent was the perfectly proper one of utilizing the Geneva product.

But the Supreme Court was hardly required to approve the Consolidated sale merely because of the Attorney General's prior error in approving the Geneva sale. The real division in the Court is a straight matter of philosophy. United States Steel controls one-third of American rolled steel production. Its manufacturing capacity in 1940, as the dissent points out, was greater than that of all German producers combined and more than twice that of all British or French producers. Such an enterprise, unless it is to merge with the few other giants in the field, will necessarily expand by "trifles," for there are no other worlds to conquer. If it may absorb comparatively small plants simply because they are—relatively—small, then United States Steel can absorb much that remains of the area of production so long as it proceeds by inches.

The philosophic clash arises because the minority, with abundant quotation of Brandeis' *The Curse of Bigness*, contends that sheer size is an evil which the Sherman Act was meant to prevent. To allow a concern to grow as large as United States Steel is in effect to transfer the government of the country from its elected representatives to an industrial oligarchy. To the dissenters, the matter is as simple as this:

... United States Steel has one-third of the rolled steel production of the entire country. The least I can say is that a company that has that tremendous leverage on our economy is big enough.

What the dissent finds so clearly written into the Sherman Act is nonexistent for the majority. To Justice Reed this is merely "an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nationwide or county-wide... If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."

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31 Ibid., at 1130 n. 6.  
32 Ibid., at 1130.  
33 Ibid., at 1123, 1124.
The rule emerging from the cases of this decade may be put thus: Sheer size may violate the anti-trust laws when one concern swallows an entire industry, as in the case of the Aluminum Company. Yet size is quite innocuous when one concern merely swallows one-third of a far more important American industry such as steel. While we may not tolerate the rule of One, we find no objections to a rule of Three or Four.

The Federal Trade Commission prevailed in two cases establishing important principles. In the Cement Institute case the basing point system was found illegal, and in the Morton Salt case quantity discounts were sharply confined.

In the Cement case Justice Black's majority opinion utilized the legendary "Pittsburgh plus" basing point system as a handy starting point for comprehending the more complicated system in the cement industry. Pittsburgh plus meant that all steel was billed as though it had been shipped from Pittsburgh even though it had been shipped from a point much closer to the purchaser than Pittsburgh. The practical result was to equalize prices by eliminating any competitive advantage of location, and thus to secure to Pittsburgh a share of the market it otherwise could not hold. Pittsburgh plus is an example of the single basing point system.

In the cement industry there is no need for a single basing-point system, for the product, by virtue of its bulk and its tendency to deteriorate, is consumed within a comparatively small distance from its point of production. Therefore, the cement industry, through its Institute, worked out a multiple basing point system with the basing points scattered about the country. While this elliptical description does not do justice to the intricacy of the device, the net effect on the consumer was substantially the same as under the Pittsburgh plus or single basing point system—prices quoted at any given point by "competitors" were identical to the fraction of a cent.

Justice Black's opinion makes completely illegal either the multiple or the single basing point system: "[C]oncerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act."37


37 FTC v. Cement Institute, 333 U.S. 683, 720 (1948). The opinion is of some interest apart from the substantive points involved as an example of the working application of the substantial evidence rule in the review of an administrative proceeding. The record before the Commission comprised 49,000 pages of testimony and 50,000 of exhibits. Briefs and appendices in the Supreme Court totaled 4,000 pages. The relative brevity of the Court's forty-
In a second FTC case the Court held that the Robinson-Patman Act and the Clayton Act forbid all cost discounts which are not justified by actual cost differences, even though theoretically all customers could buy enough to earn the discount. The latter argument is refuted by the obvious fact that only the great chains can buy in one year 50,000 cases of salt, the commodity involved in this case.\textsuperscript{38}

The \textit{Morton Salt} case illustrates the manner in which the substance of trade regulation depends upon matters of burden of proof and weight of evidence. The Court held that once the Federal Trade Commission has shown the existence of quantity price differentials, the burden of proof shifts to the company to show that the difference is justified by actual cost; and the Commission need find only that there is a "possibility," as distinguished from a "probability," that competition will be injured by the discrimination. The practical result of the substantive rule coupled with its procedural corollaries should be to carry out the congressional policy of forbidding quantity discounts to large purchasers unless justified by differences in cost.

\textit{b) Remedies and Procedure}

The laws promoting domestic free trade are of course no better than the procedures and remedies which they provide. Although such procedures and remedies received more friendly treatment from the Court in 1947-48 than in the preceding term, the remedies are still generally inadequate.

In the \textit{National City Lines} case\textsuperscript{39} the issue was whether defendants in civil anti-trust litigation, brought either by the government or private persons, were entitled to ask application of the doctrine of forum non conveniens. Section 12 of the Clayton Act provides that suit may be brought under the anti-trust laws not only where the defendant is an inhabitant but also wherever it may be found or transacts business.

With the doctrine of forum non conveniens revitalized by two decisions at the 1946 term,\textsuperscript{40} defendants in anti-trust cases argued that, despite Section 12, cases should be transferred out of the district in which they were brought. Since large anti-trust cases, whether brought by individuals claiming treble damages or by the government, usually involve many de-

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\textsuperscript{38} FTC v. Morton Salt Co., 334 U.S. 37, 41 (1948).
\end{flushright}
fendants, it is always easy to find some tenable reason for contending that, no matter where the suit is brought, it should have been brought somewhere else.

It would be hard to imagine a procedural device which would more effectively gut the application of the anti-trust laws than the intrusion of forum non conveniens into the field. These cases are always prolonged, and many of them would scarcely be worth bringing if the propriety of the forum had also to be litigated. But Justice Rutledge's majority opinion conclusively demonstrated that forum non conveniens had no application to Section 12. Justices Frankfurter and Burton dissented.

The year's most vigorous decision involving anti-trust remedies was that in the International Salt case, unrelated to the Morton Salt discussed above. This was an anti-trust action brought by the United States to enjoin the defendant from conditioning the use of its patented machines on the use of its salt. Previous decisions made inevitable the substantive holding that the practice was illegal.

The significant aspect of the case, however, was the decree itself, which not only forbade the tie-in arrangement but also provided that the machines must be leased on a uniform price or royalty basis. The defendant contended that since it had never engaged in discriminatory pricing, this clause should be eliminated. In rejecting this defense, Justice Jackson stated a sound principle which if applied generally (as it is not) would make the anti-trust laws effective. He said:

In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

The pricing provision was upheld to insure that the violator would relinquish his gains. Justices Frankfurter, Reed, and Burton dissented on this point.

In the Paramount movie case, the government won a lawsuit but may have lost a cause. As noted above, the Paramount decision invalidated a host of restrictive practices in the movie industry. But by now the majors have secured such dominance by the practices rendered illegal that only the most drastic action can undo the damage done. Hence the district

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44 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); see text at note 25 supra.
court ordered that films be sold by competitive bidding. It chose not to require the majors to divest themselves of their exhibiting outlets.

The Supreme Court set aside the portions of the decree requiring competitive bidding, essentially on the grounds that the majors had become too strong for price competition and that the supervisory task for such a requirement was impossible. Justice Douglas' opinion is persuasive on these points.

But once it has been decided not to solve the problem by competitive bidding, it becomes imperative to solve it by divestiture. Otherwise the market will not be effectively pried open to competition. Justice Douglas recorded that an unnamed "majority of the Court" was unwilling to move so swiftly, and the case was therefore remanded for findings which may support action.

But while divestiture is foreshadowed by the Court, it is not ordered. The practical result of the case as it now stands is to stop certain practices but not to undo their results. And stopping them is not enough.

While 1947 was for the most part a year of enforcement of the laws concerning trade, the Supreme Court must do infinitely more if America is to be a land of "small producers, each dependent for his success upon his own skill and character." As the gradual spread of merger and consolidation strangles competition in America, the doom of our competitive economy is clear. It may be that the real resistance to that change in our economic system ought to come from other sources than the Supreme Court, and so five Justices declare. In any case, if free enterprise is to exist in America, the resistance to monopolization requires more dramatic vision than is displayed by those five Justices.

Remedies less than Herculean are so utterly inadequate that they should perhaps not be attempted at all. If the anti-trust laws can give no resistance to the engulfing of additional productive sources by United States Steel; if neither competitive bidding nor divestiture can be immediately imposed on the movie monopoly; if price fixing under patents has any legal protection; if the anti-trust laws do not require immediate and drastic sanctions in every context; then much of modern doctrine is merely a series of fleabites to the elephant of "unification."

Justice Douglas' dissent in the Columbia Steel case manifests the vigorous philosophy which must underlie any effective anti-trust enforcement:

Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional
stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.45

OTHER PROBLEMS OF BUSINESS

There were several cases of general interest to the business community: a reminder that he who does business with the federal government is responsible for knowing what appears in the Federal Register;46 a decision broadening the base for state regulation of natural resources;47 an interpretation of the Food and Drug Act which puts it very much into the corner drugstore;48 and other cases mentioned in the note.49 But three matters

45 68 S. Ct. 1107, 1128–29 (1948). The real trouble with anti-trust law enforcement is that the “best people” are the principal violators of the anti-trust laws, and courts are hesitant to be severe under the circumstances. As sociologist Edwin H. Sutherland, the country’s foremost student of upper-class offenses, observed in his article, “White Collar Crime” Crime? to Amer. Soc. Rev. 132, 137, 138 (1945): “From 1890 to 1929 the Department of Justice initiated 438 actions under this law (the Sherman Act) with decisions favorable to the United States. Of the actions against business firms and associations of business firms, 27% were criminal prosecutions, while of the actions against trade unions 71% were criminal prosecutions. . . . White collar crime is similar to juvenile delinquency in respect to the differential implementation of the law. . . . The stigma of crime has been less completely eliminated from juvenile delinquents than from white collar criminals because the procedures for the former are a less complete departure from conventional criminal procedures, because most juvenile delinquents come from a class with low social status, and because the juveniles have not organized to protect their good names.”


47 The dissenting opinion of Justice Rutledge, joined by Justices Black, Murphy, and Burton in Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 74–99 (1948), rejects the view that conservation is the only legitimate object of regulation of natural resources, and would permit regulation for purposes of general welfare. Justice Douglas concurred with the majority because of a jurisdictional point, but obviously agreed with the dissenters on the substantive question of power. Ibid., at 72.


49 Maggio v. Zeitz, 333 U.S. 56 (1948), reviews the enforceability of bankruptcy turnover orders; Panhandle Eastern Pipe Line Co. v. Public Service Comm’n, 332 U.S. 507 (1947), further defines the boundaries of state and federal regulation of natural gas sales; United States v. Felin & Co., 68 S. Ct. 1238 (1948), deals with the price to be paid by the government when it requisitions a product in wartime which has a regulated sale value lower than its unregulated replacement value. In this case packers were forced to sell at a loss, since the OPA fixed the price of their sales but not of their purchases. Under those circumstances, Felin preferred to sell to old customers, rather than to the government, in order to keep good will. The government requisitioned his stock and contended that it need pay only the OPA price. Had this case been decided on its merits it would have been of enormous significance: A decision requiring payment of replacement value would mean that in any future war the government would be forced to regulate prices on pork, for example, from the litter to the table instead of relying on control at the end of the line to force down prices at earlier stages. For an excellent and thoroughly readable account of the problems of meat price regulation see Hyman and Nathanson, Judicial Review of Price Control: The Battle of the Meat Regulations, 42 Ill. L. Rev. 584 (1947). The opinion of Justice Frankfurter, joined by Justice Burton and the Chief Justice, found faults in the record which permitted escape from this serious question. Justices Reed, Black, and Murphy thought the OPA price proper; Justice Rutledge agreed with both
are of special significance. One is an important decentralization of the right to litigate with the government over commercial matters; another is the determination that the wartime Renegotiation Act is valid; and a third is the enlargement of some common-law notions of negligence.

a) Suits against the Government

Few of the year's opinions will have more pervasive effect than the determination in Williams v. Fanning\(^5\) that Williams, owner of a weight reducing business in Los Angeles, could sue in the federal district court there to enjoin Fanning, the local postmaster, from carrying out a postal fraud order against him. The government immediately moved to dismiss on the ground that the Postmaster General was an indispensable party. Had the defense succeeded, the practical result would have been to require that the matter be litigated in the District of Columbia, where the Postmaster General could be served, rather than in California where he is out of reach of district court process.

