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THE SUPREME COURT DISSENTS

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The use of dissenting opinions is deeply imbedded in the history of the Supreme Court of the United States. *Georgia v. Brailsford*,<sup>1</sup> the first case in which opinions were reported, witnessed the splitting of the court in a 3 to 2 decision. Broadly speaking, it was only during the times of the dominating personality of Marshall that Supreme Court Justices refrained from dissents.

The importance of the role played by dissenting opinions in the development of American jurisprudence cannot easily be appraised. The dissent of Justice Iredell in *Chisholm v. Georgia*<sup>2</sup> later became part of the supreme law of the land in the Eleventh Amendment to the Federal Constitution.

A long series of dissenting opinions at different times eventually has driven the Court to reverse its policy, or has seemed to do so. Thus Field's dissent in *Rogers v. Burlington*<sup>3</sup> became law in *Brenham v. German American Bank*.<sup>4</sup>

Miller's dissent in the legal tender case led to the overruling of *Hepburn v. Griswold*<sup>5</sup> in *Knox v. Lee* and *Parker v. Davis*.<sup>6</sup>

Field's persistent dissents intended to uphold and protect a

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1. *State of Georgia v. Brailsford* (1792) 2 Dall. 402. 1 L. Ed. 433.

2. *Chisholm Ex'r. v. Georgia* (1793) 2 Dall. 419. 1 L. Ed. 440.

3. (U. S. 1866) 3 Wall. 654.

4. (1892) 144 U. S. 173.

5. (U. S. 1870) 8 Wall. 603.

6. (U. S. 1871) 12 Wall. 457.

conservative policy find an interesting counterpart in the equally famous and equally persistent dissents of Holmes, Brandeis and Cardozo, who advocated a liberal policy for the court.

These examples appear to make a case in favor of dissenting opinions. In this light it seems surprising that so great a dissenter as Justice Holmes should have stated that dissenting opinions are "useless and undesirable."<sup>7</sup> Excessive indulgence by judges in dissents might well detract from the prestige of decisions of the courts and lead toward a weakening of confidence in the stability of the law.<sup>8</sup> The great merit of the common law has been the balance between the two opposite needs of the legal system: stability in the law, and evolution of legal principles to conform to changing economic and social conditions. Paraphrasing Chief Justice Stone<sup>9</sup> as to the latter, one could say that Judges should not cast a dynamic society into a rigid mold.

Chief Justice Hughes once said:<sup>10</sup>

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."<sup>11</sup>

In the shifting political and economic bases of the American Republic, courts change their theories and their interpretations according to changes in the training and thinking of the judges through whom they must speak. Obviously the pressures of public opinion influence the minds of judges in the direction of

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7. This quotation is due to Evans, *The Dissenting Opinion—Its Use and Abuse* (1938) 3 *Mo. L. Rev.* 120, 122.

8. This is one of the common objections raised against the use of dissenting opinions. See e. g., Justice White, dissenting in *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 608: "The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conduct of the United States (1928) p. 68.

9. Stone, R. J., *Appraisal of Justice Van Devanter* (1942) *A.B.A.J.*, p. 459.

10. Hughes, *Columbia University Lectures*, published in the *Supreme Court of the United States* (1928), p. 68.

11. See also Chief Justice Stone, speaking to the 12th Annual Judicial Conference for the Fourth Circuit, at Asheville, North Carolina, on June 19, 1942, 13 *Mo. B. J.*, p. 98: "Although in my time there have been some opinions of the Court which were originally written as dissents, the dissenting opinion is likely to be without any discernable influence in the case in which it is written. Its real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law."

policies generally accepted by others, and it is possible that these processes are more often responsible for fundamental shifts in policy by the Supreme Court than is the leading of minority views, however strongly expressed and oft-repeated. But there is a certain glamour in the role popularly ascribed to dissenting opinions in American jurisprudence.

It may have been expected that "the important shift in constitutional doctrine due to a reconstruction in the membership of the court" noted by Mr. Justice Frankfurter in the *Graves* case<sup>12</sup> in 1938 would have been followed by a greater unanimity on the court, and result in fewer dissents. Any such expectation was not to be realized.

Notwithstanding the presence on the court of seven appointees by the same President, the October, 1941 Term witnessed—as the Chief Justice himself noticed<sup>13</sup>—more dissents than during any recent years. For purposes of comparison, the following table has been prepared to show the respective number of dissents and five-to-four decisions in the 1941, 1931 and 1921 October Terms of the court.

Term	Opinions <sup>14</sup>	Dissents <sup>15</sup>	Percent of the Dissents	Dissenting Votes	5 to 4 Decisions
1941	152	58	38	159	15
1931	151	26	16	54	2
1921	173	37	21	83	2

Although clearly significant as to the composite work and trends of thought of the court, this table cannot have more than an indicative value for any other purpose. The number of dis-

12. *Graves v. New York* (1939) 306 U. S. 466. In truth the 'shift' had come before the 'reconstruction'. The restrictions on state legislative power had been removed in *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. 379, while in similar manner federal power had been released in *Labor Board v. Jones & Laughlin* 301 U. S. 1; *Labor Board v. Fruehauf Co.* (1937) 301 U. S. 49; *Labor Board v. Clothing Co.* (1937) 301 U. S. 58; *Associated Press v. Labor Board* (1937) 301 U. S. 103.

13. Chief Justice Stone, address made on June 19, 1942, at the 12th Annual Judicial Conference for the Fourth Circuit, reprinted in 1942, 13 Mo. B. J., p. 98: "There have been quite a number of five to four decisions and a goodly number of dissents—more in fact than during any recent years, but not as many, I believe, as at some other periods in the court's history."

14. Memoranda opinions have not been included in this computation. When one opinion disposed of more than one case, one opinion only has been reckoned.

15. In the "dissents" dissenting opinions have been included as well as mere registrations of dissent, without any indication of the grounds upon which the dissent rests.

sents, by itself, does prove that the court does not indulge in one-man decisions. Where the writer of an opinion is faithfully followed by his colleagues, there is not much incentive for dissenting opinions. Since, on the other hand, the number of dissents is some evidence of the intellectual vividness and of the individual application of the Justices to the cases submitted to them, a rather detailed analysis is necessary in order to evaluate the dissents.

The preliminary purpose of showing the authorship of the dissenting and majority opinions is served by the following table:

DISSENTS IN THE 1941 OCTOBER TERM

Justices	Unanimous Opinions	Majority Opinions	Dissenting Opinions	Dissent Without Separate Opinions	Separate Dissents	Total Dissenting Votes
Black	15	3	10	0	0	21
Byrnes	10	6	0	0	0	12
Douglas	22	5	8	0	1	28
Frankfurter	6	12	8	0	1	16
Jackson	7	5	3	2	0	10
Murphy	10	4	3	0	1	18
Reed	3	9	5	0	1	13
Roberts	6	9	4	2	0	18
Stone	16	5	6	0	1	21
No author			6	1		
Totals	95	58	53	5	5	157

In order to carry a step further the comparison with the 1931 and 1921 October Terms, the two following tables have been prepared after the pattern of the table for the 1941 term:

DISSENTS IN THE 1931 OCTOBER TERM

Justices	Dissenting Opinions	Separate Dissents	Dissents Without Opinions	Total Dissenting Votes
Brandeis	2	1	0	13
Butler	3	0	0	4
Cardozo	2	0	0	4
Holmes	1	0	0	5
McReynolds	3	0	3	6
Roberts	0	0	0	2
Stone	6	0	0	13
Sutherland	2	0	0	3
Van Devanter	1	0	0	4
No author	1	0	2	0
Totals	21	1	5	54

## DISSENTS IN THE 1921 OCTOBER TERM

Justices	Dissenting Opinions	Separate Dissents	Dissents Without Opinions	Total Dissenting Votes
Brandeis	4	2	0	13
Clarke	4	0	1	16
Day	0	0	0	4
Holmes	6	0	0	9
McKenne	4	0	1	11
Pitney	0	1	0	3
McReynolds	3	1	2	13
Taft	1	0	0	6
Van Devanter	0	0	1	8
No author	0	0	10	0
Totals	22	4	15	83

It is a coincidence that the Chief Justice should have written the same number of dissenting opinions in the 1941 Term that he wrote as Justice in the 1931 Term. In 1931, however, he was the top dissenter, whereas in 1941 the number of his dissents was exceeded by Justices black, Douglas and Frankfurter.

