Constitution Making by the Supreme Court

Hugh Evander Willis

Recommended Citation
Willis, Hugh Evander (1940) "Constitution Making by the Supreme Court," Indiana Law Journal: Vol. 15 : Iss. 3 , Article 1. Available at: http://www.repository.law.indiana.edu/ilj/vol15/iss3/1
CONSTITUTION MAKING BY THE SUPREME COURT SINCE MARCH 29, 1937

By HUGH EVANDER WILLIS

This period marks an epoch in judicial history. On the date marking the beginning of the period the judicial winds violently shifted. In the years immediately preceding, constitutional law had largely been made by Justices Butler, McReynolds, Van Devanter, Sutherland, and Roberts. In the years of this period constitutional law has largely been made by Justices Brandeis, Cardozo, Chief Justice Hughes, and Justice Roberts. The decisions in this last period stand out in striking contrast to the decisions just prior thereto. In the years preceding 1937 the Supreme Court had upheld some striking legislation like the gold clauses legislation, the Tennessee Valley Authority legislation, and prison made goods legislation of Congress, state moratorium legislation and legislation regulating prices outside of public utilities; but in general the position of the court had been against social

control. It once had gone so far as to adopt spot reproduction cost as the rate base⁵ and a rate of return of 8%⁶ for determination of reasonable compensation for a public utility; and just before 1937 it was assuming a more and more antagonistic attitude towards New Deal legislation, declaring unconstitutional⁷ a state minimum wage law and the federal Agricultural Adjustment Act⁸ as well as the Railroad Retirement Pension Act.⁹ At the end of March, 1937, all this was changed. The Supreme Court began to reverse many important prior decisions and to make in many respects a new and different constitution. The dissents of Holmes, Brandeis, Clark, Stone, and Cardozo now became the doctrines of the Court, and the former majority members of the Court became the dissenting members. So great were the changes in constitutional law that many violent reactions were caused. The Honorable Frank J. Hogan when President of the American Bar Association was filled with alarm and thought our Constitution was being overturned and destroyed.¹⁰ The Honorable Robert H. Jackson, Solicitor General of the United States, looked upon the changes with approval and thought that the Court was going back to the original Constitution.¹¹

The date of March 29, 1937, has been chosen as the date marking the beginning of this period because it is upon this date that occurred the constitutional conversion of Justice Roberts. His conversion may have occurred some days before this, but no public announcement of his conversion was made until this date. This announcement occurred in the case of the decision of the Supreme Court in West Coast Hotel Co. v. Parrish,¹² in which in an opinion written by Chief Justice Hughes, concurred in by Justices Roberts, Stone, Brandeis, and Cardozo, and to which Justices Sutherland, Butler,

---

¹⁰ 15 A. B. A. 629.
¹¹ 15 A. B. A. 745.
¹² 300 U. S. 379 (1937).
McReynolds, and Van Devanter dissented, the Court upheld a state minimum wage law and overruled the prior decision of the Supreme Court in Adkins v. Children's Hospital,\textsuperscript{13} and inferentially the case of Morehead v. People of New York.\textsuperscript{14} Whether or not Justice Roberts' conversion was caused by the evangelical work of the President or of the Chief Justice will never be known; but that a conversion took place, there can be no shadow of doubt. Since that time the President has appointed Justices Black, Reed, Frankfurter, and Douglas to the supreme bench, all of whom are supposed to be liberally inclined; but the liberality of the Court was determined by the decision of the Court in the minimum wage case to which reference has just been made.

We shall now briefly refer to the epoch-making decisions of the Supreme Court since March 29, 1937, classifying and discussing them under appropriate headings.

**Separation of Powers**

The decision of the Supreme Court working the greatest change in our doctrine of separation of powers has been the decision of *O'Malley v. Woodrough.*\textsuperscript{15} The opinion in this case was written by Justice Frankfurter. Justice Butler was the lone dissenter, because Justice McReynolds took no part and before the decision in this case Justices Van Devanter and Sutherland had resigned. In this case the court has held that an income tax upon the salary of a federal judge was not a diminution of his salary contrary to the provision in the Constitution that their compensation "shall not be diminished during their continuance in office." This case has expressly overruled the case of *Miles v. Graham,*\textsuperscript{16} the opinion in which was written by Justice McReynolds, and has impliedly overruled the case of *Evans v. Gore,*\textsuperscript{17} the opinion in which was written by Justice Van Devanter.