The practical consequence of the application of the indispensable party rule to injunction suits against government officials is to drive the litigant to Washington. Of almost 3,000 such actions instituted between 1941 and 1947, one-third were brought in the District of Columbia.\(^5\) This has a twofold effect: It adds the cost of Washington counsel to the expenses of litigation; and the cases are heard by judges in whose selection the Department of Justice has had a much stronger voice than in the selection of federal district judges in the states, where senatorial preferences must be respected.

These suits involve a wide range of governmental activity, particularly in the War, Navy, Postoffice, and Interior Departments. Two lines of cases had emerged\(^5\) with decisions so unintelligible that in 1941 the Court conceded that it was not "an easy matter to reconcile all the decisions of the Frankfurter and Reed positions; and Justices Jackson and Douglas dissented in the belief that the replacement cost was a proper factor in computing value. The Jackson-Douglas position is more appealing than the others in view of the fact that the Fifth Amendment specifies "just compensation" without any particular formula. If it is "just" to require a presumably honest dealer to sell to the government at a price fixed by the government which is less than the current market value for replacement or the actual market value at time of original acquisition, the reason escapes the eye.

\(^5\) 332 U.S. 490 (1947).

\(^5\) Indispensable Parties in Injunction Suits against Federal Administrative Officers, 23 Ind. L. J. 305 n. 1 (1948). This note is an excellent review of the Williams case and of the entire subject of which it is a part.

\(^5\) The earliest Supreme Court cases requiring joinder were Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897), and Gnerich v. Rutter, 265 U.S. 388 (1924). The leading case permitting non-joinder was Colorado v. Toll, 268 U.S. 228 (1925).
the court in this class of cases.” The Ninth Circuit, most distant from Washington, struggled particularly to determine when the local courts might proceed against federal officers.

In the Williams case Justice Douglas identified the two lines of cases and observed cheerfully that “the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us.” Indeed it was not; but it matters no longer. For Justice Douglas has devised a new rule: The suit may be brought locally against a local officer “if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court.” Here the decree sought would require the local postmaster to stop interfering with Williams’ mail and to honor money orders payable to Williams. “The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly . . . or indirectly.”

Hereafter, any intelligent lawyer should be able, in substantially every injunction case, to draw his prayer for relief in such fashion that it works itself out on the local official. The result will be greater freedom for regulated interests to complain and still stay at home. To the extent that policy differences exist between local and District of Columbia federal judges, it gives the plaintiff a choice of forums. It gives the occasional incompetent federal district judge—and there are a few today—far greater power over policy than he had before.

Nonetheless, the decision is wholesome and in accord with the contemporary policy of decentralization. Most federal district judges are at least as competent custodians of national policy as their brethren in the District. The Government is equipped through the United States Attorney’s offices to litigate anywhere, and private parties are not.

b) Renegotiation

The problem of profit control has plagued the country during every major war. The decision in the Bethlehem Steel case, involving World

54 The leading Ninth Circuit case was Neher v. Harwood, 128 F. 2d 846 (C.C.A. 9th, 1942).
56 Ibid.
57 Indispensable Parties in Injunction Suits against Federal Administrative Officers, op. cit. supra note 51, at 313 collects several examples of the trend toward decentralization.
58 On World War I experience, see Hensel and McClung, Profit Limitation Controls Prior to the Present War, 10 Law & Contemp. Prob. 187 (1943). On Civil War experience, see Frank, Recapturing War Profits—A Civil War Experience, 1947 Wis. L. Rev. 212.
War I profits, decided shortly after Pearl Harbor, made it clear that if the government wanted to be able to control war profits in World War II, it should act at once and not wait twenty years for law suits.

Within two months of the Bethlehem Steel case, Congress passed the First Renegotiation Act, approved April 28, 1942. The Act was amended in October 1942 and frequently thereafter. The statute’s basic assumption was that war procurement was so gigantic and so far outside previous experience that prices could only be guessed at in advance. The Act provided, therefore, that whenever on the basis of actual experience it appeared that either a prime or subcontractor was making “excessive profits,” the government might recoup them by specified means.60

While a number of constitutional questions were presented in the renegotiation cases at the 1947 term, the two which were most important dealt with the problems of improper delegation and retroactivity and related only to the original Act of 1942. The first Act instructed the Secretary of each Department, “whenever in his opinion excessive profits have been realized” to renegotiate the contracts involved and to withhold such “excessive profits.” “Excessive profits” were not defined. In the October 1942 amendment, however, Congress added the following unilluminating definition: “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.” Not until 1944 was a real definition written into the Act. Not unnaturally, the contractors argued that the lack of standards made this an unconstitutional delegation of legislative power.

Justice Burton’s opinion holding the Act valid in this respect confirms the general suspicion that the only two Supreme Court decisions which ever invalidated delegations to the executive branch of the government61 were probably wrong. The usual attitude of the Supreme Court is one of great leniency toward the congressional effort to be articulate in its command to the executive branch; and particularly where, as here, it is difficult to be explicit, the statute will be upheld.

The question of retroactivity is considerably more difficult, and the opinion of the Court is disappointing in its failure to discuss the subject. The Act of April 28, 1942 was made applicable to all contracts entered into but not completed before the Act’s passage, and on April 28 there were at least $50,000,000,000 of sub and prime contracts outstanding. If the

60 The various renegotiation acts are collected in an appendix to Justice Burton’s opinion in Lichter v. United States, 68 S. Ct. 1294, 1320 (1948).

conceptions of the Contract Clause are included within Fifth Amendment
due process, there is room for a most reasonable difference of opinion as to
whether the subsequent alteration of the terms of those sub and prime
contracts was valid.

The government brief devoted twenty pages to discussion of this point,
cited fifty cases, and proposed several theories. The opinion of the Court
is forty-nine pages long. Yet the Court disposes of the retroactivity prob-
lem without citing cases, without discussing any theories, and with only a
cursory statement identifying the problem and declaring the Act valid.\textsuperscript{1}

These cases involved subcontracts. Had they been concerned with
prime contracts, it would appear from \textit{Lynch v. United States}\textsuperscript{3} and the
\textit{Gold Clause} cases\textsuperscript{6} that the Constitution might limit the federal govern-
ment’s power to impair its own contracts, so that the Act might be invalid
unless those cases were re-examined. As to subcontracts, the Act can be
upheld on a variety of theories typified by \textit{Norman v. Baltimore & Ohio
R. R.},\textsuperscript{65} \textit{Home Bldg. & Loan v. Blaisdell},\textsuperscript{66} or \textit{Veix v. Sixth Ward Bldg. &
Loan Co.}.\textsuperscript{67} Each represents a different theory, and we are not advised
whether the Court picked one or another.

Although Justice Burton’s opinions may be criticized from time to time,
few are likely to contend that they are not thorough—indeed, thorough
to a fault. When, therefore, in a case of this magnitude, Justice Burton
omits substantially all discussion of the most critical issue, we are left
with the probable deduction that the Court knew that the Act was valid
but was unable to agree on a reason.

c) Torts

As interpreter of various federal statutes regarding injured workmen,
the Supreme Court has become a formulator of general tort law. In this
area the rule of \textit{Erie v. Tompkins} does not apply, and the Court bases its
decisions on general rather than local law. Although these decisions are
binding nowhere except in the application of these federal statutes, they
nonetheless are somewhat persuasive to other courts dealing with quite
independent negligence problems. An example is the case of \textit{Jesionowski v.
Boston & Maine R. R.}\textsuperscript{68} at the 1946 term, which stated some fairly novel

\textsuperscript{62} \textit{Lichter v. United States}, 68 S. Ct. 1294, 1318 (1948).
\textsuperscript{63} 292 U.S. 571 (1934).
\textsuperscript{64} \textit{Perry v. United States}, 294 U.S. 330 (1935).
\textsuperscript{65} 294 U.S. 240 (1935).
\textsuperscript{66} 290 U.S. 398 (1934).
\textsuperscript{67} 310 U.S. 32 (1940).
\textsuperscript{68} 329 U.S. 452 (1947). For an example of the application of the rule in a non-Federal Em-
views on res ipsa loquitur, views which have reappeared in contexts quite aside from the federal statutes.

Hence, as possible forecasts of subsequent developments in the general field of negligence, the tort decisions at the 1947 term are worth listing:

1. Deceased, an employee, fell off a moving train through no fault of the carrier. The Court held that his heirs may recover if the carrier "carelessly and negligently" for "an unnecessarily long period of time" failed to institute a search for the missing man. In short, the carrier had a duty to rescue a person whose predicament was not its fault.69

2. The doctrine of res ipsa loquitur applies in an employee's suit against his employer for the deeds of a fellow-servant, despite the fact that the employer had no control over the particular act of the fellow-servant. Where plaintiff was hit by a falling block, "the falling of the block is alone sufficient for an inference that the man who held the block was negligent."70

3. The plaintiff worked a night shift in a small building in an isolated part of defendant's railroad yards. She was wilfully beaten late one night by a man who forced his way into the building. Held, that the jury should determine whether such dangers were foreseeable, and if they were the employer was liable for the criminal act of the stranger.71

III. CIVIL RIGHTS

There were approximately three dozen civil rights decisions at the 1947 term of the Supreme Court, many of them brave and some of them important. But in this year the battle for human liberty was preponderantly outside the Supreme Court, and the battle was being lost on many fronts. The work of the Court must be seen against the temper of the country, for many large issues were before the Congress, the administration, and the candidates struggling for popular favor at the polls.

Between October 1947 and June 1948 these issues assumed nation-wide prominence in varied forms. The President presented to Congress a program intended to secure certain rights of civilization, as well as of the Constitution, for American Negroes. His program, after causing a revolt which disrupted his own party, was quietly allowed to die by the opposing majority party. Congress passed the Displaced Persons Bill, which embodied an immigration policy characterized by its opponents as a willful discrimination against the two largest religious minorities in America. Apparently little stood in the way of "outlawry" of the Communist party

until another party's courageous candidate for the Presidency staked his chances for the Oregon primary vote, and ultimately for the nomination, on his opposition to such repression.

In Washington hysteria reached previously unequalled heights. The government continued its efforts to purge itself of civil servants who might ever have associated, however innocently, with Communists. The procedures adopted might well have been borrowed from Fascists or from the Communists themselves—nothing like it had ever before been seen in a democracy. Government employees were haled before boards and told to clear themselves of "guilt by association." They were given no comprehensible charges and never learned the identity of the witnesses against them. Confrontation or cross-examination of their accusers was unheard of.7

Happily for the record of the profession, there were some lawyers who spoke out against the tide. John Lord O'Brian decried these secret inquisitions of the government, calling upon the Bar to find answers to questions which for him were clearly rhetorical:

How far, if at all, should we tolerate a policy of having our government officials build up, through secret investigations, these enormous numbers of secret dossiers dealing with the private lives of the people? For sound historical reasons the founding fathers dreaded above everything else secret activities in government operation. Must we take a different view? Is this aberration from the principles guaranteeing the privacy of the individual justified by any substantial proved facts? May not all of his agitation turn out, as after the first World War, to be an unreasonable and unworthy result of emotional instability? These are some of the questions that now lie upon the conscience of the legal profession.73

Against the background of the rest of the government, the Supreme Court from October 1947 to June 1948 looked very good.