An analysis of the dissents in the 1941 Term focusing on the grouping of the Justices shows that Justices Black and Douglas were united in 21 dissents, that Black took no part in 4 additional decisions in which Douglass dissented and that in three cases only Black and Douglass were on opposite sides, with Black joining the majority of the court. These two dissenters were joined by Murphy in 13 cases, by Byrnes in 6, by Reed in 4, by Jackson in 2 and they sided with the Chief Justice in 1 dissent only.<sup>16</sup>

A smaller pairing of dissents centers around the Chief Justice and Frankfurter who were together in 10 cases. Byrnes concurred in 5 of these opinions, Roberts in 4, Murphy in 2 and Reed in 1. It must be noted, however, that Stone participated in 11 other dissents in which Frankfurter was on the opposite side, and that Frankfurter joined in 5 dissents, which found the Chief Justice with the majority.

The Chief Justice and Frankfurter were joined by Byrnes 5 times and by Roberts 4 times, by Murphy 2 times and once by Reed. Roberts, however, joined the Chief Justice in 7 more of his dissents, thus bringing to 12 the number of dissents in which

16. *Jones v. Opelika* (1942) 316 U. S. 584.

they were united.<sup>17</sup> On the other hand, Roberts was with the majority in 8 cases in which the Chief Justice dissented. Roberts dissented alone in 5 cases, and Jackson in 2.

Quite as interesting as the positive side of the grouping of dissenting justices is the negative side of the same process. For example, Justice Byrnes never wrote a dissent, although the total number of his dissenting votes is 12, thus outnumbering by two, Jackson, who wrote 5 dissents.

It may be significant that in the 16 cases in which Frankfurter dissented, he is found only 2 times on the same side as Douglass, the two cases involving the same legal issues and practically amounting to a single decision.<sup>18</sup> In no case did Frankfurter and Black dissent together, in spite of the fact that Black dissented 21 times and Frankfurter 16. In no instance did Roberts join the dissenting duo Black-Douglas.

For purposes of discussion, the dissenting opinions will be considered under the four following headings, focusing on social, political, economic and legalistic or procedural problems. It is obvious that this classification is essentially empirical and that most of the decisions involve points which are not limited to any particular field, and which not only overlap other fields, but at times definitely embrace all of the proposed areas of discussion.

## I. SOCIAL PROBLEMS

### 1. *Freedom of Religion.*

Following the change in doctrine of 1937, the Supreme Court largely withdrew from the field leaving the disposition of the uses and management of property to the legislative, and to the executive departments of the states and the nation. A liberal court turned, then, to civil liberties and human rights as a major emphasis.

The relatively small, but irritatingly active association of zealots called Jehovah's Witnesses emerged as the most popular proving ground for the constitutional guaranties of freedom of religion and freedom of speech. This was the group formerly known as Russellites, whose interpretations of scriptural prophecies included specific expectations of "Armageddon," or "the

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17. Roberts took no part in two cases in which the Chief Justice dissented.

18. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407; and *National Broadcasting Co. v. U. S.* (1942) 316 U. S. 447.

second coming." Pastor Russell having passed away, leadership fell to 'Judge' Rutherford, who proved to be an aggressive and militant champion of the rights and liberties of his followers.

The issue of freedom of religion and its constitutional protection divided the Court in a five to four rather unusual alignment in *Jones v. Opelika*.<sup>19</sup> This is the only case of the term in which Black and Douglass joined the Chief Justice in a dissent—in which Murphy concurred. The majority ruled that sales of certain literature by the Jehovah's Witnesses were more commercial than religious, and therefore, such transactions could be subjected by local authorities to a "non-discriminatory tax." The regulatory character of the ordinance which established the tax was denied by the dissenting opinion, on the ground that the ordinance did not purport to provide for an exact compensation for services rendered, but established a "flat tax," and that the state court had not sustained the ordinance as regulatory. Stone pointed out with great vigor that this type of "flat tax" has been repeatedly deemed by the Supreme Court to be prohibited by the commerce clause, and that

"Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce."<sup>20</sup>

Moreover, the Chief Justice stated that the ordinance should be held invalid, on another independent ground, namely, that the license for distributors of the literature in question was revocable at will without cause and in the unrestrained discretion of administrative officials.<sup>21</sup>

Laymen and lawyers alike favorably received the dissent and approved the criticisms of the majority opinion.<sup>22</sup>

The dissenting view which is notable because Murphy, Black and Douglas took the unprecedented step of repudiating their concurrence in the *Gobitis* case<sup>23</sup> was destined to receive extraor-

19. (1942) 316 U. S. 584.

20. 316 U. S. 584, 610. The dissent of the Chief Justice recalls for its importance Brandeis' dissent in *Gilbert v. Minnesota* (1920) 254 U. S. 325, 334, which became law in *Gitlow v. N. Y.* (1925) 268 U. S. 652.

21. 316 U. S. 584, 600.

22. A sampling of newspaper editorials is given by Rotnem and Folsom, *Recent Restrictions upon Religious Liberty* (1942) 26 Am. Pol. Sci. Rev. 1066, notes 35 and 36.

23. *Minersville School District v. Gobitis* (1940) 310 U. S. 586. After Congress on June 22, 1942, Public Law No. 623, provided that the mere

dinary sanction within a very short time. The new turn appeared in *Jamison v. State of Texas*, decided by the Supreme Court on March 8, 1943.<sup>24</sup> The appointment of a new Justice, Rutledge, made possible the shifting of the court by his deciding vote. Rutledge's position on the issue as appellate judge was already on record in the *Busey* case,<sup>25</sup> and the decision of *Murdock v. Pennsylvania*<sup>26</sup> represents both a logical corollary to his philosophy,<sup>27</sup> and a speedier reversal of the Supreme Court than otherwise could have been expected.<sup>28</sup> The Chief Justice, lone dissenter in the *Gobitis* case,<sup>29</sup> had carried the court in less than three years.

## 2. Freedom of Speech.

The five to four decision in the *Bridges* case<sup>30</sup> is probably the outstanding event in the 1941 October Term, involving the balancing of such fundamental interests as independence of the judiciary with freedom of speech and press.<sup>31</sup>

standing at attention shows full respect to the flag by civilians, the Supreme Court of Kansas in *Kansas v. Smith* (1942) 155 Kans. 588, 127 P. (2d) 518, held that the refusal to salute the flag could not be a ground for expelling a pupil from the Kansas public school under the Kansas constitution.

24. 11 U. S. Law Week 4245.