\textsuperscript{13} 261 U. S. 525 (1923). \textsuperscript{14} 298 U. S. 587 (1936). \textsuperscript{15} 307 U. S. 277 (1939). \textsuperscript{16} 268 U. S. 501 (1925). \textsuperscript{17} 253 U. S. 245 (1920). The difference between *Evans v. Gore* and *Miles v. Graham* was that in the latter the judge was appointed after the enactment of the tax statute, and in the former the judge was appointed before the enactment of the tax statute.
In *Shields v. Utah Idaho Central R. Co.*, Chief Justice Hughes writing the opinion, the Supreme Court has held it was a constitutional delegation of authority to give the Interstate Commerce Commission power to determine whether or not a particular electric railway was an interurban railway. In *United States v. Rock Royal Co-op.* the Supreme Court has permitted Congress to delegate to the Secretary of Agriculture the power to determine the details of a legislative scheme. These cases show a liberality in the matter of the delegation of legislative power; but it should be remembered that in these cases there has been no attempt to delegate governmental authority to private individuals as was true in the *Schechter* case and in the *Panama* case.

The Supreme Court in this period also has held that Congress has the power to determine the jurisdiction of the lower federal courts.

**Dual Form of Government**

So far as the quantity of its decisions are concerned, the Supreme Court in this period has done more work on the doctrine of a dual form of government than it has upon any other part of our Constitution.

One of the most significant changes which it has made in our dual form of government has related to the matter of governmental taxation. Here it has substituted a doctrine of reciprocal taxation by each of the other for an old doctrine of reciprocal immunity of both the states and federal government from taxation by each other. This doctrine of reciprocal

---

18 305 U. S. 177 (1938).
20 A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935). It should be noted that the N. R. A. which was involved in this decision was not the product of President Roosevelt or the New Deal, but it was a product of the United States Chamber of Commerce, except for the provision in regard to collective bargaining, suggested by Secretary Perkins, and the men most active in its authorship were H. I. Harriman, P. W. Litchfield, and Gerard Swope. This plan was all worked out and published during the Hoover administration.
21 Panama Refining Co. v. Ryan, 293 U. S. 388 (1934).
taxation has gradually been worked out in the case of *James v. Dravo Contracting Co.*, where the Supreme Court upheld a state income and gross sales tax upon a contractor building a dam for the federal government; in the case of *Helvering v. Gerhardt*, in which the Supreme Court allowed the federal government to tax an employee of the state of New York working for the Port of New York Authority; in the case of *Allen v. Regents of University System of Ga.*, in which the Supreme Court permitted the federal government to tax athletic admissions charged by a state; in the case of *Graves v. People of New York ex rel. O'Keefe*, where the Supreme Court permitted the state of New York to levy a tax upon the salary of an employee of the federal Home Owners Loan Corporation; and in the case of *State Tax Commission of Utah v. Van Cott*, in which the Supreme Court permitted the state of Utah to tax the salary of an attorney of the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation. The opinions in these cases have been written by Chief Justice Hughes and Justices Stone and Roberts. Justices Butler and McReynolds have been consistent dissenters. In the case of *James v. Dravo Contracting Co.* Justice Roberts temporarily backslid and also dissented. The doctrine of reciprocal immunity from taxation had been established by the case of *Collector v. Day*, which apparently abolished the doctrine of federal supremacy in the field of dual taxation as it had been established by Chief Justice Marshall in the case of *M'Culloch v. Maryland*. These recent cases have expressly overruled the case of *Collector v. Day*. However, the doctrine of federal supremacy in the field of taxation seems again to have been reestablished by the Court in the case of *Pittman v. Home Owners Loan Corporation*.

---

24 304 U. S. 405 (1938).
26 306 U. S. 466 (1939).
27 306 U. S. 511 (1939).
28 11 Wall. 113 (1870).
29 4 Wheat. 316 (1819).
30 60 S. Ct. 15 (1939).
where it was held that Congress has the power to protect a corporation created by it against state taxation.

In the case of *United States v. Butler* the Supreme Court prior to 1937 had held that the federal government could not use a tax power which it possessed to invade a state's police power, although it still recognized the doctrine of federal supremacy over the states as against private individuals when the federal taxing power came into conflict with the states' taxing power or when the federal government's police power came into conflict with the states' police power, and permitted the federal taxing power to be used for federal police power purposes. Since 1937 it has gradually been overthrowing the doctrine of the case of *United States v. Butler*. In *Carmichael v. Southern Coal & Coke Co.* and *Charles C. Steward Mach. Co. v. Davis*, over the strong dissent of Justices Butler, McReynolds, Sutherland, and Van Devanter, the Court has upheld the federal Social Security Act and a state act passed to satisfy the prerequisites of the federal act, on the theory that the federal government was not using its taxing power to coerce the states. And in *Mulford v. Smith* the Court in an opinion written by Justice Roberts, who also wrote the opinion in *United States v. Butler*, has upheld the second federal A. A. A. because it was held to be a regulation of interstate commerce, although it was practically as sweeping as the first A. A. A.

No other topic affects the relation between the states and the federal government more vitally than that of interstate commerce. In the period under discussion the Supreme Court has more or less made over constitutional law upon the subject.