The Supreme Court may never have the opportunity to pass upon the secret trials of government employees, but *In re Oliver* made very dear the Court's attitude on the fundamentals of procedural due process. Under the Michigan one-man grand jury system, a trial judge may serve as a


73 O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592 (1948). The law-teaching profession may take great pride in the letter to the House Un-American Committee prepared by Professor Walter Gellhorn of Columbia for the American Civil Liberties Union and signed by a great number of law teachers. The letter asked that in proceedings before that Committee the defendants be given an opportunity to answer charges against them; that they be permitted to call witnesses; that they should be fully informed of the charges against them; that they be allowed counsel; that hostile testimony be subject to "reasonably limited cross-examination"; and that the judgment of the Committee should be based on "material presented at the hearing and should not rest on undisclosed material in the Committee's files."

74 In re Oliver, 333 U.S. 257 (1948).
grand jury to investigate crimes. The judge may also punish for contempt witnesses who do not satisfactorily answer non-incriminating questions. Oliver’s answers in such a secret proceeding did not satisfy the judge-jury, who immediately proceeded to sentence him for contempt. The entire summary proceeding took place with the public excluded and with Oliver having no opportunity to seek the aid of friends or counsel. In the Supreme Court’s reversal of Oliver’s conviction, Justice Black traced the history of secret trials, showing that they had been intolerable to Anglo-American jurisprudence at least since 1641. “A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”

Recognition of Oliver’s constitutional rights is not the only difference between the treatment accorded the Michigan practice here held invalid and the federal government’s practice in its loyalty cases. Oliver’s punishment, set aside by the Supreme Court, had been a sixty-day sentence. A government economist discharged for guilty associations loses the means of support for his wife and children and has a reputation so blasted that he may never again be able to obtain work within the scope of his profession. Another passage of the Oliver case gives ground for contemplative comparison:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial.

The number of civil rights cases at the October 1947 term was so great that, despite the real interest of most of them, any survey of the group would be far from fascinating reading. For the most part, therefore, discussion will be reserved for the novel developments, and those which might clearly have been anticipated will be put aside.

75 Ibid., at 273. The statement obviously needs qualification to reflect the views of the Court majority, since five of the Justices made clear elsewhere that a more accurate statement would be: “These rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel, PROVIDED that an American citizen may have these rights in state courts only if he has enough money to pay for them, and if he is poor he shall go without.” Betts v. Brady, 316 U.S. 455 (1942), reaffirmed in Bute v. Illinois, 333 U.S. 640 (1948).

76 In re Oliver, 333 U.S. 257, 268–70 (1948).
Most decisions concerning criminal procedure were foreshadowed in the previous term’s opinions. For example, five members of the Court reaffirmed the doctrine that counsel, even though requested by the petitioner, is not a general constitutional prerequisite to a fair trial in a state criminal proceeding. This was at least not new error. The Court also, by the same thin margin, held that very few particular cases fell within the exception to the general rule.

One can but hope that eventually the Court will overrule Betts v. Brady, and its successor case at the 1947 term, Bute v. Illinois, and hold that the right to counsel is a requirement of civilized society in any serious criminal case. Such an overruling need not, as is sometimes feared, result in a general delivery of the jails in those few states which have not previously allowed counsel. An extensive analysis of the literature by Justice Gilkison of the Indiana Supreme Court during the past year is a reminder that a decision overruling a constitutional precedent may be made prospective if circumstances warrant.

More surprising than the right to counsel cases was the opinion by Justice Frankfurter, with Justices Black, Douglas, Murphy, and Rutledge dissenting, that the Attorney General might order deportation of aliens for Nazi sympathies without any judicial review whatever. The only bright spot is that this particular deportation program was administered in the Department of Justice by a group unusually sensitive to civil rights, so that in all likelihood few injustices resulted.

Elsewhere the Court saw oppression and hit hard. A number of decisions dealt with racial discriminations; of these, the restrictive covenant cases concern the largest portion of the population.

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79 316 U.S. 455 (1945).
80 Swank v. Tyndall, 78 N.E. 2d 535 (Ind., 1948).
82 Another race-prejudice case of considerable interest to the law school world was Sipuel v. Board of Regents, 332 U.S. 631 (1948), holding per curiam that when a Negro applied for legal education at the University of Oklahoma Law School, there then being no other state law school, “[t]he State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.” Thereupon Oklahoma created overnight a new law school for Negroes, and the same case was brought back as Fisher v. Hurst, 333 U.S. 147 (1948), with a request for an order that the state comply more adequately with the Supreme Court’s mandate. The court necessarily held that on the record before it the adequacy of the new school could not be considered. The case thereupon was remanded to provide a record on the adequacy of the new school. The resulting trial included courageous testimony by Dean Page Keeton of the Oklahoma University Law School condemning the “quickie” school as a mere subterfuge, and by Henry Hubbard Foster,
The decision forbidding enforcement of restrictive covenants aimed at racial minorities was the most important case of the year in terms of legal theory.\textsuperscript{84} Paradoxically, its practical consequence in the immediately foreseeable future will be small.

A restrictive covenant is an agreement, made either among the landowners of an area or between a vendor and purchaser of land, usually prescribing that no person "not of the Caucasian race" may purchase or occupy the restricted property. Hitherto, enforcement has been in equity to restrain a sale in violation of a covenant, to require that land which has been sold in violation of a covenant be forfeited, or to restrain occupancy. The proceeding is usually brought by a neighbor who objects to the new occupant.

The history of the device is well documented elsewhere and will not be repeated here.\textsuperscript{85} In \textit{Buchanan v. Warley}\textsuperscript{86} the Supreme Court held invalid an ordinance of the city of Louisville which provided in substance that Negroes and white persons should not live in the same block. The basis of invalidation was partly due process of law and partly a post-Civil War statute providing that all citizens of the United States should have the same rights as white citizens to purchase, hold, and convey real property.\textsuperscript{87}

This decision resulted in the widespread use of restrictive covenants to achieve the result which, under the \textit{Buchanan} rule, could not be achieved by a municipal ordinance. The theory of those defending the covenants was that under the doctrine of the \textit{Civil Rights} cases, the Fourteenth Amendment restricts only state action and does not limit private or individual discriminations. This point of view received implicit acceptance in \textit{Corrigan v. Buckley}.\textsuperscript{88}

In the current restrictive covenant cases Chief Justice Vinson discov-

\textsuperscript{84} Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). The Hurd case, involving problems peculiar to the District of Columbia, will not be discussed here, and many secondary theoretical problems in both cases will also be excluded because of space limitations.

\textsuperscript{85} The leading work is McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

\textsuperscript{86} 245 U.S. 60 (1917).

\textsuperscript{87} 14 Stat. 27 (1866), 8 U.S.C.A. § 42 (1940).

\textsuperscript{88} 271 U.S. 323 (1926).
erred that Corrigan v. Buckley had not decided anything except that private agreements to discriminate were not as such invalid under the Fourteenth Amendment. "Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes."98

Thus freed of precedent, the Court held that the action of state courts and of judicial officers in their official capacities was state action and therefore that the judicial enforcement of restrictive covenants violated the Fourteenth Amendment even though the covenants themselves did not.

While the distinction of Corrigan v. Buckley is more ingenious than real,99 for practical purposes the decision is gone and will not be mourned here. A judicial decree is equivalent to the Louisville ordinance, and it would have been hair-splitting indeed to say that a state may do through its courts what it may not do through its legislature.

And yet some hair-splitting is sure to follow and eventually will be necessary. The logical application of the principle announced in these cases will subject to constitutional limitations a number of activities never previously regarded as so controlled.

Assume that the doctrine of the restrictive covenant cases is that a court may not by its decree achieve a discriminatory result which a state could not order by direct legislative action. It would then follow that whatever would be violation of constitutional rights if done by statute is also a violation of constitutional rights if done by decree.

Take, for example, Marsh v. Alabama.90 The Marsh case held that a state statute was invalid in its attempted application to prohibit an individual from distributing religious literature on the streets of a company-owned town. The following questions arise:

1. If the company police had, instead of causing Marsh to be prose-

89 Shelley v. Kraemer, 334 U.S. 1, 8 (1948).

90 The same argument successful in these cases was pressed upon the Court by counsel in the brief in the Corrigan case, and the Court disposed of the argument with the phrase "it likewise is lacking in substance." Corrigan v. Buckley, 271 U.S. 323, 331 (1926). While the meaning of that phrase is open to some quibbling (see United States brief in the 1948 restrictive covenant cases, at 89–92), the fact remains that a series of District of Columbia decisions thereafter had construed the phrase as an adverse decision on the state action theory, and certiorari had been denied in all of them. The most recent of that series is Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), cert. den. 325 U.S. 868, 896 (1945). Great credit is due the foresight, scholarship, and courage of Justice Edgerton of the District of Columbia Court of Appeals who led the way to the new rule in his dissent in the Mays case.

cuted, sought an injunction to restrain her "trespass" upon their property, would a judgment of the state Supreme Court that the common law of Alabama permitted such an injunction have been subject to federal judicial review?

2. Suppose instead of the foregoing suit brought by the company police, Marsh had sought the injunction to restrain the company police from interfering with her access to the town and that this relief had been denied. Would denial of the relief on common law grounds have presented a federally reviewable question?

3. Suppose that instead of resorting to the courts, the company police had utilized self-help and had evicted Marsh bodily from the premises. If Marsh then sued in tort for damages in an Alabama state court, would a judgment denying her damages on the ground that she was a trespasser have been subject to federal judicial review?

If we take the interpretation of the restrictive covenant cases assumed above, then all three questions receive affirmative answers and it can rationally follow that the entire realm of common law interpretation by a state will be subject to federal judicial review. It is doubtful that the Court meant to go so far, and some theory of limitation will emerge. Yet this will not be easy if logic is to be maintained. That a limitation is intended is indicated by the firm emphasis with which the Court went out of its way to reaffirm the Civil Rights cases and to declare that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." This is the most seriously disappointing aspect of the opinions, for it was wholly unnecessary to reaffirm the Civil Rights cases; and the issues presented in them deserve reconsideration upon argument which is directed squarely to the issue. The dissenting opinion of Justice Harlan in the Civil Rights cases has never been satisfactorily answered, and the current decision buries it even deeper in oblivion.

As a practical matter the restrictive covenant cases are more largely a contribution to long-range education than to an immediate solution of the Negro housing problem. True, the first reaction of litigant McGhee was, "We have a mighty fine little home here and we didn't want to lose it." But such cases are rare. An examination of the situation in Indianapolis illustrates that in many cities the restrictive covenants are so firmly supported by extra-legal sanctions that the covenants themselves are of no great significance.

92 109 U.S. 3 (1883).
94 The text discussion is based on facts learned in informal conversations with experts on the Indianapolis situation. A flood of schemes have been proposed for avoiding the effect of the
As the following diagram shows, the Negro population of Indianapolis is located principally in two sectors, one (A, B, and C) north and west of the Circle in the center of the city and the other (D) to the northeast of the same area. Sector A is now regarded as a blighted area in which some 450 families live almost bordering the grounds of the state capitol without modern plumbing or sewage facilities. The sector marked as area B contains the bulk of the Indianapolis Negro community and includes a considerable area of fairly satisfactory, though greatly overcrowded, housing.

Area C is one into which Negroes have been gradually moving in recent years.

The real pressures which are keeping the Negro population in Indianapolis cooped up within these sectors are not provided by restrictive covenants but by three other factors. The “code of ethics” of the real estate dealers forbids them to sell to a Negro property outside the marked areas. Should an individual white householder choose to make a direct sale to an individual Negro purchaser without the intervention of a real estate agent, the Negro would be unable to obtain credit for a mortgage. Should
the sale be from a white seller to a Negro purchaser, and should the Negro purchaser have cash on hand, the community pressure against the white seller as soon as the proposed sale became known would be so strong that the sale would never be consummated. Local organizations implement these neighborhood controls.