25. Rutledge's dissent in *Busey v. District of Columbia* (App. D. C., 1942) 129 F. (2d) 24, 28, was quoted in Murphy's dissent in *Opelika*, 316 U. S. loc. cit. at p. 614.

26. 11 U. S. Law Week 4326, opinion rendered on May 3, 1943, by Mr. Justice Douglas, with Justices Reed, Roberts, Jackson and Frankfurter dissenting.

27. *Busey v. District of Columbia* (App. D. C. 1942) 129 F. (2d) 24, 38: "This is no time to wear away further the freedoms of conscience and mind by nicely technical or doubtful construction. Everywhere they are fighting for life. War now has added its censorships. They, with other liberties, give ground in the struggle. They can be lost in time also by steady legal erosion wearing down broad principle into thin right."

28. The *Opelika* case was law for less than eleven months.

29. (1940) 310 U. S. 586, 606-7: "The constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities."

The same process of analogy was used by the Chief Justice in the *Opelika* case. See *supra*.

30. *Bridges v. California* (1941) 314 U. S. 252.

31. In *Times-Minor Co. v. Superior Court* (1940) 15 Cal. (2d) 99, 98 P. (2d) 1029, the California Court stated that "liberty of the press is subordinate to the independence of the judiciary." To this Justice Black

The California Supreme Court had, in a sense, subordinated liberty of the press to the protection of judicial independence. The Supreme Court of the United States vindicated the freedom of speech and of the press in the circumstances there presented, which under the 14th Amendment is entitled to "the broadest scope that could be countenanced in an orderly society."<sup>32</sup> The court held that the judicially established standard of "clear and present danger" did not sustain the conviction, and that respect for the judiciary does not require shielding the judges from criticism: "To regard [criticism] as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise."<sup>33</sup>

The minority not only reaches the opposite conclusion in the application of the test of the "clear and present danger," but challenges the basic doctrine of the majority. The dissent does not hesitate to state that to substitute the "clear and present danger" test for the "age-old" formula of the "reasonable tendency" test is "an idle play on words."<sup>34</sup>

It is noteworthy that, in vindicating the rights of the judiciary to be shielded from criticism in the "calm" and "detached" discharge of their duties,<sup>35</sup> Justice Frankfurter himself resorted to strong language, stronger perhaps than would be expected from that calmness and detachment of the members of the judiciary which he had prescribed. In fact, he charged the majority with "careful ambiguities" and "silences"<sup>36</sup> of questionable justification in fact, and with giving "constitutional sanctity" to "trial by newspapers."<sup>37</sup>

The dissent reveals some of the characteristics of Justice

replied for the court, 314 U. S. 252, 260: "Free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

32. (1941) 314 U. S. 252, 265. Cf. Justice Sutherland in *Grosjean v. American Press Co.* (1936) 297 U. S. 233, 250: "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." And Justice Cardozo in *Palko v. Connecticut* (1937) 302 U. S. 319, 327: [Freedom of speech] "is the matrix, the indispensable condition, of nearly every other form of freedom."

33. *Bridges v. California* (1941) 314 U. S. 252, 273. The court refers to the language of Holmes dissenting with Brandeis, in *Toledo Newspaper Co. v. U. S.* (1918) 247 U. S. 402, 424.

34. *Ibid.* p. 295.

35. *Ibid.* p. 292.

36. *Ibid.* p. 279.

37. *Ibid.* p. 279-80.

Frankfurter's philosophy, namely, his reliance upon English traditions and precedents, as well as his belief in the dominating force of the Tenth Amendment—even, it sometimes seems, to the extent of endangering the constitutional guaranties of the individual. Slightly debatable seems the propriety of the reference made in the dissent to the fact that one of the petitioners was an alien,<sup>38</sup> since the relevant part of the 14th Amendment is not limited to citizens.

The five to four decision in *Ritter's Cafe* case<sup>39</sup> carries on the alignment and the play of philosophies which clashed in *Bridges v. California*. Frankfurter's strong belief in the controlling scope of state powers is again in conflict with Black's thesis that the due process clause safeguarding freedom of speech should be given the greatest latitude and effect.<sup>40</sup> Here, however, the positions are reversed. Black writes for the minority, and Frankfurter for the majority of the court.

Both opinions agree that picketing *may* come within the protection of freedom of speech, but that picketing involves something more than freedom of speech.<sup>41</sup> The disagreement focuses on the criteria to be used in drawing the line, and in this respect neither opinion seems quite to have found a satisfactory answer. The concept of "economic context," of economic capacity of the person against whom the picketing is directed, elaborated by Justice Frankfurter to delimit the permissible scope of peaceful picketing is none too clear as a touch-stone.<sup>42</sup> On the other hand,

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38. *Ibid.* p. 280.

39. *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe* (1942) 315 U. S. 722.

40. Black's dissent *id.* at p. 732:

"Accepting the constitutional prohibition against any law 'abridging the freedom of speech or of the press'—a prohibition made applicable to the states by the Fourteenth Amendment—'as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow', *Bridges v. California* (1941) 314 U. S. 252, 263, ante, 192, I think the judgment should be reversed."

41. See Justice Reed's dissent, *id.* at p. 728:

"We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations not destructive of the right to tell of labor difficulties, may be required."

The protection of picketing as an expression of free speech is criticized by Teller, "Picketing and Free Speech" (1942) 56 *Harv. L. Rev.* 180, and defended by Dodd, "Picketing and Free Speech: A Dissent" (1943) 56 *Harv. L. Rev.* 513.

42. See Reed's criticism, *id.* at p. 739 and Comment (1942) 40 *Mich. L. Rev.* 1200, 1210, 1213.

to consider with the minority "identity of the picketed person" as sufficient basis for lawful picketing is open to question on practical grounds. It seems that something more needs saying here before the court rests.

### 3. *Right of Privacy.*

In *Goldstein v. United States*<sup>43</sup> and in *Goldman v. United States*,<sup>44</sup> the right of privacy was further restricted by the Supreme Court, in favor of strengthening the enforcement of the criminal law. It is a matter of speculation whether the war emergency and the publication of Justice Roberts' report on Pearl Harbor, which was relied on in the *Goldman* case, were responsible for the alignment of the Justices.

The majority opinions were delivered in both cases by Justice Roberts, and in both cases the dissenters were the Chief Justice and Justices Frankfurter and Murphy.

In *Goldstein v. United States* it appeared that the two chief witnesses for the government were co-conspirators, who turned state's evidence after finding that certain implicating telephone conversations had been overheard by federal agents through wire-tapping.

The court's holding rests on the proposition that, under the Fourth Amendment, only the victim of the tapping operations may avail himself of the privilege and that since petitioners were not parties to the wire-tapped communications, they were not within the scope of Sec. 605 of the Federal Communications Act.<sup>45</sup> The court held that even if the Act were violated, that alone would not render the testimony so procured inadmissible, but only render the violator liable to the sanctions provided for by the Act.

As stated in the dissent, this argument seems to disregard the language of the statute, which prohibits the disclosure or publication of intercepted information whether for use of the interceptor or for use of *another*. The minority contends that the

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43. (1942) 316 U. S. 114.

44. (1942) 316 U. S. 129.