In the *Carter Coal* case, the *Schechter* case, and espe-

---

31 297 U. S. 1 (1936).
32 Houston & Texas Ry. v. United States, 234 U. S. 342 (1914).
33 Cincinnati Soap Co. v. United States, 301 U. S. 308 (1937).
34 301 U. S. 495 (1937).
35 301 U. S. 548 (1937).
36 307 U. S. 38.
cially in the case of *Hammer v. Dagenhart* the Supreme Court had been taking a narrower and narrower view of what was interstate commerce in order to limit the power of the federal government, but in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.* and the case of *Associated Press v. National Labor Relations Bd.*, against the vigorous dissent of Justices Butler, McReynolds, Van Devanter, and Sutherland, the Supreme Court has very greatly enlarged the powers of the federal government, both by enlarging the scope of interstate commerce, so as to make it reach back even into production, and by emphasizing the power of the federal government to foster and protect interstate commerce. As a result of these decisions and the prison made goods decisions, it now must be taken for granted that the first child labor case of *Hammer v. Dagenhart* and the other cases referred to have been impliedly overruled. The doctrine of the *Jones & Laughlin* case has later been applied to holding companies controlling gas and electric companies and to manufacturers. In the *Virginian Railway Company v. System Federation No. 40* the Court has upheld the provisions of the Railway Labor Act requiring collective bargaining, and it has also upheld the provisions of the federal Tobacco Inspection Law.

At the same time the Supreme Court has been increasing the power of the federal government to regulate interstate commerce, it also has increased the power of the state governments to exercise their police power even though it affected interstate commerce. Thus it has permitted the state of Indiana to require a license for the transportation of dead

---

39 247 U. S. 251 (1918).
40 301 U. S. 1 (1937).
41 301 U. S. 103 (1937).
44 300 U. S. 515 (1937).
animals from the state of Indiana into other states although
the state did not prohibit the transportation of such animals
into the state;\textsuperscript{46} the state of Washington to inspect and regu-
late motor driven tugs engaged in interstate and foreign com-
merce in the absence of regulation by Congress;\textsuperscript{47} and the
state of Pennsylvania to regulate the milk industry and fix
minimum prices for milk though a part of the milk was to
be shipped to another state;\textsuperscript{48} but the Supreme Court has
declared unconstitutional an inspection statute of Florida be-
cause it exacted an excessive fee, sixty times the actual cost of
inspection.\textsuperscript{49}

In the same way the Supreme Court has been very liberal
in the matter of state taxation. Thus it has permitted the
state of New Mexico to levy a tax for the privilege of pre-
paring, printing, and publishing magazine advertisements, even
though such advertisements were intended to circulate in
interstate commerce,\textsuperscript{50} and has permitted the states to levy
use taxes for the use of property after it has come to rest in
the state;\textsuperscript{51} but the Supreme Court is still of the opinion that
a gross receipts tax on receipts from interstate commerce is
too much of a burden upon interstate commerce.\textsuperscript{52}

Nothing has had a more radical effect upon our dual form
of government as it was established by the commerce clause
than has the Twenty-first Amendment. The necessity for
stopping the trade barriers and conflicts between the various
states and the need of federal regulation of commerce were
undoubtedly the most impelling reasons for bringing the
colonies to the point where they would adopt the new federal
Constitution. The Twenty-first Amendment runs counter to

\textsuperscript{46} Clason v. Indiana, 306 U. S. 439 (1939).
\textsuperscript{50} Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938).
\textsuperscript{51} Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Southern P. Co.
\textsuperscript{52} J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Gwin, White &
this main philosophy of the Constitution and has tended to restore so far as traffic in intoxicating liquors is concerned all the evils which it was the purpose of the Constitution to destroy in the commerce clause. Because of the weasel words "in violation of the laws thereof" found in Section 2 of the Twenty-first Amendment, the Supreme Court has held, as it had to hold, that the Twenty-first Amendment is not limited by the commerce clause or the equality clause or by the due process clause. In other words the police power of the state is absolutely supreme so far as concerns interstate commerce.

The first case cited above was decided prior to 1937 but all the cases since have been in accord. The consequence is that the Twenty-first Amendment is encouraging and producing all of the evil consequences which it was one of the main purposes of the Constitution to stop. The power of the states under the Twenty-first Amendment adds to the power which they already had through inspection laws and incidental police power, so that now the states are beginning to set up all sorts of barriers to free trade between the states, and commerce from one state to another is even made to pass through ports of entry.