The consequence is that the restrictive covenant becomes the fourth line of defense for entrenched prejudice. In Indianapolis there has not been a single instance in many years in which the Negro purchaser got through to the fourth line of defense. In other words, in Indianapolis there are no suits to enforce restrictive covenants because there are no sales outside the permitted sections. Because of the extra-legal sanctions a Negro also cannot build outside the Negro sectors, and there is as a result very little opportunity for Negro building even if the money is available.

But there are occasional adjustments in this situation. For example, in area C on the diagram, there have been sales by whites to Negroes in cases where the white population recognized that in the long run the land would probably be occupied by Negroes anyway and that there was a present opportunity to obtain the higher price which Negroes would pay out of necessity. The real estate dealers can always find a convenient way around their own code by winking at sales through intermediaries. Yet the line between areas B and C remains firm, at least for the moment, because the white occupants of the intervening blocks do not have sufficient means to go elsewhere and therefore will resist tenaciously any crossing of 30th Street by the Negroes south of it.

In sum, prior to the restrictive covenant cases, Negroes in Indianapolis could not move out of the areas identified. That situation is in no wise changed by the restrictive covenant cases. From the standpoint of the Negro population, it is not very important whether the current decisions can be frustrated by some new form of legal arrangement, since such arrangements are unnecessary. Yet the decision is of tremendous importance. It is not only heartening but it may be a contribution to the educational process by which the Emancipation Proclamation may in some distant era become a reality.

Discriminations against Japanese Americans, and discriminations against Japanese within our borders, have long been a blot on American constitutional traditions. This year the Supreme Court struck down two more of these racial barriers.

The Oyama decision\(^9\) invalidated a California statute which forbade

\(^9\) 332 U.S. 633 (1948).
"aliens ineligible for citizenship" (a euphemism for Japanese) from acquiring agricultural lands in that state. Should a Japanese violate this statute by buying a farm, the property might escheat to the state. In this case, Oyama Senior, a Japanese, provided the payment for two land sales nominally made to his minor son, an American citizen. Title was in Oyama Junior, but Oyama Senior managed the properties as his guardian.

In anticipation of just such cases, the California statute provided that the property should escheat if transfers were made with "intent to prevent, evade, or avoid" escheat, and then added a presumption clause that an intent to "prevent, evade, or avoid" would be presumed when an ineligible alien paid the consideration for a transfer. The California statute had been held constitutional in 1922 in a decision focusing primarily on the rights of the Japanese alien under the Constitution.

Counsel brought up the Oyama case in a manner which permitted but did not require reconsideration of the old decision. In Oyama the rights not only of the alien father but of the citizen son were presented, and an ingenious argument was offered that the presumption denied equal protection of the laws to the son. If other Americans received gifts from their fathers, there was no presumption of invalidity, and Justice Vinson for a majority of six held that a different set of presumptions could not be applied to a minority group of citizens simply because their parents had been Japanese.

The validity of presumptions as a rule of evidence rests on their reasonableness, and dissenting Justices Reed, Burton, and Jackson had strong ground for contending that, once it is assumed that the original discrimination against Japanese is valid, it is eminently reasonable to apply this presumption to transactions in which they are involved. Chief Justice Vinson and Justice Frankfurter in the majority did not challenge that underlying assumption, preferring to rely on the presumption point rather than overruling the earlier case on its merits. Justices Black, Douglas, Murphy, and Rutledge accepted the presumption argument of the Chief Justice but also believed that the earlier case should have been overruled on its merits.

If the majority view leaves room for quibbling with its logic, it does not disappoint as to its result. Although technically, in view of the narrow

Speculation has arisen as to why, if these two Justices didn't care to face the issue squarely, they should have chosen this particular technicality instead of an easier one. For example, Oyama's counsel also argued that the field had been occupied by the federal government since the earlier cases. However, persons present in the courtroom at the time of argument report that Mr. Dean Acheson, counsel for Oyama, stressed the presumption theory with great persuasiveness and ability in his oral argument. Counsel's emphasis may account for this element of the case being foremost in the minds of these Justices.
decision, California might have proceeded in whatever escheat actions remained in which citizen sons were not involved, the California Attorney General chose to relinquish the field and immediately canceled all statutory escheat actions.97

The wisdom of his judgment was confirmed later in the term by the Takahashi decision,98 in which Justice Black wrote the opinion invalidating a California statute forbidding fishing by aliens ineligible for citizenship. While the Court noted a distinction between the 1922 decision on the land law—still not technically overruled but obviously drained of strength—and the instant case, the distinction was only the fairly obvious one that one statute dealt with land and the other with fish. The fishing statute was flatly invalidated on its merits as a denial of equal protection, Justices Reed and Jackson dissenting.

Three other important developments in the field of civil rights have little in common but their importance. They were the growth of the law in respect to searches and seizures, labor unions’ expenditures of funds for political purposes, and religion in the schools.

At the 1946 term, the Court in Harris v. United States99 had appeared to sanction the complete ransacking of a man’s house by police without a warrant on the occasion of an arrest. The decision there was five to four, with the Chief Justice writing the majority opinion. At the 1947 term, in Trupiano v. United States,100 the Court very narrowly limited the Harris doctrine, again by a five-to-four margin, and the Chief Justice felt so strongly about the stunting of his brain child that he wrote his only dissenting opinion since coming to the Court.

In Trupiano government agents without either arrest or search warrants arrested the operators of an illegal still and seized “a still, alcohol, mash and other equipment.” Since the raid had long been planned and a government operative had been posing as a member of the criminal gang, there was no conceivable reason for the lack of warrants.

Because the arrest was made when the still was in operation, and the criminal activities of the defendants were clearly visible from outside the distillery, the arrest itself was approved despite the lack of an arrest warrant. Law enforcement officers may arrest for a felony committed in their presence without a warrant. But the seizure was disapproved despite the

97 "Despite the partial victory, Japanese-Americans in California were jubilant. Over fifty other legal attempts by the State to escheat land similarly held by Nisei were abandoned. Attorney General Fred N. Howser of California announced that the State would drop its efforts." 17 Civil Liberties Quarterly 1 (1948).

98 Takahashi v. Fish and Game Comm’n, 68 S. Ct. 1138 (1948).


100 68 S. Ct. 1229 (1948).
fact that the objects seized were in open sight around the first person arrested. The traditional rule that objects may be seized which are related to the crime and in plain sight at the time of arrest was ignored on the ground that it was mere accident that the first criminal arrested was surrounded by his paraphernalia—"Antoniole might well have been outside at that particular time," and the immunity from search without a warrant cannot depend "upon such a fortuitous factor as the precise location of Antoniole at the time of the raid." ¹⁰¹

The extent to which the *Harris* case outlives *Trupiano* is reserved by the Court. To the extent that the *Harris* rule still exists, widespread searches without warrants may follow from arrests, and therefore the *Harris* minority is alert to constrict the legality of the arrest itself when a search is also involved. In this Justice Douglas of the *Harris* majority joined the dissenters, and the result was two decisions narrowly defining the power to arrest without a warrant. ¹⁰² This is unfortunate to the extent that the law of arrest is manipulated to avoid the consequences of the *Harris* decision as to search. The only really happy solution to that problem would be the overruling of the *Harris* case.

Another highly important civil rights case was the decision holding that labor unions may continue to use union newspapers to exhort their members to desired political activity. Use of union funds for this purpose was held by Justice Reed for the Court not to be an "expenditure" within the meaning of the Taft-Hartley prohibition on expenditures of union funds for political purposes. ¹⁰³ Finding this meaning in the Taft-Hartley Act required some tall construction, and a reading of both the legislative history and the indictment will probably not persuade most readers of the opinion. But no matter; the larger significance of the case, aside from the eminently practical application of the interpretation in the 1948 elections, is the discussion of the constitutional limitation on the power of Congress to put restrictions of this sort on publications.

Five Justices reached their result as a matter of statutory interpretation qualified to the extent explained below. Justice Rutledge, concurring

¹⁰¹ Ibid., at 1233–34.

¹⁰² United States v. Di Re, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10 (1948). A case involving an important point related to search and seizure was Shapiro v. United States, 68 S. Ct. 1375 (1948), holding that production of records required to be kept by law does not give immunity from prosecution to their producer either under the Constitution or under the standard immunity provision of government statutes. The issue is very difficult as well as important and is thoroughly considered in the majority opinion by the Chief Justice and the dissent by Justice Frankfurter. Justices Murphy, Jackson, and Rutledge also dissented.

¹⁰³ United States v. CIO, 68 S. Ct. 1349 (1948).
in the result with Justices Black, Douglas, and Murphy, interpreted the statute to forbid the activity but thought the statute itself void.

The problem is a serious one. In the last fifteen years, the expansion of labor unions has been accompanied by a vast enlargement of both the scope and the weight of their political activities. These activities have had the twofold effect of enlightening the voters and increasing the size of the vote. Those whose careers in politics have suffered from or been endangered by this political program have been alert to find reasons and means for its repression. The principal reasons put forward have been the desire to prevent unions from exerting excessive weight in national affairs and to prevent the funds of dissenting union members from being used for political activities of which they might disapprove. The device chosen was the prohibition of “expenditures” for political purposes.

The concurring Justices flatly disbelieved that the real object of the legislation was the protection of union members from the exploitation of their funds by their officers. Justice Rutledge put it bluntly:

[The] object was rather to force unions as such entirely out of political life and activity, including for presently pertinent purposes the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective.104

The tool of invalidation lay in the excessive scope of the regulation in relation to its objects. If excessive influence had really been feared, the statute might have controlled union electioneering without prohibiting it. If minority protection was the real object, “it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portion of them to be applied to the forbidden uses without jeopardy to their rights as members.”105 In any case, the statute was too indefinite.

All this is four-man theory, and it takes five to make a majority. But the majority too declared that if the section prohibited publication of periodicals advising union members or corporate stockholders of matters concerning their interests, “the gravest doubt would arise in our minds as to its constitutionality.”106

The underlying social problem is of the gravest significance as we swing from the New Deal to the renovated Old. There is obviously a strong appeal to the new in-group in both major parties to retain or broaden their power by making political eunuchs out of those who might oppose them. The Hatch Act and the Taft-Hartley Act are very much in point. Congress

104 Ibid., at 1371.  105 Ibid., at 1370.  106 Ibid., at 1357.
might well hold in mind the adjuration of the concurring Justices respecting free and full discussion and free assembly:

The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function.107

One last civil rights case: Last year this writer said of the 1946 term decision in the Everson case,108 "It would seem to follow from both the majority and minority opinions that the use of public school buildings for any type of religious education would be precluded as direct aid."109 In the McCollum case110 this year, Justice Black's majority decision applied the principles of the Everson case to invalidate the use of Champaign, Illinois school buildings in conjunction with the Champaign system of compulsory school attendance as a means of affording religious education. School teachers distributed cards on which parents could designate the religious training, if any, they desired their children to receive. Classes were held in the school buildings once a week by religious instructors who were not paid by the state, and attendance in accordance with the parents' wishes was compulsory. Those children whose parents preferred that they should not have religious education participated in required secular education at the same time.

The opinion of the Court consisted substantially of a quotation from the Everson case and a refusal to overrule it. The Everson case had held, inter alia, that American traditions required separation of church and state, and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."111 The Court in substance held in the McCollum case that when the state uses its compulsory educational processes to round up the communicants, enforces their presence, and furnishes the building for their activities, it is not keeping separate the church and the state.

A well-reasoned and well-documented dissent by Justice Reed illustrates that so long as religion and government exist side by side, interactions are inevitable, and he clearly develops his proposition that there cannot be utter, complete, and total separation of church and state. And yet, despite difficult marginal cases, the decisions over many years have established two lines of analysis which dispose of the hard cases as well as

logic and analysis ever can. First, general social legislation, ranging from routine police and fire protection to welfare measures such as free textbooks or free transportation, may be extended to all citizens and is not to be denied to some because they or their children are of particular faiths or receive religious education. General facilities of the state, such as streets or parks, may be made available for the dissemination of all religious doctrines to those who care to receive them. But general welfare legislation is in its own class, and there cannot be direct or substantial subsidization of any or all denominations with tax funds. There is apparently a historical exception for tax exemptions.