45. 47 U. S. C. A. sec. 605. The relevant provision of this section declares that "no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;" and shall not publish said information.

second *Nardone* case<sup>46</sup> should be controlling, and rejects the distinguishing criterion used by the majority that in the principal case petitioners were not parties to the intercepted messages.<sup>47</sup>

Since the Federal Communications Act does not purport to create a privilege as does the Fourth Amendment, but merely makes certain conduct unlawful, it seems that the minority opinion rests on a better ground than that of the majority. It may be ventured that, at least at the end of the war emergency, the scholarly opinion of Justice Murphy may come to be regarded as the better law.

The *Goldman* case emphasizes the division of the court on the limits of the right of privacy. The majority held that the overhearing of messages through a detectaphone is not "interception" within the meaning of Sec. 605 of the Federal Communication Act and that words spoken into a telephone in the presence of another do not constitute a communication by wire within the scope of the section. The Chief Justice and Justice Frankfurter dissented for the reasons expressed in their dissent in the *Olmstead* case<sup>48</sup> and Justice Murphy in a separate dissent brands the holding as an infringement of the Fourth Amendment, which needs an evolutionary interpretation if it is to secure today those guaranties which it was intended to provide in times of less scientific development. His dissent is important also because it points to a practical solution of the problem, by advocating that the use of a detectaphone be brought under the safeguard of a warrant.<sup>49</sup>

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46. *Nardone v. United States* (1939) 308 U. S. 338, (Frankfurter's opinion) held that evidence secured through clues furnished by the intercepted communication is inadmissible under the provision of Section 605 of the Federal Communications Act. The first *Nardone* case, *Nardone v. United States* (1937) 302 U. S. 379, (Robert's opinion) held that the Act applies to federal officers. N. Bernstein (1942) *The Fruit of the Poisonous Tree*, 37 Ill. L. Rev. 99, 116, argues that the majority in *Goldstein v. United States* is inconsistent with the holding of the first *Nardone* case. Certainly the effect of the *Goldstein* case is to restrict the rule of the *Nardone* cases to situations in which the person complaining of the violation of the Act has been party to the intercepted message.

47. (1942) 316 U. S. 114. As Justice Murphy stated in his dissent, p. 126, "While the sender can render interception, divulgence, or use lawful by his consent, it is a complete *non sequitur* to conclude that he alone has standing to object to the admission of evidence obtained in violation of Sec. 605."

48. *Olmstead v. U. S.* (1928) 277 U. S. 438.

49. (1942) 316 U. S. 129, at p. 140.

#### 4. *Right to Counsel.*

The delimitation of the constitutional right to counsel found the court divided both in *Betts v. Brady*<sup>50</sup> and in *Glasser v. United States*.<sup>51</sup>

In the *Betts* case, petitioner, unable for lack of funds to employ counsel, vainly requested the state court to appoint a counsel, and was committed to eight years' imprisonment for robbery. The Supreme Court was confronted with the issue whether the denial of counsel to an indigent accused is a violation of the constitutional guarantee of the 14th Amendment.

The majority opinion, rendered by Justice Roberts approved the finding of the trial court that

"the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure."<sup>52</sup>

And Justice Roberts added:

"the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."<sup>53</sup>

50. (1942) 316 U. S. 455. The dissenting opinion was written by Justice Black and concurred in by Justices Douglas and Murphy.

51. (1941) 315 U. S. 60. The dissenting opinion written by Justice Frankfurter, with the concurrence of Chief Justice Stone, would sustain the conviction on the grounds that the petitioner acquiesced in the appointment of his counsel as counsel for a confederate, and that the appointment did not result in any real prejudice to petitioner.

52. (1942) 316 U. S. 455 at p. 472. It is hardly realistic to state that a man of limited education can find his way through the intricacies of legal procedure. This point was made with great vigor by the Supreme Court in *Powell v. Alabama* (1932) 287 U. S. 45, 69:

"Even the intelligent and educated layman \* \* \* lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

This passage is quoted by Black's dissent in *Betts v. Brady*, *ibid.* pp. 475-6.

53. *Ibid.* p. 473.

The court appears apprehensive that to hold the facts of the case within the scope of the 14th Amendment would mean to extend the constitutional guaranty of counsel to innumerable situations involving minor offences.

Since petitioner had been sentenced to eight years' imprisonment, it seems that the difficulty of where to draw the line was carried a step too far. Thus it is almost surprising that the same court at the same term should have solemnly stated in *Glasser v. U. S.* that

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."<sup>54</sup>

Two philosophies are clearly shown in conflict, and it can be easily understood that the judge who, for the majority of the court, wrote this admonitory and well-considered statement should have sided with the minority in *Betts v. Brady*.

It is true that the protection of life is more important than the protection of liberty and that on this very ground, *Powell v. Alabama*<sup>55</sup> can be distinguished from *Betts v. Brady*. It is also true that *Betts v. Brady* is bottomed on the 14th Amendment, whereas *Glasser v. U. S.*<sup>56</sup> and *Johnson v. Zerbst*<sup>57</sup> are both applications of the 6th Amendment. Yet the majority of the court in the *Brady* case shakes the rationale of these distinctions some-

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54. (1942) 315 U. S. 74, 76. In this case, petitioner, an assistant United States attorney was convicted by the trial court for conspiracy to defraud the government. The Supreme Court reversed the conviction on the ground that the trial court had appointed as attorney for petitioner the attorney of a confederate without petitioner's consent, thus violating the 6th Amendment.

55. (1932) 287 U. S. 45. On its facts, this case can be limited to situations involving the death penalty. A different and more liberal trend had been shown by the court in *Grosjean v. American Press Co.* (1936) 297 U. S. 232, 243-4, when Justice Sutherland stated for the court that: "In *Powell v. Alabama*. \* \* \* we concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the 14th Amendment, and among them the *fundamental right of the accused to the aid of counsel in a criminal prosecution.*" (Our emphasis.)

56. It is an ironic coincidence that in the *Glasser* case a lawyer who had been an assistant U. S. attorney for 4 years should have been deemed entitled to the benefit of counsel under the due process clause of the 6th Amendment, and that in *Betts v. Brady* a similar protection should have been denied to an indigent layman of little education under the due process clause of the 14th Amendment.

57. (1938) 304 U. S. 458.

what when in its conclusion, instead of squarely limiting the right of counsel under the 14th Amendment to cases involving the death penalty, it relies on the rather loose and indefinite proposition that lack of counsel should not result in lack of "fundamental fairness."

This criterion seems intended to leave the door open to include within the protection of the 14th Amendment cases other than those providing for the death penalty.

*Betts v. Brady* and *Glasser v. U. S.* have one element in common: for opposite reasons, both cases show that law and justice still are far apart upon occasion, and in each of them the dissenting opinion seems to be more realistic and just than the majority opinion.<sup>58</sup> If the importance of safeguarding a basic constitutional guaranty may justify the decision in the *Glasser* case,<sup>59</sup> even at the risk of overstepping the breaking point, the opposite would appear to be true in *Betts v. Brady*.

##### 5. *Due Process and Coercion of Testimony.*

The court split in *Hysler v. Florida*<sup>60</sup> and *Lisenba v. California*<sup>61</sup> on the point of whether testimony had been extorted through coercion, in alleged violation of the 14th Amendment, with the majority upholding both convictions. The dissenting opinions were written by Black, with whom Douglas concurred in both instances, and Murphy in the *Hysler* case. The Court's decision in the latter case was written by Justice Frankfurter and clearly reveals his reluctance to bring the federal system to resume any kind of interference with the realm of state courts.<sup>62</sup> Actually, it was a factual decision. The holding seems to rest on

58. The majority in *Betts v. Brady* was criticized in the following comments: 21 Chi. Kent L. Rev. 107; 42 Col. L. Rev. 1205; 31 Ill. B. J. 139; 16 S. Cal. L. Rev. 55; 17 Tul. L. Rev. 306.