In this period the Supreme Court has further strengthened the money power of the federal government by holding in Guaranty Trust Co. of New York v. Henwood that bonds are payable in legal tender of the United States though there is therein a promise to pay in foreign currency, thus further making private contracts subject to the police power of the federal government. In United States v. Bekins the Court held a subdivision of the state might take advantage of the provisions of the bankruptcy act after the state had given its

56 Zeffrin, Inc. v. Reeves, 60 S. Ct. 163 (1939).
58 304 U. S. 27 (1938).
consent, thus settling a point not expressly decided by the case of *Ashton v. Cameron County District.* The constitutionality of the Tennessee Valley Authority has been further upheld in the case of *Tennessee Electric Power Co. v. Tennessee Valley Authority,* in which the court held that private public utilities did not have a right to free competition and that they could not therefore enjoin its competition with them either on the ground of the unconstitutionality of the Tennessee Valley Authority Act or because of illegal practices because the evidence did not show any such practices. Justices Butler and McReynolds dissented in all these cases and in the money power case they were also joined by the Chief Justice and Justice Stone.

In the case of *Pacific Employers Insurance Co. v. Industrial Ac. Com. of California,* the Court has held that the full faith and credit clause does not require one state to substitute for its own compensation law the compensation law of another state in the case of persons and events within it, though such other statute would be applied by the other state in a suit therein involving the same persons and events. This decision has put a slight modification on the case of *Bradford Electric Light Co. v. Clapper* and limits the application of the full faith and credit clause to state statutes not obnoxious to the policy of another state.

**Supremacy of the Supreme Court**

Perhaps the most sensational decision of the Supreme Court in the present period of constitutional law has been the case of *Erie R. Co. v. Tompkins.* This decision touches our dual form of government as well as the supremacy of the Supreme Court, but perhaps it is better to treat it under the latter heading. This case overruled the case of *Swift v. Tyson.*

---

59 298 U. S. 513 (1936).
60 306 U. S. 118 (1939).
63 304 U. S. 64 (1938).
64 16 Pet. 1 (1842).
Swift v. Tyson had established the rule that in diversity of citizenship cases wherever there was a question of general or commercial interest, the federal courts would not follow the judge-made law of the highest courts of the states but would make their own common law upon the subject. Erie R. Co. v. Tompkins has theoretically changed this rule and now requires all the federal courts to apply in such cases not a federal common law but the common law of that state in which the particular federal court is sitting. The Supreme Court in this case placed its decision not on the ground that Swift v. Tyson had incorrectly interpreted the conformity act of Congress, but that it had rendered an unconstitutional decision in holding that the judicial power of the United States included the power to decide substantive law.

The rule of Swift v. Tyson had been followed for almost one hundred years, and was intended to give the people of the United States a general, uniform body of common law where federal jurisdiction attached. Justice Brandeis, who wrote the opinion in Erie R. Co. v. Tompkins, urged that the rule of Swift v. Tyson created a well of uncertainty. This was true only where the amount involved was less than $3,000, so the federal jurisdiction could not attach, and where the amount involved was close to $3,000 so that a plaintiff might choose either federal jurisdiction or state jurisdiction by varying the amount of his claim. Now there will be a well of uncertainty where the amount involved is over $3,000. Not only this but the federal courts have never thought of following state decisions where the federal question is involved and in a case decided since the Erie R. Case the court has said that it is going to continue to follow this procedure.65 Where the state courts have not as yet decided a question and where the decisions of a state court are in conflict, the federal courts will also probably continue to decide common law questions according to their own view.66

65 Lyeth v. Hoey, 305 U. S. 188 (1938).
66 Sohn v. Waterson, 17 Wall. 596 (1873); Thompson et al. v. Consolidated Gas Utilities Corp., et al., 300 U. S. 55 (1937); Folsom v. Township 96, 159 U. S. 611 (1895).
But worse than this, in such questions as the termination of the common law liability of a common carrier and the change by contract of the common law liability of a common carrier, a question of conflict of laws is involved where there is as yet no state conflict of laws upon the subject. Will the Supreme Court in such case make a rule of conflict of laws? If it does, there is a likelihood that we shall again be back about where we were before the case of *Swift v. Tyson* was overruled. In any event it may well be asked why is there any advantage in having two different rules followed by the United States Supreme Court according to whether the case comes before it from a state supreme court or from a lower federal court. It is submitted that this recent case by a liberal court has some earmarks of being a very non-liberal and non-progressive case, and that the dissenting conservative Justices Butler and McReynolds came nearer having the right of it than the great liberal Justice Brandeis.

**Protection of Personal Liberty Against Social Control**

(Private Right v. Public Authority)

The present, like other periods of constitutional history, has laid much stress upon the doctrine of the protection of personal liberty against what the Supreme Court regards unreasonable social control.