Second, the coercive power of the state may not be used to compel or encourage participation in religious activities. The Champaign system was velvet-glove coercion, but it was coercion all the same. Presumably the only reason the denominations requested that the system be instituted was because they could not so handily procure participation in their programs without state aid. The Champaign case holds simply that the truant officer cannot be substituted for the spirit of the Lord as an inducement to attend religious classes.

As Justice Reed points out, Congress and the military forces have chaplains, and this is a form of state aid to religion. But no one is compelled to be a Congressman, and in the military forces there is no provision for a truant officer to enforce attendance at religious services.

It remains to count noses. However, in arriving at any sound judgment about the Court or its individual members, it must be remembered that the significance of counting positions in disputed civil rights cases is obscured by a number of factors. In the first place, the simple classification of "in support" or "in denial" of a claimed civil right overlooks the fact that the Justices reaching one result in a given case may themselves be far apart. In the second place, procedure may at times outweigh substance as the controlling factor in the minds of particular justices, and cases decided on procedural points are included in the tabulation.

Still more important as a distortion factor is the circumstance that the

113 And, indeed, if available to any, these facilities must be available equally to all without discrimination. The most recent case in this long line is Saia v. New York, 68 S. Ct. 1148 (1948), holding that police officers may not have unlimited discretion in granting licenses for the use of loud speaking equipment. While the Saia result follows inevitably from the cases cited, it is devoutly to be hoped by those who have suffered from the dreadful racket of such contrivances that municipalities may do equal justice if they care to by outlawing sound trucks altogether.

114 As the discussion of the Oyama case, text at note 95 supra, and United States v. CIO, text at note 103 supra, show.
Court as a whole is probably more generous to civil rights than a perfect cross-section of American opinion would be. Justices Reed, Jackson and Burton, and Chief Justice Vinson, the civil liberties laggards on the Court, are far indeed from being Rankins or Gerald Smiths.\textsuperscript{11} The statistics permit a judgment relative only to the other members of the Court.\textsuperscript{5}

But with all these limitations the fact remains that a heavy preponderance of a given Justice's positions in one column, when the number of cases is sizable, gives a clue as to his basic attitudes about civil rights. There were twenty-seven non-unanimous civil rights cases at the recent term,\textsuperscript{6} and the positions of the Justices, compared with their 1946 positions, appear in Table 1.

### TABLE 1

**DISTRIBUTION OF VOTES IN NON-UNANIMOUS CIVIL RIGHTS CASES**

<table>
<thead>
<tr>
<th>Justice</th>
<th>In Support of the Claimed Right</th>
<th>In Denial of the Claimed Right</th>
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<td>1946</td>
<td>1947</td>
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<tr>
<td>Vinson</td>
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<tr>
<td>Black</td>
<td>8</td>
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<td>Reed</td>
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<td>Frankfurter</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>Douglas</td>
<td>8</td>
<td>23</td>
</tr>
<tr>
<td>Murphy</td>
<td>10</td>
<td>25</td>
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<tr>
<td>Jackson</td>
<td>7</td>
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<tr>
<td>Rutledge</td>
<td>11</td>
<td>26</td>
</tr>
<tr>
<td>Burton</td>
<td>3</td>
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</tr>
</tbody>
</table>

These figures document the obvious fact that in disputed cases involving civil rights there are identifiable blocs. They also show that those blocs are sufficiently fluid to make it worth while to argue a given case.\textsuperscript{116}

\textsuperscript{11} To pick but one example, the Chief Justice wrote the restrictive covenant opinions in which Justice Burton joined.

IV. LAWYERS’ LAW

Now, Never, or Later?

At the October 1947 term the Supreme Court avoided deciding a sufficiently large number of cases which seemed ripe for decision to justify a review of the devices for avoidance.

Cases come to the Supreme Court by two principal means, certiorari and appeal. Certiorari is totally discretionary, and appeal is theoretically of right. The certiorari jurisdiction is being used extremely sparingly, and a recent device may cut down the statutory right of appeal.

Certiorari, says the Court rule, is granted either because the question presented is important or because there is a conflict of decisions; and a denial of certiorari is said not to indicate approval of the decision below. The rule is not wholly candid. Attorneys regularly include in their briefs in opposition to certiorari a section arguing that the decision below was correct, and that therefore the Court may as well leave it alone; and no one can look at the cases granted and denied review without concluding that the merits had something to do with the choice. This doubtless accounts for the fact that a preponderant number of certiorari cases are reversed.

In one case this year, the Court observed with unusual frankness, “The case is here on a petition for certiorari which we granted because the construction given to the federal Act seemed to us not only a dubious one but also at variance with . . .” another state decision.

The Supreme Court in recent years has been hearing fewer cases than formerly. The percentage of writs of certiorari denied remains very high. In an address given last year, Justice Burton observed, “Without further explanation, such a high percentage might suggest a possible abuse of its own discretion, by the Court, in unduly restricting access to it.” This, the Justice claimed, is avoided by the fact that only four Justices, instead of five, are sufficient to grant certiorari.

Perhaps. But in 1947 the Court heard the smallest number of cases in years and frequently denied certiorari in cases which, at least superficially, appeared to be worthy of the Court’s attention.

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117 Robertson and Kirkham, The Jurisdiction of the Supreme Court of the United States, is the most elaborate work in this subject.
119 This year, for example, the ten Federal Circuit Courts of Appeals and the Court of Appeals for the District of Columbia were affirmed twenty-three times and reversed thirty-nine times. Review of the Supreme Court’s Work, 16 U.S.L. Week 3383, 3384 (1948).
120 LeMaistre v. Leffers, 333 U.S. 1, 3 (1948) (italics added).
121 Burton, Judging Is Also Administration, 21 Temple L. Q. 77, 84 (1947).
122 There were 119 opinions this year as compared with 142 at the 1946 term, 136 at the 1945 term, and 162 at the 1944 term.
123 This view is expressed timidly, because every year there are sure to be marginal cases in which reasonable men can differ as to whether certiorari should be granted. Of the list that
The situation is now such that sincere and able lower court judges, anxious to be affirmed if they are right and reversed if they are wrong, go to extremes in writing their own opinions so as to be reviewed, and this writer has more than once heard Court of Appeals judges say wistfully, "I wrote it so as to put it squarely up to them." This practice received mocking rejoinder from Justice Jackson in one case this year when he observed of certain phraseology in an opinion below that it was perhaps a "decoy intended to attract our attention to the problem." Getting a case reviewed by the Supreme Court should not involve the hazards of a duck hunt, and decoys ought not to be necessary.

But Congress gave the Supreme Court discretionary jurisdiction as to certiorari. It did not do so as to appealed cases, and judicial power is abused when those are not decided. At the October 1946 term the Court began the practice of dismissing appeals when it was dissatisfied with the shape of the record or with the extent of the consideration of the issues below. That practice as applied to the Denver Milk case at the current term deserves a glance.

The suit was brought in a Colorado court to enjoin a milk drivers' union from engaging in peaceful picketing. A series of such milk cases arose together in Colorado, and in one or another of them there was complaint, temporary restraining order, and a full trial at which evidence was introduced by both sides. On appeal, the Colorado Supreme Court, in a sixteen-page majority opinion and a dissent, analyzed the facts and applied the Colorado Labor Peace Act to the situation. The adequacy of the facts was specifically noted by that Court.

The United States Supreme Court noted probable jurisdiction of the appeal, there may be good reason why some, even under the declared rule, should not have been granted, but they may at least be listed as dubious denials: No. 146, Schulte v. Park & Tilford (insider stock purchases); No. 162, Wilcox v. DeWitt (exclusion of "subversive" from West Coast); No. 277, Bernstein v. Van Heyghen Frères (effect of Nazi property confiscation); No. 342-343, United States v. Swiss Confederation (right of foreign government to sue United States for property taken by eminent domain); No. 484, Sellers v. Johnson (exclusion of religious sect from town by sheriff on ground of fear of riot); No. 534, Kennedy v. Tennessee, and No. 553 Misc., Hall v. United States (exclusion of Negroes from jury by use of prosecutor's challenges for that purpose); No. 535, Josephson v. United States, and No. 766, Barsky v. United States (contempt of Congressional Committees); No. 592, Kentucky v. Illinois Central R.R. (constitutionality of statute requiring that employees be given time off with pay to vote); No. 663, United States v. Cold Metal Proc. Co. (alleged fraud in obtaining patent).

peal on November 10, 1947. The case was argued on January 9, 1948. On May 3 the following order was entered: "Because of the inadequacy of the record, we decline to decide the Constitutional issues involved. The appeal is dismissed, without prejudice to the determination in further proceedings of any questions arising under the federal Constitution." Justices Black and Murphy dissented.

And thus the injunction stands because the Supreme Court "declined to decide." When it takes six months to discover that a record is inadequate, one may suspect that the complexity of the issues as well as the obscurity of the facts had something to do with the matter. But, as the Court showed in cases arising on certiorari, when further illumination is needed the case can be sent back to obtain it. Dismissing an appeal ends a case completely, without deciding it, and Congress has given the Court no such authority over appeals. In such an instance the practice of remanding for further proceedings below seems preferable to dismissal.

In addition to the avoidance devices of denying certiorari, dismissing appeals, and remanding cases, there are the devices of close definition of the cases which are ready for hearing either by the Supreme Court or by lower federal courts. In the Republic Natural Gas case a majority of five held that a decision of the Oklahoma Supreme Court was not a "final judgment" and hence was not subject to Supreme Court review. In that case Republic had been ordered by the Oklahoma Corporation Commission to buy or market the gas of another concern in the same field or to close down, and the Oklahoma Supreme Court had approved. Presumably Republic would either buy or market the gas. Justice Frankfurter for the Court held that, although "it is of course not our province to discourage appeals," the fact that the price Republic must pay had not been determined kept the decision of the Oklahoma Supreme Court from being final and reviewable.

Justice Rutledge, dissenting with Justices Black, Murphy, and Burton, declared that so to decide "is to make a fetish of technical finality." It made the final judgment provision of the Code, he said, "an instrument of sheer delay..." The dissenters thereupon proceeded to consider the issues of the case on the merits and concluded that the decision below should be affirmed. Justice Douglas split the difference by becoming the

131 Ibid., at 87.
fifth member of the majority on the final judgment point, while making
clear in a concurring opinion that he thought the four dissenters were cor-
rect on the merits.

The most extreme avoidance case was Eccles v. Peoples Bank. This
was an action for a declaratory judgment brought by the bank against the
chairman of the Federal Reserve Board. It sought a declaration of invalid-
ity with regard to a provision in the charter of the bank permitting the
Board to eliminate the bank from the Federal Reserve system if Trans-
america Corporation took a stock interest in the bank. Justice Frank-
furter held for the Court that as a matter of equitable discretion the fed-
eral courts should not consider the question, since the Board had not yet
indicated affirmatively that it intended to use the power it had to oust the
bank.

Justices Reed and Burton were persuasive in dissent. Since the Board
refused to indicate whether or not it would enforce the restriction, it held
a constant threat over the bank, preventing the latter from carrying on
activities which might, if the merits were reached, be held perfectly legal.
The bank, which needs its Federal Reserve standing, must accede to what
may be an illegal restraint on the marketability of its stock, and the Board
can thus enforce the requirement without its ever being tested in court.