The majority in *Glasser v. United States* was criticized in the following law review comments: 9 U. Chicago Law Rev. 733; 27 WASHINGTON UNIVERSITY LAW QUARTERLY 518. See also Green, *Liberty Under the 14th Amendment*, id., 497 at 530, note 170.

59. On this ground, the majority opinion is praised or justified in 30 Ga. L. J. 570; 31 Ill. B. J. 71; 41 Mich. L. Rev. 321; 26 Minn. L. Rev. 657.

60. (1942) 315 U. S. 411.

61. (1941) 314 U. S. 219.

62. (1942) 315 U. S. 422.

"The state's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the State Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction."

the proposition that the allegations of coercion were patently incredible and, therefore, did not require a hearing by the trial court.

Long excerpts from the record were used by the minority to lend support to the contention that the cause should have been remanded to the lower court for further proceedings.<sup>63</sup>

## II. POLITICAL PROBLEMS

The issues considered under this heading will be limited to those arising out of the dual system of government and dealing with the allocation of power between state and federal agencies. The point of departure in government is the *control* of power. A number of opinions have already been discussed, in which the conflicting interests of state powers and federal rights created a division in policy on the court. Justice Frankfurter's standing on this problem represents one of the few clear lines which can be traced through many of the Court's split decisions.

### 1. *Substantive Law.*

Determination of the extent of federal powers under the interstate commerce clause caused the court to be divided in *Kirschbaum v. Walling*<sup>64</sup> and in *Cloverleaf Butter Co. v. Patterson*.<sup>65</sup> The *Kirschbaum* case found Justice Roberts registering his dissent from the rest of the court in what constituted a far-reaching application of the Fair Labor Standards Act.

In the *Patterson* case a 5 to 4 majority of the Court held that the Renovated Butter Act shows the Congressional intent to "occupy the field" and therefore, to preclude the exercise of state powers in the same area. The Chief Justice, joined by Justices Frankfurter, Murphy and Byrnes filed a strong dissent, urging that

"To find \* \* \* an intent to restrict state power, not required by the words of the statute, is to condemn a working, harmonious federal-state relationship for the sake of a sterile and harmful insistence on exclusive federal power."<sup>66</sup>

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63. A similar division on the interpretation of the facts of the case split the court in *Lisenba v. California* (1942) 314 U. S. 219.

64. (1942) 316 U. S. 517. This case is commented in 27 WASHINGTON UNIVERSITY LAW QUARTERLY 588 (1942). For a criticism of the holding see Jaffin (1943) 43 Col. L. Rev. 98 at pp. 102-3.

65. (1942) 315 U. S. 148.

66. *Ibid.* p. 174.

The Chief Justice emphasizes the rapidly vanishing concept that the process of construction of federal statutes must be shaped according to the basic requirements of the dual system of government.<sup>67</sup>

The delimitation of the overriding force of federal statutes split the court in another 5 to 4 decision in *Reitz v. Mealey*.<sup>68</sup> Here the alignment of the court differs again, with Justice Roberts writing the majority opinion, and Douglas the dissent, in which Black, Byrnes and Jackson concurred. The court held that a New York statute which suspended the driving license of a car operator for nonpayment of a judgment for an injury resulting from the operation of the car until the judgment had been satisfied—otherwise than by a discharge in bankruptcy—and conferred power upon the judgment creditor to lift the suspension, did not contravene the federal law on bankruptcy.

The majority held that the statute was a lawful exercise of the police power of the state to provide for the safety of its highways and refused to pass on the constitutionality of the power granted by the statute to the judgment creditor, on the ground that such power had not actually been exercised in the instant case.<sup>69</sup> The minority found the very existence of the power sufficient to throw the debtor at the mercy of his creditor, in spite of the discharge in bankruptcy and in violation of the federal law.<sup>70</sup>

The closing words of the dissenting opinion of the Chief Justice in *U. S. v. Pink*<sup>71</sup> give a further illustration of his conception

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67. *Ibid.* p. 176: "It is one thing for courts in interpreting an Act of Congress regulating matters beyond state control to construe its language with a view to carrying into effect a general though unexpressed congressional purpose. It is quite another to infer a purpose, which Congress has not expressed, to deprive the states of authority which otherwise constitutionally belongs to them, over a subject which Congress has not undertaken to control."

68. (1941) 314 U. S. 33.

69. A 1939 amendment to the statute required the County Clerk to certify the judgment only upon the request of the creditor, instead of automatically as before. Although the creditor had actually exercised this power, the court held that, since the judgment should have been certified even under the old law, the statute would stand even if the amendment is invalid.

70. (1941) 314 U. S. 41: "Bankruptcy is not then the sanctuary for helpless debtors which Congress intended."

71. (1942) 315 U. S. 203, 256: "Under our dual system of government there are many circumstances in which the legislative and executive branches of the national government may, by affirmative action expressing its policy, enlarge the exercise of federal authority and thus diminish the power which otherwise might be exercised by the states. It is indispensable

of the dual system of government and of the function conferred by it upon the courts. Whereas Stone's philosophy in *Pink's* case is the same as that which found expression in the *Patterson* case,<sup>72</sup> it is rather surprising to find Justice Frankfurter siding with the majority in a concurring opinion.

The *Pink* decision is a revolutionary proposition of international law, holding that because of the recognition of a foreign government, state courts are prevented from applying local law and policy to litigation concerning property within the states. The Chief Justice dissented on the ground that neither such recognition nor the accompanying assignment of the claims of a foreign state to the American government compelled in their terms or history such holding. This conclusion is said to stand—even though the executive agreement be deemed to have become "the supreme law of the land."<sup>73</sup>

## 2. *Jurisdiction and Procedure.*

INJUNCTIONS: In the *Kepner* case,<sup>74</sup> the majority, through Justice Reed, denied the power of a state court to enjoin the prosecution of an action brought in a federal court under the Federal Employers' Liability Act. This decision which merely follows the weight of authority<sup>75</sup> is criticized by Frankfurter, joined in his dissent by the Chief Justice and Justice Roberts, on the ground that the Federal Employers' Liability Act did not limit the jurisdiction of state courts.<sup>76</sup> A second characteristic theory

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to the orderly administration of the system that such alteration of powers and the consequent impairment of state and private rights should not turn on conceptions of policy which, if ever entertained by the only branch of the government authorized to adopt it, has been left unexpressed. It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred."

The Chief Justice's dissent was concurred in by Justice Roberts.

72. (1942) 315 U. S. 148.

73. For an elaborate criticism of this decision, see (1942) 51 Yale L. J. 848.

74. *Baltimore & Ohio R. R. Co. v. Kepner* (1941) 314 U. S. 44.

75. See Annotation, 86 L. Ed. 39, 40.

76. *Baltimore & Ohio R. R. Co. v. Kepner* (1941) 314 U. S. 60: "Instead of being deemed hostile to the purposes of the Federal Employers' Liability Act and not to be entrusted with its administration, the state courts were accepted as the most active agencies for its enforcement."