Shortly before the present period in the case of *Colgate v. Harvey* and in an opinion written by Justice Sutherland, the Supreme Court extended the scope of the United States privileges and immunities clause to cover the "privilege of acquiring, owning, and receiving income from investments outside the state," thus seemingly protecting both the fundamental rights, powers, privileges, and immunities of the Bill of Rights and all the fundamental rights, powers, privileges, and immunities of the common law. This was a startling decision. It reversed a policy, which had continued from the time of the *Slaughter-House Cases*, to confine the scope of

---


16 Wall. 36 (1873).
the United States privileges and immunities clause to the protection of only those interests which grew out of the relationship of the citizen to the national government. Justice Miller was largely responsible for this policy. It is true that in the eighties Justice Fields succeeded in extending the scope of the due process clause to cover the territory denied the United States privileges and immunities clause, but it was startling nevertheless to have the scope of the United States privileges and immunities clause thus extended at this late date. Justices Stone, Brandeis, and Cardozo dissented. Whether or not the doctrine announced in \textit{Colgate v. Harvey} will continue to stand is questionable. In the case of \textit{Breedlove v. Suttles} the Supreme Court said "the privileges and immunities protected" under this clause "are only those that arise from the Constitution and laws of the United States and not those that spring from other sources" and never referred to the case of \textit{Colgate v. Harvey}. The question of the scope of the United States privileges and immunities came up again in the case of \textit{Hague v. Committee for Industrial Organization} where the question was whether the privileges to peaceably assemble and to discuss such legislation as the National Labor Relations Act were privileges and immunities of United States citizenship. Only three of the Justices (Roberts, Black, and Hughes) were able to agree that they were. Justices Stone and Reed took the position that they were not, but that they were protected by due process of law. Justices Roberts and Black and Chief Justice Hughes concurred as to due process of law. Justices McReynolds and Butler dissented on both grounds. It would therefore seem that the decision of the case was under the due process clause and that the court almost repudiated the doctrine first announced by \textit{Colgate v. Harvey}. Justices Frankfurter and Douglas did not take any part in the decision of \textit{Hague v. Committee for Industrial Organization}. Perhaps the safest guess is that when they do participate in any new decision involving the United States privileges and immunities clause, the Supreme Court will expressly repudiate the case of \textit{Colgate v. Harvey}. 

\begin{footnotesize}
\item[69] 302 U. S. 277 (1937).  
\item[70] 307 U. S. 496 (1939).  
\end{footnotesize}
In the case of *Wright v. Vinton Branch Bank*\(^7^1\) the Supreme Court has upheld the second Frazier-Lemke Act not only as a bankruptcy act but as not impairing the obligation of the contract between mortgagor and mortgagee so as to violate the due process clause; although in the case of *Louisville Joint Stock Land Bank v. Radford*,\(^7^2\) the court had declared the first Frazier-Lemke Act unconstitutional. The court found the second Frazier-Lemke Act reasonable because it provided for the preservation of the creditor’s lien, his right to realize upon security by judicial sale, and his right to bid at such sale. In the case of *Honeyman v. Jacobs*\(^7^3\) the Supreme Court has held that changing a remedy does not impair the obligation of a contract.

In *United States v. Powers*\(^7^4\) the Supreme Court has held that an amendatory criminal act continuing in effect another act which had expired was not an *ex post facto* law.

An interesting application of the equal protection of laws clause has occurred in this period. In the case of *State of Missouri ex rel. Gaines v. Canada*,\(^7^5\) Chief Justice Hughes, writing for the Court, said that the state of Missouri violated this clause in failing to give legal education to negroes when it afforded such education to white residents although it provided for the payment of tuition for such negroes outside the state. The Court held that the obligation of the state to refrain from discrimination could be performed only within its own jurisdiction. Justices Butler and McReynolds dissented. However, in the case of *Great Atlantic & Pacific Tea Co. v. Grosjean*\(^7^6\) the Supreme Court, through Justice Roberts, has announced that it was proper classification to tax chain stores by a license tax according to the number of units within the state and to base the rate per unit on the total number of units within and without the state. Justices Butler and McReynolds, as well as Justice Sutherland, also dissented in this case.

\(^7^1\) 300 U. S. 440 (1937).
\(^7^2\) 295 U. S. 555 (1935).
\(^7^3\) 306 U. S. 539 (1939).
\(^7^4\) 307 U. S. 214 (1939).
\(^7^5\) 305 U. S. 337 (1938).
\(^7^6\) 301 U. S. 412 (1937).
The most important due process decision of this period has been *West Coast Hotel Co. v. Parrish.* In this case the Supreme Court has upheld a statute of the state of Washington passed prior to the decision of *Adkins v. Children's Hospital,* providing for the establishment of minimum wages for women; and expressly overruled the case of *Adkins v. Children's Hospital* and perhaps impliedly overruled the case of *Morehead v. New York.* The statute was held to be a proper exercise of the police power because of the social interest in the health and the economic welfare of women. The opinion was written by Chief Justice Hughes. Justices Sutherland, Van Devanter, McReynolds, and Butler dissented. In this period the Court has also extended the protection of due process of law to the privilege of peaceable assemblage as well as to the privilege of freedom of speech and of press. This was done in the case of *DeJonge v. Oregon,* which involved a criminal syndicalism law and the case of *Hague v. Committee for Industrial Organization,* which involved the National Labor Relations Act. Justices Butler and McReynolds dissented in the *Hague* case but not in the *DeJonge* case. In the case of *Schneider v. State of New Jersey* the Supreme Court has extended the protection of the due process clause to the distribution of handbills on the streets and the distribution of circulars from house to house as forms of freedom of speech and of the press. In the case of *Driscoll v. Edison Light & Power Co.* the Supreme Court had an opportunity to think through in a rational fashion the problem of how to determine reasonable compensation for a public utility and to attempt to decide what are a reasonable and scientific rate base and rate of return for that purpose. The doing of such a job would have, of course, required the repudiation of such