This is not to say that the Court invariably struggled to avoid decision.
A leading example to the contrary is the Connecticut Mutual case, which
upheld a New York statute requiring payment to the state of certain un-
collected benefits on life insurance policies. The statute covered foreign in-
surance companies and reached all policies on persons in New York
at the time the policy was written. Nine foreign insurance companies
brought an action in the New York state courts for a declaratory judg-
ment that the Act was invalid, but the New York courts upheld the Act
generally on all policies delivered in New York.

The statute raised the question of the relative merits of the claims of
different states to the revenue available from uncollected insurance pol-
icies. For example, the state of incorporation of the company might have
as much of an interest as the state in which the policy was issued. The situ-
ation would be further complicated if the beneficiary's last known resi-
dence was in a different state from that of the deceased, or if the deceased
had moved after the issuance of the policy. Hence the Court divided over
whether it could consider this variety of situations in a declaratory judg-
ment proceeding between these parties.

But Justice Reed, writing for the majority, did not allow the complications to divert him from the routine case. Doubtless there will be a normal case, a case in which the deceased took out the policy in New York and died in New York, and where the beneficiary was a resident of New York at the maturity of the policy. Justice Reed declared that in such a case the interest of New York outweighed the interest of the state of incorporation and added, "We do not pass upon the validity in instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy." Thus, the Court broke the case apart and decided as much as it reasonably could. While the Reed opinion may be hard to justify in the logic of jurisdiction, it has strong appeal to common sense.

LEGISLATION

Although Justice Jackson made an interesting proposal to the American Law Institute that courts ought to stop trying to discover what Congress "meant" by legislation, aside from the terms of the statute, the Court as a whole proceeded along its chosen path of interpreting statutes as best it could in terms of all available indications of congressional intention. Generally speaking, the device of interpretation by aid of canons of construction is incompatible with that objective, since the canons are artificial straitjackets quite unconnected with congressional will except by accident, and construction by canon received little support this year. The rule that statutes should be interpreted to avoid consideration of constitutional issues was specifically repudiated for a moment, though later reinstated, and "strict construction of criminal statutes" was overridden.133

133 Ibid., at 549. On the general subject of "now, never, or later," few of the Justices can be identified with particular attitudes. Justice Frankfurter most consistently and articulately expresses the view that the Court should avoid escapable decisions, particularly in the constitutional area. See, for example, his special opinions in the Gypsum and CIO cases.


135 The canon that statutes should be so interpreted as to avoid raising constitutional questions is quite different from the rule that statutes should not be so interpreted as to make them unconstitutional. This rule, that statutes should not be construed so as to require the Courts to look at the Constitution, results in gross distortions of statutes, as in United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); and see cases collected in Canon of Restrictive Interpretation Repudiated, 23 Ind. L. J. 323 (1948). United States v. Sullivan, 332 U.S. 689 (1948), was a reversal of a Circuit Court of Appeals decision. The Supreme Court said, "A restrictive interpretation should not be given a statute merely because... giving effect to the express language employed by Congress might require a court to face a constitutional question." The passage appeared to be a repudiation of the canon. However, without distinguishing this passage, a majority of five in the CIO case used the canon as the principal path to their result.

Of course the recognized difficulty in interpreting statutes with the aid of congressional intent is that in countless cases there is no ascertainable intent. The Court dealt with that problem in various ways.

\( a) \) **How Much Freedom for Judges?**

Where words are not clear and legislative history reveals only that Congress never thought about the subject at hand, the question becomes one of how freely the judges may look over the alternative constructions and choose the one they happen to like best. Perhaps the most candid statement applying this judicial free will was Justice Frankfurter's. In a special concurring opinion, the Justice said of a jurisdictional statute that it was desirable as a matter of sound policy to interpret it in a certain fashion and, "Since it can be so read, I do so read it..."\(^1\)

The *Uebersee* and *Evans* cases may be compared as illustrating the outer limits to which the Court will go in giving sense to badly drafted legislation.

In *Uebersee* the Court dealt with what it described, and charitably at that, as "hasty legislation which Congress did not stop to perfect as an integrated whole."\(^2\) *Uebersee* was a Swiss corporation holding shares in various American corporations, and those interests were vested by the Alien Property Custodian under the Trading with the Enemy Act of 1917, amended in 1941. Under the 1917 Act, and prior to the 1941 amendments, *Uebersee* could have recovered the property vested since, as a corporation of a friendly alien, it was neither "enemy nor ally of enemy." Recovery would have been under Section 9(a) of the Act.

In view of the German practice of infiltrating American industry by means of German-dominated neutral holding companies, Section 5(b) of the Act was amended in 1941 broadly enough to permit the vesting of Swiss corporate interests. But Congress neglected to amend Section 9(a), so that, were the statute interpreted in its terms, the property would be vested under 5(b) and immediately be returned under 9(a). The Court, confronted with "difficulties whichever way we turn," cut through them by doing what Congress had not thought to do and modified the definition of "enemy or ally of enemy" to include holding companies with an enemy taint. That solution both permits innocent foreign corporations to have a judicial remedy and preserves the policy of the 1941 amendment.

This amounts to rewriting of poor legislation. In the *Evans* case the Court was asked to do the same thing. The case involved a statute which made it unlawful 1) to bring aliens into the country unlawfully or 2) to

\(^{12}\) United States v. United States District Court, 68 S. Ct. 1035, 1038 (1948).

harbor aliens brought in unlawfully. By some error the penalty applied only to the former activity, and there was none specified as to the latter. The Court declined to supply one, saying that "we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply.... This is a task outside the bounds of judicial interpretation." \textsuperscript{140}

The point, somewhere between \textit{Uebersee} and \textit{Evans}, at which a statute becomes too chaotic to be interpreted cannot, of course, be identified by any generalization. Such statutes as that in the \textit{Evans} case merge finally into those acts which are too indefinite to be applied at all.

\textbf{b) Indefiniteness}

The doctrine that a statute may be void for indefiniteness is of American origin and came into existence as an aspect of substantive due process of law.\textsuperscript{141} While there were random references to indefiniteness prior to the Fourteenth Amendment, the conception received its largest impetus from Justice Brewer, who was also a prime architect of judicial review of rates and of social legislation generally.\textsuperscript{142} The rules concerning definiteness were invoked largely for the purpose of challenging regulatory legislation, particularly that dealing with monopolies and trusts in the 19th Century.

According to the modern statement of the rule, "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process of law."\textsuperscript{143} The trouble with this as a rule is that in most cases worth litigating there is the sort of difference as to statutory application which the rule would appear to cover. The principal of definiteness thus gains its sole meaning from the consideration of the concrete cases in which it has been applied.

If there is a unifying strain in the Supreme Court cases, it is this: A legislature may use very general language when in the nature of the problem it has no practical alternative or when as a matter of deliberate social policy it determines that there is a preponderate merit in doing so. But a legislature may not use such loose and indefinite language where no im-

\textsuperscript{140} United States v. Evans, 333 U.S. 483, 495 (1948).
\textsuperscript{141} For an excellent recent study of indefiniteness, see Void for Vagueness: An Escape from Statutory Interpretation, 23 Ind. L. J. 272 (1948).
\textsuperscript{142} The device is unknown in England and was mentioned in federal courts only twice before the Fourteenth Amendment. The Enterprise, 8 Fed. Cas. 732, No. 4,499 (C.C. N.Y., 1810); United States v. Sharp, 27 Fed. Cas. 1014, No. 16,264 (C.C. Pa., 1815). For early state cases see the Note, supra, n. 141. The real life of the rule began with Justice Brewer's dicta in Chicago & N.W. Ry. Co. v. Dey, 35 Fed. 866, 876 (C.C. Iowa, 1888).
\textsuperscript{143} Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
perative reason exists and particularly when more explicitness would be readily possible. It would be hard to find a better way to deal with the problem than to say that hotel-keepers should "do all in their power" to save guests in case of fire; or that business expenses must be "reasonable" for tax purposes; or that the penalty for kidnaping shall be affected by whether the victim is "liberated unharmed." And Congress made a careful judgment when it used "restraint of trade" in the Sherman Act. All have been held valid.

On the other hand, it would have been easy to have been more precise and to give the citizen more adequate notice of his duties than in those statutes, held invalid, which required a contractor to figure out the "prevailing wage" in an area; or forbade a grocer to "exact excessive prices"; or ordered that streetcars be operated "without crowding."

Sound application of the principle of practicality is demonstrated by the leading indefiniteness case at the 1947 term. In *Winters v. New York* the Court invalidated a New York statute which, as interpreted by the New York courts, forbade booksellers to sell accounts of crime and violence "so massed as to incite to crime." The modern object of such statutes is the salutary one of keeping out of the hands of children low-grade publications which will incite to juvenile delinquency.

The trouble with the statute is that whether any given publication is of the offending type depends on highly variable reader responses which the bookseller has no conceivable way of predetermining. Many a youngster can doubtless purchase a series of stories behind a cover depicting a dagger plunged into a beautiful lady without being induced to find a dagger—and a beautiful lady—and repeat the act. The mere transfer of a dime from the youngster to the bookseller is not the sort of transaction which permits the seller to decide whether the purchaser will be inspired to evil deeds by his

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144 Miller v. Strahl, 239 U.S. 426 (1915).
147 Nash v. United States, 229 U.S. 373 (1913).
151 333 U.S. 507 (1948).
152 The bookseller's task is rendered particularly difficult because while crime accounts, and particularly those of sadistic and masochistic nature, appeal to anti-social perversion, there is no scientific evidence that they incite "normal" youngsters to crime. "If even a small percentage of those who saw stories of crime in the movies or of those who read 'pulp magazine' accounts of criminals were delinquents, the statistics for juvenile delinquency would be a hundredfold what they are." Healy and Bronner, New Light on Delinquency 135 (1936).
purchase. Too much depends upon the response of the reader, too little on the book. The Bible, for example, has probably incited more murders than any other printed work.

Under such circumstances it seems reasonable to require New York and other states with similar statutes to devise some more precise way of dealing with the problem. So Justice Reed held for the Court, with Justices Frankfurter, Jackson, and Burton dissenting. If a more precise statute cannot be drafted, then an administrative agency to make ad hoc determinations about particular publications will be necessary and presumably appropriate as far as the objection of indefiniteness is concerned.

The frequency with which the objection of indefiniteness has been arising of late makes the topic worthy of the closest attention. Because most statutes involve general terms, there is great possibility here for the restoration of a judicial veto of disliked legislation, after the fashion of the old due process, this time on the ground that the statute in question is vague. Yet it should be noted that no statute which fulfilled the general rule of practicality described above has been invalidated in recent years.

c) Congressional Re-enactments

Were there a contest to select the most completely chaotic corner of the law, the one containing the principles for determining the effect of congressional re-enactment of a statute after judicial interpretation would be a fair candidate. Congress acts, the Court decides, Congress re-enacts, and later the Court is pressed to re-examine the earlier decision. May it do so?

The Court at the 1947 term added more literature than light to this subject, and the cases can only be listed without drawing any clear conclusions. In a tax case, where the interpretive decisions were by lower courts, there was no difficulty in thrusting them aside: "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."

But what if the error is enthroned on high? In Francis v. Southern Pacific Co., Supreme Court decisions interpreting a provision of the Hepburn Act were held to have been re-enacted by the Transportation Act of 1940. The majority opinion cited nothing to show that Congress actually intended by its re-enactment to adopt the judicial interpretations, and

154 333 U.S. 445 (1948). The earlier Act had been interpreted as depriving railroad employees of all claims for negligence against the railroad if they had been riding on free passes.
Justice Black suggested in dissent that it was merely a "convenient fiction" to suppose that Congress even knew of the older interpretations.

A far more serious example of the practice of construing re-enactments as approval of decisions occurred in *United States v. South Buffalo Railway Co.* In 1936 the Supreme Court held in the *Elgin* case that while the commodities clause of the Interstate Commerce Act forbade railroads to haul goods for use in activities of its own unrelated to railroading, the railroad might undertake such hauling for the use of an affiliated corporation. Justices Brandeis, Stone, and Cardozo dissented, doubting that Congress had intended its policy to be thus gutted by use of holding companies.