And at p. 61: "To read the venue provision of the Act as do the majority of the Court is to translate the permission given a plaintiff to enter courts previously closed to him into a withdrawal from the state courts of power historically exercised by them, and into an absolute direction to the specified federal and state courts to take jurisdiction."

of Justice Frankfurter is apparent in the dissent, namely, his concern for the "controlling factor of public interest" imbedded in the "important national function of which the railroads are the agency."<sup>77</sup> Frankfurter's contention was spiritedly criticized in the concurring opinion of Justice Jackson in the *Miles* case,<sup>78</sup> who denounced the "rather fantastic fiction that a widow is harassing the Illinois Central Railroad."<sup>79</sup> The dissenting trio in the *Kepner* case was reinforced by Justice Byrnes in *Miles v. Illinois Central Railroad Co.*

In the light of these decisions it is not surprising to find Frankfurter writing the majority opinion in the *Toucey* case,<sup>80</sup> which, overruling by implication the authority of *Supreme Tribe of Ben Hur v. Cauble*,<sup>81</sup> held that federal courts lack the power to enjoin the parties in a state action from relitigating the same issue decided by a federal decree. The positions here are reversed: Reed who in the *Kepner* and *Miles* cases wrote the majority opinion is now the author of a vigorous dissent in which he was joined by the Chief Justice and Justice Roberts. The previously dissenting Justice Frankfurter writes here for the majority in an opinion which has the same stylistic characteristics as the *Rochester Telephone* case,<sup>82</sup> but which is possibly not equally persuasive in its reasoning and conclusion.<sup>83</sup>

DECLARATORY JUDGMENTS: A similar alignment of the court is carried over in the *Brillhart* case,<sup>84</sup> in which Justice Frankfurter wrote for the majority and the Chief Justice prepared the

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77. *Ibid.* p. 36.

78. *Miles v. Ill. Central R. R. Co.* (1942) 315 U. S. 698 (majority opinion by Reed) held that a state court could not enjoin a suit brought in a court of another state under the venue provision of the Federal Employers' Liability Act.

79. *Ibid.* p. 706.

80. *Toucey v. N. Y. Life Ins. Co.* (1941) 314 U. S. 118. The same decision disposed also of *Phoenix Finance Co. v. Iowa-Wisconsin Bridge Co.* (1941) 314 U. S. 118.

81. (1921) 255 U. S. 356.

82. *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125. Typical of the two opinions is a scholarly discussion of problems broader than the specific issue calling for the decision of the court.

83. The decision in the *Toucey* case is criticized in (1942) 20 *Chi. Kent Rev.* 272 and in (1942) 27 *Iowa L. R.* 652.

84. *Brillhart v. Excess Ins. Co.* (1942) 316 U. S. 491, held that a Federal District Court did not properly exercise its discretion in dismissing a declaratory judgment suit brought by a reinsurer to determine his liability, without making a finding as to whether the question could be adequately tested in a garnishment proceeding pending against the insurer in a Missouri state court.

dissent, with the concurrence of Justices Roberts and Jackson. The court split on the proper limits of federal jurisdiction, Justice Stone arguing that "a suitor ought not to be penalized, as respondent plainly is, for invoking the federal jurisdiction,"<sup>85</sup> and Justice Frankfurter relying on the principle that "gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."<sup>86</sup>

**PARTIES ALIGNMENT:** The same clash of philosophies had occurred in the *Chase* case<sup>87</sup> which was decided before the *Brillhart* and the *Miles* cases. Here the issue was whether a certain party alignment was "window dressing" envisaged in order to confer federal jurisdiction over the suit. The majority opinion was again written by Justice Frankfurter, whereas the minority opinion was prepared by Jackson, with whom sided the Chief Justice, and Justices Roberts and Reed. Here as in the *Brillhart* case, the minority seems concerned with the prejudice resulting to a suitor who after years of litigation in the Federal Courts is ousted on jurisdictional grounds.<sup>88</sup> The majority relies on the rule that jurisdiction of federal courts resting on diversity of citizenship should be strictly construed.<sup>89</sup>

### III. ECONOMIC PROBLEMS

#### 1. *Construction of Economic Legislation.*

The construction of legislation directed toward raising the economic standards of the people either directly or through the

85. *Ibid.* p. 502. The dissent agreed with the Court of Appeals that the District Court abused its discretion and should enter judgment on the merits.

86. *Ibid.* p. 495.

87. *Indianapolis v. Chase National Bank* (1941) 314 U. S. 63. The Chase Bank, citizen of New York and Trustee under a mortgage deed, sued the mortgagor and the present holder of the mortgaged property, both citizens of Indiana. The point on which the court split was whether the mortgagor's liability for overdue interests was collateral to the main issue of the holder's liability, as to which plaintiff and mortgagor were in agreement.

88. Jackson, *ibid.* p. 83, points out that: "Three years ago this Court refused to review the decision of the Circuit Court of Appeals that this controversy was within the federal jurisdiction. \* \* \* where the case is again brought here after some years of litigation, jurisdiction ought not to be overturned on light or inconsequential grounds, or on disagreements with the court below on matters of fact." The dissent relies also on the fact that the decision of the court "forces into the position of co-plaintiff one party which the District Court adjudged solely liable to pay that sum."

89. *Shamrock Oil & Gas Corp. v. Sheets* (1941) 313 U. S. 100. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 *Corn. L. Q.* 499. Statistics showing the percentage of cases concerning diversity of citizenship are given in Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts* (1933) 19 *A. B. A. J.* 499.

promotion of industrial development split the court in six decisions. Here again the court does not show a steady alignment. Although Justice Douglas was frequently joined by Justices Black and Murphy in what has been called the left wing of the court, they were on opposite sides in *United States v. Emory*.<sup>90</sup> In this case Black joined the majority, and Douglas the dissenting Justices Reed, Roberts and Jackson. The court held that the statute granting priority to the claims of the United States<sup>91</sup> is not conflicting with the provisions or the purpose of the National Housing Act. The dissent objects that this decision runs afoul of the purposes of the Housing Act, by discouraging private investment and thus preventing "that economic recovery which was the aim of the legislation."<sup>92</sup>

Black, Douglas and Murphy are the dissenters in the *Williams* case,<sup>93</sup> in which the court held, through Justice Reed, that red caps tips could be treated as part of the statutory minimum wages. Here the dissent is based upon a not too impressive literal interpretation of the Congressional language which casts the duty to pay minimum wages upon "every employer." Another issue arising out of the interpretation of the Fair Labor Standards Act split the Court in a 5 to 4 decision in the *Belo* case,<sup>94</sup> with Reed, Black, Douglas and Murphy on the dissenting side. Writing for the majority, Byrnes rationalized that

"Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected."<sup>95</sup>

The dissent finds that the contract in question was intended to defeat the purpose of the statute, and therefore, should not be sustained.

Douglas, Black and Murphy are joined by Byrnes in their dissenting opinion in *Puerto Rico v. Russell*.<sup>96</sup> On the ground that the holder of a contract with the government to secure water was a beneficiary under an irrigation project and as such should

90. (1941) 314 U. S. 423.

91. Rev. Stat. 3466, 31 U. S. C. sec. 191.

92. (1941) 314 U. S. 423, 436. For a comment favoring the minority view see 9 U. Ch. L. Rev. 522 (1942).

93. *Williams v. Jacksonville Terminal Co.* (1942) 315 U. S. 386.

94. *Metcalfe Walling v. Belo Corporation* (1942) 316 U. S. 624.

95. *Ibid.* p. 635.

96. (1942) 315 U. S. 610.

not be permitted to escape his fair share of the costs, the dissenters refuse to adhere to the holding that the statute authorizing the assessment conflicted with the contract clause of Puerto Rico's organic law.