---

77 300 U. S. 379 (1937).
78 261 U. S. 525 (1923).
79 298 U. S. 587 (1936).
80 299 U. S. 353 (1937).
81 307 U. S. 496 (1939).
82 307 U. S. 104 (1939).
83 60 S. Ct. 146 (1939).
cases as Smyth v. Ames,\textsuperscript{84} McCordle v. Indianapolis Water Co.,\textsuperscript{85} and United Railways of Baltimore v. West.\textsuperscript{86} However, the Supreme Court preferred to continue to wallow in the uncertainties of the rule as to rate base announced in Smyth v. Ames, and not to reconsider the whole question of a reasonable rate of return, although Justice Frankfurter wrote a concurring opinion attacking the case of Smyth v. Ames, and Justice Black concurred in this opinion. However, in Valvoline Oil Co. v. United States\textsuperscript{87} the Court has held that pipe line companies are common carriers though they carry only to their own refineries; and in Union Stock Yard & Transit Co. v. United States\textsuperscript{88} that stock yard companies are common carriers though not owning any railroad tracks but only platforms and chutes used in loading and unloading live stock shipped by rail in interstate commerce.

Due process as a matter of jurisdiction has had considerable development in this period. In the case of Guaranty Trust Co. of New York v. Commonwealth of Virginia\textsuperscript{89} the Court had no difficulty in permitting the state of Virginia to tax the receipt of income within Virginia, by a citizen residing there although the state of New York had already taxed the fund from which the payments were to be made. This was taxing two different privileges. But when it came to the taxation of the same privilege by different states the Court had more difficulty. In a long line of prior decisions culminating in the case of First National Bank of Boston v. Maine,\textsuperscript{90} the Supreme Court had tried to stop multiple taxation of intangibles (as well as land and tangibles) by the different states, by holding that it was a violation of due process as a matter of jurisdiction. Justices Stone, Holmes, and Brandeis dissented to this doctrine. In the recent cases of Curry v. McCanless\textsuperscript{91} and

\bibliography{84 169 U. S. 466 (1899).  
85 272 U. S. 400 (1926).  
86 280 U. S. 234 (1930).  
87 60 S. Ct. 160 (1939).  
88 60 S. Ct. 193 (1939).  
89 305 U. S. 19 (1938).  
90 284 U. S. 312 (1932).  
91 307 U. S. 357 (1939).}
Graves v. Elliott the Supreme Court in opinions by Justice Stone has adopted the view of the former dissenting judges and held that different considerations apply to the taxation of intangibles from what apply to the taxation of tangibles, and that "where a taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule 'mobilia sequuntur personam' is not controlling." Chief Justice Hughes and Justice Roberts joined Justices Butler and McReynolds in dissenting. In Boteler v. Ingels the Supreme Court has upheld a statute of Congress making a bankrupt estate liable for automobile license fees and penalties imposed by a state and incurred by the trustee in operating the bankrupt's business. In Pearson v. McGraw the Supreme Court has held that a state may levy an inheritance tax on an irrevocable trust executed in that state of federal reserve notes bought and located in another state. In the case of Worcester County Trust Co. v. Riley the Supreme Court has held that state taxing officials cannot be interpleaded in a federal court with the tax officials of another state likewise claiming domicile and the right to tax, in order to have the federal court determine which state is in fact domiciliary and enjoining taxing by the court of the other state, because such a suit was in effect a suit against the state. But the Court in State of Texas v. State of Florida has permitted one state to interplead others for the purpose of determining which of four states was the true domicile of a party so as to permit such state to impose death taxes on decedent's intangibles, where the net estate was not sufficient to pay the amount of taxes assessed on the basis of domicile by the four states. However, the Supreme Court in Commonwealth of Massa-

93 60 S. Ct. 29 (1939).
94 60 S. Ct. 211 (1939).
95 302 U. S. 292 (1937).
chusetts v. State of Missouri\textsuperscript{97} has held that it has no original jurisdiction over a suit by one state against another to have a question of domicile determined when the securities were sufficient to cover the claims of both states.