In the *South Buffalo Railway* case five members of the Supreme Court held that Congress, by adoption of the Transportation Act of 1940, meant to retain the *Elgin* decision. Justice Rutledge, joined in his dissent by Justices Black, Douglas, and Murphy, began, "This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it, the unjustified inference that Congress approves the mistake."

While the dissent seems sounder than the majority in its analysis of the actual intent of Congress in the 1940 Act, both majority and minority demonstrate the proper method for determining the effect of a subsequent statute. Both attempt to discover what Congress actually meant to do by its subsequent legislation. When Congress did not deal with the subject consciously, there is no reason to draw any conclusion from the second statute.

**CONFLICT OF LAWS**

Among the most satisfying accomplishments of the Court at the 1947 term is clarification of the divorce muddle. As Justice Jackson put it, "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom." Justices Burton and Vinson had been added to the Court since *Williams I* and *II*, and the Court's position on foreign divorce problems was left in doubt until the new Justices declared themselves. Since the details will doubtless be discussed in every law review, only the basic principles need be stated:

1. Divorce decrees based on domicile of one party and constructive

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155 68 S. Ct. 868 (1948).
service on the other are entitled to full faith and credit in other states;\textsuperscript{59} except that:

2. Other states may in appropriate proceedings ignore such divorces if they find that the claimed residence of the moving party in obtaining the divorce was a fraud upon the court which granted it.\textsuperscript{60} In short, Florida and Nevada divorces based on constructive service are no better than other states are willing to consider them.

3. If, however, both parties leave the state of origin, go to the divorcing state, participate in the proceedings, and have full opportunity to challenge residence, and if they are accorded full procedural due process there, neither party can subsequently attack the validity of the divorce in another state.\textsuperscript{61} If, then, a lawyer wants a client to obtain a Nevada or Florida divorce which cannot be challenged by his client's spouse, he ought to send both parties.

The first and second of the above propositions, established by the Williams cases, remain firm on the basis of their respectful recitation in this year's divorce cases. The third was established by this year's cases.

A less frequent problem was treated with equal clarity in the term's other divorce cases: If state A gives a separation decree to a couple in residence, ordering alimony, and state B subsequently gives a total divorce to one of the parties with constructive service on the other, the alimony portion of the separation order still stands.\textsuperscript{62} A husband may not duck out of his support money debt by running to Nevada, because the Nevada court has no jurisdiction over his creditor wife.

To approve the decisions, one must indeed believe that certainty is the special element of value in the law of full faith and credit in divorce. Justice Frankfurter, dissenting in these cases, argues with great force and eloquence that these decisions subordinate the policy of 43 states, which do not allow quickie divorces, to the five which do. But this is not so. The rule for which the Justice contends permits every state to re-examine the divorces of every other state; for example, his principal reliance, Andrews v. Andrews, involved states different from the five which he says have the most lax residence laws.

The problem thus passes to Congress. If the overwhelming majority of

\begin{itemize}
\item[\textsuperscript{60}] Williams v. North Carolina, 325 U.S. 226 (1945).
\item[\textsuperscript{61}] Coe v. Coe, 68 S. Ct. 1094 (1948); Sherrer v. Sherrer, 68 S. Ct. 1087 (1948). "Insofar as [Andrews v. Andrews, 188 U.S. 14 (1903)] may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court." Ibid., at 1092.
\item[\textsuperscript{62}] Estin v. Estin, 68 S. Ct. 1213 (1948).
\end{itemize}
the states object to husbands and wives both going to Nevada for divorces, Congress presumably has power under the Full Faith and Credit Clause to make the necessary regulations.

V. THE INSTITUTION AND ITS JUSTICES

THE WORK OF THE INSTITUTION

The Court handed down 119 opinions this year, probably the smallest number since the Civil War. One of the reasons for this shrinkage of the docket, which has been discussed above, is the narrowly confined grant of the privilege of certiorari. But there are a number of other causes as well. One is the fact that since *Erie v. Tompkins* the common law questions arising in diversity have substantially disappeared from the docket. A second is the decline of substantive due process of law in the economic field and the expansion of federal power under the Commerce Clause, so that it is no longer purposeful to litigate questions which ten years ago came to the Court. For these and perhaps other reasons, there were far fewer petitions for certiorari than usual.

As a result of these three factors, the Court's docket would be far smaller than it is had not the civil liberties cases so expanded in number. Frankfurter and Landis, *The Business of the Supreme Court*, chronicled the shift in the nature of the Court's business from the 19th to the 20th Century, a shift from a private law to a public law docket. We are in the midst of another shift almost as radical in its nature, this time carrying a substantial portion of the business of the Court to the civil rights sector of the public law.

Since the docket was smaller, the fact that considerable variation exists in the number of majority opinions written by individual Justices was slightly less striking than last year. As usual, the largest number of opinions was written by Justices Black and Douglas, but Justice Murphy's ill health caused him to slip for the moment out of his usual third position, which he yielded to Justice Jackson.

The most apparent differences between the 1946 and 1947 terms were

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The table of opinions is as follows:

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16 As usual, the largest number of opinions was written by Justices Black and Douglas, but Justice Murphy's ill health caused him to slip for the moment out of his usual third position, which he yielded to Justice Jackson.
the declining influence of Justices Frankfurter and Jackson in determining the results of important cases and the corresponding increase in weight of Justices Black and Douglas and, even more markedly, Justices Murphy and Rutledge. The influence of particular Justices can be measured only by concentrating on the most important decisions. For this purpose I have, obviously arbitrarily, picked two groups of cases. The first are the nine cases which seem the most significant of the year. The second group, twenty-four in number this year, are the cases which, though less important, are far from routine. The remaining cases were put aside either because they are less important or because the decision made was the fairly obvious one, even though a contrary decision would have made the case of great interest.\(^{164}\)

The data in Table 2 are taken from the nine “major” cases and the


### Table 2

**Voting Distribution**

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<tr>
<th>Justice</th>
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<th>Dissenting Votes</th>
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<td>Rutledge</td>
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twenty-four “important” cases. Disqualifications give some Justices less than the total of thirty-three.

The distribution of agreements among the Justices in these thirty-three cases, whether in majority or dissent, is shown in Table 3.

Last year’s equivalent of Table 2 showed appreciable differences. At the 1946 term the controlling group consisted of Justices Reed, Burton, and Chief Justice Vinson. They were seldom in dissent. Next most influential at the 1946 term were Justices Frankfurter and Jackson, who were in agreement more often than any of the remaining Justices and were pre-

<table>
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<th>TABLE 3</th>
<th>AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES</th>
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dominantly in the majority. At the 1946 term Justices Black, Douglas, Murphy, and Rutledge were very frequently on the losing side, Justice Rutledge being more often in dissent than in the majority in the significant cases.

The 1947 term told a different story. Once again Justice Vinson was predominantly in the majority, but so was Justice Rutledge. Justices Black, Douglas, and Murphy ranked next. Justice Burton had become a leading dissenter along with Justices Frankfurter and Jackson, who were in dissent most often of all the Justices.

In short, at the 1947 term a little of the balance of power had shifted, giving the views of Justices Black, Douglas, Murphy, and Rutledge an effectiveness they had not had the year before. However, the number of cases is so small and the figures so close that it would be premature to call the trend substantial. Some of the difference may be accounted for by the slight shift in the nature of the cases which happened to come before the Court.

The pattern of agreements among Justices remained as before. Chief Justice Vinson and Justices Reed and Burton are predominantly in agreement with each other, as are Justices Black, Douglas, Murphy, and Rut-
ledge. Justices Frankfurter and Jackson continued to be in frequent accord.

The most substantial difference between the 1946 and 1947 terms comes to this: Justices Black, Douglas, Murphy, and Rutledge were in agreement substantially as often as before; but they were joined by one or two other Justices more often than in the preceding term.

THE WORK OF THE INDIVIDUAL JUSTICES

Chief Justice Vinson in his second term continued to administer his responsibilities with the same outward good temper as during his first. The only open display of ill-temper among the Justices during the term was a momentary brush during oral argument between the Chief Justice and Justice Frankfurter which, though widely recounted in the press, is surely but a trifle of strain in a nine-month term. The Chief Justice's majority opinions and his only dissent to date were extremely temperate, and his serious responsibility of assigning opinions continues to be well handled. The Chief Justice's technical workmanship, good enough the year before, appeared at least as good in his second term. In his second term, as in his first, he occasionally made his task simpler than it was by making exceedingly thin distinctions of apparently controlling precedents. We may conclude that it is not the Chief Justice's conception of the judicial function that he should meet his intellectual difficulties head on when he can go around them. Certainly, however, he continues to have no fear of precedent, and in his most important opinions (the restrictive covenant cases, the divorce cases, and the Japanese farmer discrimination cases) he cheerfully made new law.

The principal new dimension added to the picture of Vinson, C.J., in the 1947 term, was a friendship toward civil rights. The 1946 term had shown Vinson as markedly insensitive to claims of civil liberty. But so small a sampling gave a distorted picture. As discussion earlier in this article shows, Vinson remains far from the civil rights philosophy of a Holmes or a Hughes, but his conservatism is moderate. "Civil liberties" is of course a loose phrase, covering the entire Bill of Rights and perhaps more. On searches and seizures or right to counsel, Vinson is little moved by appeals to the Constitution; but on the leading race-prejudice cases of the year, he stood firm for freedom. One who would pigeon-hole the Chief Justice must define his values very sharply.

165 The Louisville Courier Journal (Apr. 30, 1948) headline was: "Vinson Hushes Up Frankfurter in Unusual Supreme Court Flare-Up." For details see 16 U.S.L. Week 3329 (1948).

166 The restrictive covenant cases, Oyama v. California, and Sherrer v. Sherrer are examples.

167 Cases cited note 166 supra.
Justice Black continued to do somewhat more than his share of the work of the Court, and he had the satisfaction of seeing his views prevail more often than the year before. In a year presenting a large number of anti-trust and trade regulation cases, he was certain to be busy; for the core of Black's economic faith is a belief in the rigorous enforcement of the laws affecting competition. It is doubtful if Black has ever found a case before him in which he considered the anti-trust laws too vigorously applied to an industry. This year he wrote the opinions affirming the Federal Trade Commission in striking down the basing-point system in the cement industry and the quantity-discount system in the salt industry.\textsuperscript{168}

As a stylist, Black continued to write concise, simple English. His \textit{Cement} opinion, one of the longest he has ever written, is a remarkable digest of a case in which the record of testimony and exhibits contained almost 100,000 pages. Probably Black's least satisfactory opinion of the year from the standpoint of crisp organization was the \textit{Francis} dissent,\textsuperscript{169} which expressed his view that railroads were not free of liability for negligence to employees riding on free passes. Though the conclusion is strong, the beginning is discursive.

Black's views on civil rights have seldom been more clearly reaffirmed than in this term. He continued his pattern of broad construction of the government's power of search and seizure. Otherwise he hit hard at serious restrictions. His opinion in \textit{Von Moltke v. Gillies},\textsuperscript{170} where a defendant charged with espionage had not been given proper counsel, illustrates Black's device of careful fact presentation and shows his experience as a jury lawyer. His majority opinion in the \textit{Oliver} case,\textsuperscript{171} invalidating a contempt order of a Michigan one-man grand jury, and his dissent in the \textit{Ludecke} case,\textsuperscript{172} involving deportation without judicial review, are among the most forceful and effective he has written.

The 1947 term was probably the most influential year Justice Reed has had since coming to the Court, and his central position on the Bench has long made him a figure of great influence. He wrote the opinion of the Court in the \textit{Gypsum} and \textit{Line Material} cases\textsuperscript{173} which, as discussion above


\textsuperscript{170} 332 U.S. 708 (1948). The majority opinion was followed and applied later in the year in Behrens v. Hironimus, 166 F. 2d 245 (C.C.A. 4th, 1948).