A sustained cautious attitude toward liberal construction of labor laws is shown in two dissents of the Chief Justice. In *Southport Petroleum Co. v. N. L. R. B.*,<sup>97</sup> the Chief Justice joined Justice Reed's dissent from the holding that a transferee of an employer, against which a reinstatement and notice-posting order has been entered by the National Labor Relations Board, may be bound by it. Stone is the lone dissenter in *United States v. Local 807*,<sup>98</sup> in which a 6-man decision rendered by Justice Byrnes held that no violation of the Federal Anti-Racketeering Act<sup>99</sup> was committed by labor union members who, by threats of violence, obtained payment of "wages" as bona fide employees of truck owners, who acceded to their demands for the purpose of procuring protection rather than of hiring their services. The Chief Justice strongly dissented on the point that where no actual service is rendered, there can be no employment relationship<sup>100</sup> and, therefore, no exemption from the application of the statutory sanctions. There seems to be a sound and wholesome policy underlying the dissent. It is doubtful whether good law can ever be predicated upon bad morals.

## 2. Administrative Discretion.

Reviewability of administrative discretion split the court in eight cases, involving three agencies, the National Labor Relations Board, the Interstate Commerce Commission and the Bituminous Coal Division.

In the *Southern Steamship Co.* case,<sup>101</sup> Justices Reed, Black, Douglas and Murphy refused to follow the majority's holding that the National Labor Relations Board had abused its discre-

97. (1942) 315 U. S. 100, commented on in 55 Harv. L. Rev. 1048.

98. (1942) 315 U. S. 521.

99. 18 U. S. C. 420a excepts from punishment under the Act "any person who \* \* \* obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion \* \* \* the payment of wages by a bona fide employer to a bona fide employee."

100. *United States v. Local 807* (1942) 315 U. S. 521, 541: "It is a contradiction in terms to say that the payment of money forcibly extorted by a payee who is in any case a lawbreaker, and paid only to secure immunity from violence, without establishment of an employment relationship or the rendering of services, is a good faith payment or receipt of wages."

101. *Southern Steamship Co. v. N. L. R. B.* (1942) 316 U. S. 31.

tion in ordering the reinstatement of seamen discharged by their employer for having struck on board a docked ship, and having thus become guilty of mutiny.<sup>102</sup> Justice Byrnes who wrote for the majority in the instant case, sided with the dissenting Justice Roberts and the Chief Justice in *Gray v. Powell*,<sup>103</sup> which upheld the discretion of the Bituminous Coal Division in denying the position of producer to a Railroad lessee of coal mines operated by an independent contractor for the exclusive use of the Railroad.<sup>104</sup>

In the two grandfather clause cases, in which the court set aside the orders of the Interstate Commerce Commission,<sup>105</sup> Douglass wrote the majority opinions, from which Justices Jackson and Frankfurter dissented. Their dissent is particularly interesting because of the criterion of reviewability of administrative action which it set up. The two justices affirm their faith in the administrative process, which—they believe—should be given greater discretion whenever the subject matter involved falls squarely within the federal field and does not conflict with any rights of the states.<sup>106</sup>

This criterion combines two of the basic philosophies of Justice Frankfurter: development of the administrative process and the overriding force of the Tenth Amendment.

In the third case which arose from the grandfather clause,<sup>107</sup> the majority, through Justice Jackson upheld the order of the Interstate Commerce Commission, denying claimant's applica-

102. For a criticism of the decision, see (1942) 42 Colo. L. R. 1053.

103. (1941) 314 U. S. 402.

104. Speaking for the court, Justice Reed laid down the rule on judicial review, *id.* at p. 413: "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed." Reviewing the facts of the case, the court stated, *id.* p. 414: "The shortness of the leases, the freedom from investment in coal lands or mining facilities, the improbability of profit or loss from the mining operations, the right to cancel when cheaper coal may be obtained in the open market, all deny the position of producer to the railroad."

105. *United States v. Carolina Motor Freight Carriers Corp.* (1942) 315 U. S. 475, and *Hall Co. v. United States* (1942) 315 U. S. 495.

106. *Ibid.* p. 491: "It is one thing to require the Interstate Commerce Commission to be explicit in finding jurisdictional facts before it invades conceded state power. It is a wholly different thing to read with a hostile eye the Commission's findings that a claim for exemption from conceded federal regulatory authority has not been sustained."

107. *Gregg Cartage & Storage Co. v. United States* (1942) 316 U. S. 74.

tion on the ground that he had "control" of the facts leading to a receivership proceedings and therefore, was not within the purview of the grandfather clause.<sup>108</sup> Douglass, Black and Byrnes refused to follow the Commission's interpretation of the statutory word "control" which they claim is "non-technical" and does not call for the application of the rule that in a "highly specialized field" administrative interpretations are entitled to special consideration by the courts.<sup>109</sup>

Two rulings of the Interstate Commerce Commission caused the court to split again in the *Swift*<sup>110</sup> and *Frank*<sup>111</sup> cases, with the majority upholding the administrative determination in each case. The Chief Justice, who wrote the dissent in the *Frank* case with the concurrence of Justices Reed, Frankfurter and Byrnes, sided with the dissenting Justices Douglass and Murphy in the *Swift* case. It may be noted that this is one of the three cases in which Douglass and Black were on opposing sides.

As a whole these decisions fail to reveal a clear-cut alignment of the court, except for the fact that the Chief Justice and Justice Roberts<sup>112</sup> are generally found in favor of closer scrutiny of administrative action.

### 3. *Delegability of Subpoena Power.*

A striking illustration of the clashing philosophies of the expanding needs of the administrative process upon the one hand, and of respect for the traditional canons of statutory construction on the other, with the binomial Douglass-Black on the one side and the Chief Justice on the other, is offered by the 5 to 4 decision in the *Cudahy Packing Co.* case.<sup>113</sup>

Speaking for the court, the Chief Justice denied authority to

108. The pertinent part of Sec. 206(a) of the Motor Carrier Act of August 9, 1935, 49 U. S. C. A. sec. 306(a), provides that the Commission shall issue a certificate of public convenience and necessity if the carrier or his "predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 \* \* \* and has so operated since that time, except \* \* \* as to interruptions of service over which the applicant or its predecessor had no control." (Our emphasis.)

109. *Gregg Cartage & Storage Co. v. United States* (1942) 316 U. S. 74, 88.

110. *Swift & Co. v. United States* (1942) 316 U. S. 216.

111. *N. Y., Chicago & St. Louis R. R. Co. v. Frank* (1941) 314 U. S. 360.

112. Justice Roberts was the lone dissenter in *N. L. R. B. v. Electric Vacuum Cleaner Co.* (1942) 315 U. S. 685, in which the court upheld the finding of the Board.

113. *Cudahy Packing Co. v. Holland* (1942) 315 U. S. 357. The other dissenting Justices were Jackson and Byrnes.

the administrator of the Wage and Hour Division to delegate to subordinate officers his statutory power to issue subpoenas duces tecum. This decision seems to represent a further step in the court's trend evidenced by the first *Morgan* case.<sup>114</sup>

The lack of express statutory grant of power is construed by the majority as a denial of such power in the light of the legislative history of the specific provision in question<sup>115</sup> and of the peculiar nature of the power to issue subpoenas.<sup>116</sup> This conclusion is also supported by an application of the principle of construction *inclusio unius exclusio alterius*<sup>117</sup> and by a reduction *ad absurdum* of the Administrator's contention.<sup>118</sup>

The dissent scores a point in indicating that the requirement whereby the Administrator alone can issue a subpoena duces tecum is more a formal than a substantial safeguard for the parties in interest.<sup>119</sup> It is obviously impossible for one man to "exercise an independent judgment" on each of the 6,000 subpoenas issued in the 1941 fiscal year.<sup>120</sup> There is a certain

114. *Morgan v. U. S.* (1936) 298 U. S. 468. The literature on this case is reviewed in Gellhorn, *Administrative Law—Cases and Comments* (1940) 746.