**Universal Citizenship and Suffrage**

In the case of *Kessler v. Strecker*\textsuperscript{98} the Supreme Court has added to the doctrine of universal citizenship and suffrage by holding that, under a statute requiring deportation of any alien who at any time after entering the United States is found to have been at the time of entry or who became thereafter a member of an organization which advocates the overthrow of the United States government by force, an alien is not subject to deportation merely because of past membership in such an organization. Justices McReynolds and Butler dissented. In the case of *Hague v. Committee for Industrial Organization*\textsuperscript{99} the Court has indicated that it again was going to put a narrow construction upon the United States privileges and immunities clause. In *Chippewa Indians v. United States*\textsuperscript{100} the Supreme Court has held that giving citizenship to Indians does not terminate the United States' guardianship over them. In *Lane v. Wilson*\textsuperscript{101} the Supreme Court has again protected the negro against discrimination in the matter of voting found in a registration law only slightly modifying a former "grandfather clause" law. Justices McReynolds and Butler disagreed with the rest of the Court. In *Perkins v. Elg*\textsuperscript{102} the Court has held that a child born in the United States does not lose his United States citizenship by the expatriation of his parents.

**Amendment**

In the case of *Coleman v. Miller*\textsuperscript{103} the Supreme Court has held that what is the reasonable time for the ratification of a

\textsuperscript{97}60 S. Ct. 39 (1939).
\textsuperscript{98}307 U. S. 22 (1939).
\textsuperscript{99}307 U. S. 496 (1939).
\textsuperscript{100}307 U. S. 1 (1939).
\textsuperscript{101}307 U. S. 268 (1939).
\textsuperscript{102}307 U. S. 325 (1939).
\textsuperscript{103}307 U. S. 433 (1939).
proposed amendment to the United States Constitution is a political question for Congress. This is a position contrary to the position taken by the Court in the case of Dillon v. Gloss. Justices Butler and McReynolds dissented in the case of Coleman v. Miller. This case also affects the doctrine of separation of powers in that the Supreme Court by practicing self-denial has conferred upon Congress a power which it itself exercised in the case of Dillon v. Gloss.

CONCLUSION

After this survey of the Supreme Court decisions since March 29, 1937, there can be only one opinion as to whether this period has been epoch-making. During this short time the Supreme Court has rewritten a large part of our Constitution, at least as it existed just prior to this date. It has changed many of the constitutional doctrines established in his prior period and introduced new doctrines. Things which were unconstitutional prior to this date are no longer unconstitutional, and things which were constitutional are now unconstitutional. In this short period more than twelve prior constitutional decisions have been overruled. A remarkable record! If these prior decisions were good decisions, men like Mr. Hogan may well be filled with alarm. If, however, the decisions overruled were bad and the overruling decisions good, there is no reason for alarm but for congratulation. For this reason the real question is not how many decisions have been overruled, but whether the decisions in the present period have been right or have been wrong.

All fair-minded men will agree that the decision was right which permitted the taxation of the salaries of federal judges. All will agree with Justice Holmes that it is no diminution of the salary of a judge when he is required to pay only the same taxes that all other citizens in the community pay. As to whether the decisions permitting a greater delegation of legislative power are right or wrong is a matter of opinion. The doctrine of separation of powers permits, and always has

104 256 U. S. 368 (1921).
permitted, a certain amount of delegation of legislative power. It is simply a matter of degree. The permission of reciprocal taxation by the states and the federal government of each other is not objectionable so long as the taxation is not discriminatory. In the first place the only reason for tax immunity was to prevent such discrimination. The decision on the second A. A. A. only restored the doctrine of federal supremacy to a position from which it should never have been taken. In its interstate commerce decisions the Supreme Court, both so far as the power of the United States and so far as the power of the states is concerned, has only taken us back to the doctrines of Chief Justice Marshall. Justices Butler, McReynolds, Van Devanter and Sutherland in their interstate commerce decisions had been trying to protect business from any social control either by the states or by the United States. It was never the philosophy of the Constitution to do any such thing. The most recent legal tender decision also is in accord with all legal tender decisions except the first, and has taken us back to the position of Justice Miller. The decision on the full faith and credit clause must be regarded to have introduced a wise modification of another full faith and credit decision. If the most recent decisions on the United States privileges and immunities clause are correcting the decision in *Colgate v. Harvey*, they also are to the good and are taking us back to the position established by Justice Miller. The protection of the negroes under the equality clause also is in accord with prior decisions, and the position of the dissenters in this case should be compared with their position in the Chain Store Taxation case. The due process decision upholding minimum wage laws must be held to be a good decision since both great political parties came out against the decisions which it overruled—the Democratic party in its platform and the Republican party through its presidential candidate. The decisions involving assemblage and freedom of speech and the press will hardly be condemned in the United States after what has happened to these privileges in other parts of the world. The change in the law as to jurisdiction for the taxation of intangibles is only
another illustration of a bit of realism. The Citizenship cases are hard to condemn by any people free from bias and prejudice.