\textsuperscript{171} In re Oliver, 333 U.S. 257 (1948).

\textsuperscript{172} Ludecke v. Watkins, 68 S. Ct. 1429, 1436 (1948).

has shown, reconsidered and narrowed the rights of patent holders under the anti-trust laws. The latter case shows particularly well the crucial position of Reed in the intellectual current of the Court. Black, Douglas, Murphy, and Rutledge would overrule the antecedent General Electric case; Vinson, Frankfurter, and Burton would leave it largely as it was; and Jackson did not participate. Thus Reed’s unique compromise becomes the law, for he has the pleasure of the man in the middle in holding the balance of power. It is sometimes rumored that in five-to-four decisions the task of writing the majority opinion is frequently assigned to the Justice least enthusiastic for the result so as to hold him firm. In the light of this surmise, it may be noted that Reed wrote the opinion for five Justices in the Columbia Steel case, which permits United States Steel to inch ahead to further expansion.174

Reed’s opinions were as usual fairly extensive and occasionally, as in Andres v. United States, not quite clear. Each opinion deals conscientiously with the problem presented, seldom but occasionally skidding around an issue.176

In short, Reed continued in 1947 to defy successful generalization. Usually conservative in civil rights matters, he is reasonable and moderate. Because his views and his temperament lack the color of some of his brethren’s, he receives far less attention from students of the Court than he warrants. Reed has now served for ten full terms, and someone would perform a service by making a detailed study of his work.

If Justices at the end of a term pause for a moment after clearing off the desk and try to decide whether the year has been good or bad, Justice Frankfurter must have had a moment of unhappy thought. The 1947 term, measured by any standard, must have been one of the least satisfactory he has known. The number of his majority opinions was very small, and he was in dissent more often than any other Justice in the significant cases of the year. He was in the majority in all nine “major” cases (which were largely unanimous) except for his partial dissent in

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174 United States v. Columbia Steel Co., 68 S. Ct. 1107 (1948). Speculation as to whether Reed “really meant it” was also engaged in on the Bench, when Justice Frankfurter’s oral dissent to the Reed opinion in the Bay Ridge case said in substance that the audience could tell from the tone of Reed’s voice as he gave the majority opinion that Reed had reached his result reluctantly.


176 For example, in the Connecticut Mutual case, Justice Reed never explained the exact theory which permitted him to affirm a declaratory judgment granted by the New York courts and at the same time decline to express himself on some of the points which the New York court had decided.
Paramount; but his views were in the minority when he upheld the contempt power of the one-man grand jury, when he objected to the comprehensive anti-trust decree in Jackson's International Salt case, when he contended that venue might be challenged for inconvenience in anti-trust suits, and when he asserted that city officials should be subject to no standard in granting licenses for speaking devices. His most important majority decision was the holding that alleged Nazi aliens could be deported by order of the Attorney General without judicial review.

Superficially at least, no standard appears to guide Justice Frankfurter's judgment as to when to write a special opinion. Obviously, no Justice can write in every case; and if he attempts to do so in an enormous number, his real work of writing opinions for the Court will suffer. In this term Justice Frankfurter had something to say in forty cases, 33% of the total. Hence he contributed only seven majority opinions. Sometimes the concurrence or special opinion was better than the opinion with which it was joined, and sometimes the Justice wrote with the prodigious power of which he is capable. But more often the special opinion seemed expression for its own sake, without anything really worth saying. Justice Frankfurter's range between good and bad work is the widest on the Court.

The 1947 term for Justice Douglas, like each of its predecessor terms, was a year of tremendous hard work. Douglas wrote twenty-two majority opinions, more than any other Justice; and many of them, as, for example,

\[\text{177 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).}\]
\[\text{179 Ludecke v. Watkins, 68 S. Ct. 1429 (1948).}\]
\[\text{181 The dissent in Coe v. Coe and Sherrer v. Sherrer, 68 S. Ct. 1097 (1948), is a good example.}\]
\[\text{182 A great number of examples could be cited. To choose one, United States v. United States District Court, 68 S. Ct. 1035 (1948), presented a problem of interpretation of a minute point in the statute providing for transfer of anti-trust cases from the Supreme Court to a Circuit Court of Appeals when there is a lack of a quorum in the Supreme Court. It is extraordinarily unlikely that this problem will ever arise again, and Justice Frankfurter concedes it is "rare, if not unique." The question was decided for the Court in an opinion by Justice Douglas. Justice Frankfurter concurred specially to reach the same result by a slightly different path. While the Frankfurter way may be better, the utility of writing even a paragraph to describe it is dubious.}\]
\[\text{183 Examples of good workmanship are cited in notes 180 and 181 supra. Consider, on the other hand, the dissent in International Salt Co. v. United States, 332 U.S. 392 (1947), which contains more clichés than three pages will carry ("burning even part of a house to roast a pig"; "bare bones of the pleadings"; "the baby is not to be thrown out with the bath"). And see the concurrence in Haley v. Ohio, 332 U.S. 596 (1948), a forced confession case, particularly important because the decision was five to four. The concurrence is highly autobiographical and is going to give the state supreme courts trying to apply it a difficult time.}\]
the Paramount decision, dealt with matters of time-consuming difficulty.

Throughout the year, Douglas' name was coupled with political speculation over whether he might be a candidate for the presidency. But if siren voices may occasionally have tempted, they certainly never affected Douglas' work. From the standpoint of politics, it would have been well in 1948 for Douglas to trim a little, particularly in civil rights matters. But never did he hold more firmly to the lines he had previously laid out for himself, and particularly in race-discrimination cases he was firm for the full guarantees of due process and equal protection.

The least satisfactory Douglas opinion from a purely technical standpoint was Ahrens v. Clark, holding that federal courts cannot hear habeas corpus actions when the prisoner is outside the territorial jurisdiction of the court. A sound line of authority, beginning with an opinion by Judge Cooley, had held that if the captor to whom the writ is directed was within the jurisdiction, the Court might proceed. Douglas himself had in another year quoted the Cooley passage with approval. The new rule raises serious troubles for petitioners in the custody of the District of Columbia, which occasionally keeps its prisoners over the District border. Furthermore, the fourth footnote in the Ahrens opinion specifically reserved a subsidiary question for future decision, and yet Justice Douglas cited with approval in the text a case which had decided the very point reserved.

Douglas' writing style is usually more businesslike than emotional, but occasionally restraint gives way to eloquence. The Columbia Steel dissent, quoted above, is an example. As examples of concise lucidity, two concurrences and a dissent demonstrate Douglas' best writing qualities. They are the Bob-Lo and Line Material concurrences and the Bute dissent.

As indicated in this article last year, the 1946 term was a year of superb accomplishment for Justice Murphy, and one of the best he has had. Unhappily the Justice's ill health kept the 1947 term from being as successful. For nearly two months he was unable to hear argument, and his health

\[\text{Footnotes:}\]
\[183\] 334 U.S. 131 (1948).
\[184\] 68 S. Ct. 1443 (1948).
\[188\] 68 S. Ct. 1107, 1127 (1948).
\[189\] 333 U.S. 28, 40 (1948); 333 U.S. 287, 315 (1948); 333 U.S. 640, 677 (1948), respectively.
precluded his writing as many opinions as usual. He was completely recovered by term’s end.

Nonetheless, the opinions Justice Murphy did write were of extremely high quality. Murphy’s special genius is his capacity to write passionately about civil rights without becoming a sentimentalist. The number of odd or marginal civil rights cases which come before the Court, cases in which rights are claimed by obviously guilty criminals or by persons themselves intolerant, occasionally obscure the basic American values involved. Justice Murphy effectively invokes those values. Examples are his dissent in Moore v. New York,199 condemning the “blue ribbon” jury as contrary to the Constitution’s faith in the jury system in criminal cases, and his concurrence in the Oyama case,191 which gives a thorough factual base to the repudiation of a relic of racism in California. His leading majority opinions of the year were in Price v. Johnston,192 reviewing the nature of the writ of habeas corpus, and the Trupiano case,193 which established a strong requirement for search warrants.

Justice Jackson wrote seventeen opinions, more than usual, and produced several of high quality. His disqualification in five of the term’s major cases to some extent limited his effectiveness.

Jackson was criticized in this article last year for occasional bad taste in dissent or concurrence. Although that charge was repeated for this year’s cases in a St. Louis Post-Dispatch editorial,194 it cannot be made with the same propriety this year as last. Jackson is both blessed and cursed with a flashing style which makes his opinions read easily, and at the same time he falls too readily into personal aspersions. This year that style seemed, the Post-Dispatch to the contrary, in reasonably good control.

Jackson certainly has the ability to have his say and be done with it, and discursiveness is not a common fault with him. Examples of good, concise writing are his opinions in a minute matter, Hunter v. Martin,195 and a more serious one, International Salt Co. v. United States.196 His views on substantive questions, particularly but not exclusively in the civil rights area, remained conservative to the point of reaction. He dissented even in the two decisions invalidating discriminations against Japanese in Cali-

198 Undated editorial, “Supreme Court Discord,” said after defending the right of dissent, “What is wrong is that Justice Jackson should be so unjudicious in his disagreement.”
fornia, and with only rare exceptions, such as his opinion in *Townsend v. Burke*, continued to support limitations on the right to counsel.

As noted above, Justice Rutledge was in the majority far oftener than in the preceding term. He wrote ten majority opinions as well as some excellent dissents and concurrences.

As Rutledge's best opinions always reveal, he is prodigiously capable of handling great cases well. But his ability with great cases is a source of weakness with lesser matters, for it is difficult for Rutledge to make sufficiently light of those narrow issues better decided in a word. Two extensive opinions in venue cases this year make the point.

But there were also larger issues which gave full scope to Rutledge's meticulous researches. The dissenting opinion in the *South Buffalo* case is an example of a solidly built Rutledge structure which overshadows its majority rival, and his concurrence in the CIO labor publications case received the serious treatment it deserved. So did his opinion for the Court in the *Panhandle Eastern Pipeline* case, involving the relation of state and federal natural gas regulations. One of his most fluent opinions was the concurring blast at the Illinois procedural run-around confronting prisoners claiming constitutional rights. The opinion expresses all the indignation of which Rutledge is capable, and this is a very satisfying quantity indeed.

Justice Burton's treatment of each case before him continued to be so meticulous that he could deal with only a few. He wrote four opinions for the Court as well as several dissents. This figure distorts the picture slightly, because the re-negotiation cases were really three distinguishable matters written as one opinion. Their importance and treatment have already been discussed. His opinion in the *Bute* case reaffirms the proposition that the right to counsel does not extend to state defendants and is an extended reaffirmation of the 1942 Roberts opinion in *Betts v. Brady*.

Burton's other majority opinions were on minor matters.

Every now and then Justice Burton emerges from the mass of detail which usually interests him and writes a crisp opinion. A dissent in a minor patent case is an example of such clarity. From the standpoint of effec-

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197 68 S. Ct. 1253 (1948).
199 68 S. Ct. 868, 875 (1948).
200 68 S. Ct. 1349, 1361 (1948).
201 333 U.S. 507 (1947).
204 333 U.S. 649 (1948).
205 316 U.S. 455 (1942).
tive expression, the dissent in the *Von Moltke* right to counsel case was probably the best Burton opinion.\textsuperscript{207}

**CONCLUSION**

One cannot in fairness press together the vagaries of an institution, as reported in the pages above, and say in a phrase: This was the Supreme Court in the year just passed. There was little of unity and much of dissent and concurrence, not only in the given case but also in the given area.

Yet if little either great or clear-cut emerged in this year, there was much that was satisfying. The application of the laws protecting competition at least did not retrogress, and there were some real advances for civil liberty.

\textsuperscript{207} 332 U.S. 708 (1948).