The decisions on the Twenty-first Amendment are enough to fill good citizens with alarm, but the Supreme Court cannot be blamed for these decisions. The blame must rest with those who put the Twenty-first Amendment in the United States Constitution. Some people may doubt the wisdom of the decision in *Erie R. Co. v. Tompkins*, but the chances are that opinion on this subject is pretty evenly divided. The Court perhaps may be criticised for its decision on the rate of return and rate base for public utility regulation; but if so, it will have to be criticised not for what it has done, since this decision was in accord with prior decisions, but for what it has not done but should have done. Here the Court was not liberal enough. But this was not one of the decisions filling with alarm men like Mr. Hogan. The decision on the question of amendment favoring making the matter a political instead of a judicial question may also arouse a difference of opinion, but certainly it is no cause for alarm.

The only conclusion to which it is possible to come, therefore, is that the decisions in the last three years have been good decisions, and that they are no cause for anybody getting alarmed. If so, it would seem to follow that the decisions which they overruled were the decisions about which people ought not have been alarmed.

Our United States constitutional history may be divided into eight periods: (1) The Constitutional Convention, (2) The Bill of Rights, (3) The period of Chief Justice Marshall, extending down to the Civil War, (4) The period of Miller and Waite, extending to the Eighties, (5) The period of Field, Fuller, and Peckham, extending to about 1910, (6) The period of Holmes, Brandeis, Hughes, and Stone, extending to 1922, (7) The period of Butler, McReynolds, Sutherland, and Van Devanter, extending through 1936, (8) The period of Cardozo, Brandeis, and Stone since 1936. The last six periods are all judicial periods. When the period since March 29, 1937, is compared with these other periods, it is found to
resemble the period of Holmes, Brandeis, and Hughes, and the period of Miller and Waite and to some extent the period of Chief Justice Marshall. The decisions rendered in this last period are not in conflict with decisions rendered in these other earlier periods. The only earlier periods which the last period does not resemble are the periods of Butler, McReynolds, Sutherland, and Van Devanter and the period of Field, Fuller, and Peckham; and its decisions are in conflict with the decisions in the period of McReynolds, Butler, Sutherland, and Van Devanter.

For this reason it can easily be seen that the Supreme Court in its recent overruling decisions was not destroying the original Constitution, nor the Constitution made by the formal amendments, nor the Constitution made by the Supreme Court in the third, fourth, and sixth periods, but only the Constitution made in the fifth and seventh periods, and mostly only the Constitution made in the seventh period. The Supreme Court has merely overthrown the dominance of justices Butler, McReynolds, Sutherland and Van Devanter. If the decisions dictated by these men in the seventh, as well as their dissents in the eighth, constitutional period had been more carefully analyzed by those who have criticized the decisions undoing their work it would have been realized that they had not necessarily announced the best constitutional doctrines and that they were out of line with general constitutional development and the work of the greatest justices on the Supreme bench; and more sympathy and less resentment would have been shown towards the attack of President Roosevelt on the Court, while disapproving of his methods. In reality he was not attacking the Supreme Court as a tribunal but only the decisions of Justices Butler, McReynolds, Sutherland, and Van Devanter. Happily or unhappily the dominance of these men has at last been overthrown, and henceforth our Constitution is likely to grow and develop along the lines marked out by justices with a very different viewpoint as to the function of a constitution.

Both Mr. Hogan and Mr. Jackson have taken indefensible positions. The trouble with Mr. Hogan was that he showed
familiarity only with the decisions of Justices Butler, McReynolds, Sutherland, and Van Devanter. Anybody believing in the wisdom of these decisions would naturally show the hysteria which Mr. Hogan manifested. But if Mr. Hogan had read all the decisions of the Supreme Court instead of the decisions of these four justices, he might have found more cause for alarm over the decisions which were overruled than in the decisions which did the overruling. Mr. Jackson took a position exactly opposite to that of Mr. Hogan. He was filled with pride over the work of the Supreme Court during the last three years, but he was filled with pride because he thought that these recent decisions of the Supreme Court were simply removing the successive layers of oil which had been spread over the original Constitution and taking us back to a genuine masterpiece welcomingly restored. Unfortunately for this position, these recent decisions do not take us back to the original Constitution but only to a judge-made Constitution, although too that judge-made Constitution made by such Justices as Marshall, Story, Taney, Miller, Waite, Holmes, Brandeis, Hughes, Cardozo, and Stone instead of by such Justices as Butler, McReynolds, Sutherland, and Van Devanter.