115. *Cudahy Packing Co. v. Holland* (1942) 315 U. S. 357, 359. Section 9 of the Fair Labor Standards Act of June 25, 1938, 29 U. S. C. A. sec. 209, confers upon the Administrator the chief of the Children's Bureau and the Industry Committee the subpoena power granted to the Federal Trade Commission, which has no authority to delegate said power. The court notes also that a section of the bill conferring expressly the delegating power was rejected by the Conference Committee. The dissent denies that the specific issue of the delegability of the subpoena power was debated in Congress. *Id.*, at p. 372.

116. *Ibid.* p. 363: "It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

117. "The power to gather data and make investigations is expressly made delegable by Sec. 11" of the Act, 29 U. S. C. A. sec. 211. *Id.* at p. 364. See also p. 361.

118. *Ibid.* p. 361: "A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words."

This argument is disregarded in (1942) 40 Mich. L. Rev. 894, 895 which seems to favor full discretion in the administrator as to which powers should be delegated. Cf. *Lowell Sun Co. v. Fleming* (C. C. A. 1, 1941) 120 F. (2d) 213.

119. As the majority opinion noted, *id.* at p. 365, footnote 8, some of the agencies have delegated the actual issuance of subpoenas, though not their signing. The court, however, refrained from passing on the validity of this practice.

120. Rather weak seems the other argument of the dissent that the subpoena power is but an incident of the investigatory power, which is expressly made delegable by the Act.

strength in the minority argument that formal requirements do not add a great deal to the substantial justice in the administration and that they become merely perfunctory.<sup>121</sup> Yet the argument seems more proper for Congress to pass upon than for the judiciary which is necessarily limited in its constitutional function. The closing words of the dissent state the case for an untrammelled administrative process. They give warning that the requirement in question "may well retard the social and economic program which the Act inaugurated. We should be alert to prevent sheer technicalities from interposing delay in a law enforcement program."<sup>122</sup> This is one of the shibboleths of administrative absolutism.

#### 4. *Procedural Requirements to Review.*

One of the major legal issues in the present century, the reviewability by the judiciary of the administrative process, divided the court in two leading cases. The most important decision was rendered by the Chief Justice in *Columbia Broadcasting System v. United States*,<sup>123</sup> with Justice Frankfurter writing the dissent, in which he was joined by Justices Reed and Douglas.<sup>124</sup> The court split on the issue whether certain regulations promulgated by the Federal Communication Commission and setting forth new requirements for the granting and cancellation of licenses to operate a radio station were orders reviewable under Sec. 402(a) of the Communication Act of 1934, 47 U. S. C. A., Sec. 402(a). Since these requirements were in direct conflict with contracts between the Columbia Broadcasting System and its affiliated stations, some of the stations had notified complainant that they would not be bound by their contracts after the regulations should become effective. Thus the court held that the regulation in question affected complainant's rights immediately, and not only on the contingency of future administrative

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121. The argument is often made that placing direct responsibility upon subordinate officers is conducive to a better administration than letting them do the work with ultimate responsibility vested in the higher official, who merely signs the papers. As Justice Brandeis said in *St. Joseph Stock Yards Co. v. United States* (1935) 298 U. S. 38, 92: "Responsibility is the great developer of men."

122. *Cudahy Packing Co. v. Holland* (1942) 315 U. S. 357, 373.

123. (1942) 316 U. S. 407.

124. Justice Black, who usually sides with Justice Douglas took no part in the consideration of this case, nor in that of its companion case, *National Broadcasting Co. v. United States* (1942) 316 U. S. 447, which witnessed the same alignment of the court.

action,<sup>125</sup> as it is claimed by the dissent.<sup>126</sup> The Chief Justice leans heavily upon the realities of the case and refuses to pay attention to what he calls an "over-refined technique"—apparently implying that of the minority.<sup>127</sup> At least, the hint is answered by Frankfurter,<sup>128</sup> who urges that courts are not the only guardians of the rights and liberties of the people,<sup>129</sup> and that

"\* \* \* this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest."<sup>130</sup>

It may be noted that the concept expressed here by Justice Frankfurter seems to be slightly out of harmony with what he wrote for the majority of the court in the *Scripps-Howard* case.<sup>131</sup>

"\* \* \* judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made."<sup>132</sup>

In the *Scripps-Howard* case, the dissenting Justices Douglas

125. On the merits, the regulations of the Commission were lately upheld by the Supreme Court in the October Term, 1942, 11 U. S. Law Week 4865, with Justices Murphy and Roberts dissenting.

126. The minority opinion considers that the regulations have affected only complainant's economic interests, but not its legal rights, which might be affected only by *future* action of the Commission denying a license. On this basis, the dissent states that it is controlled by the decision in *United States v. Los Angeles* (1927) 273 U. S. 299. The premise of the majority affords a proper ground for distinguishing this holding from the principal case. The dissent is considered the better view in (1942) 56 Harv. L. Rev. 121, but is criticized in (1942) 42 Col. L. Rev. 1197 and in (1942) 41 Mich. L. Rev. 316.

127. *Columbia Broadcasting System v. United States* (1942) 316 U. S. 407, 425: "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

128. *Ibid.* p. 441: "While formally we may appear to be dealing with the technicalities, behind these considerations lie deep issues of policy in the division of authority as between administrative agencies and courts in carrying out the constitutional will of Congress. \* \* \* What we are here concerned with is due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative and the judicial."

129. *Ibid.* p. 446.

130. *Ibid.* p. 445.

131. *Scripps-Howard Radio v. Federal Communications Commission* (1942) 316 U. S. 4.

132. *Ibid.* p. 10.

and Murphy carried the function and characteristics of the administrative process to their greatest latitude, by denying the inherent power of the reviewing court to grant a stay of enforcement of the administrative order, during the pendency of judicial review.<sup>133</sup>

#### IV. LEGAL PROBLEMS

##### 1. *Stare Decisis.*

An interesting illustration of the different degrees of reliance placed by members of the court on the principle of *stare decisis* is offered by the *American Surety Co.* case.<sup>134</sup> The contention stated by Justice Frankfurter for the majority that the decision was compelled by the *Merrill* case<sup>135</sup> was strongly resisted by the dissenting Justices Douglas and Black:

"The only virtue possessed by *Merrill v. National Bank of Jacksonville* \* \* \* is the fact that it has been on the books for over forty years."<sup>136</sup>

Although in the *Commercial Molasses Corporation case*,<sup>137</sup> the authority of the precedents seems to have been more on the side of the dissenting Justices Black, Douglas, Murphy and Byrnes,<sup>138</sup> than on that of the majority,<sup>139</sup> yet the dissenters stated their willingness to cast precedents aside, in order to reach a result more in harmony with the complexities of modern shipping.<sup>140</sup>

133. The effort of the minority to find support for their contention in the silence of Congress is beautifully disposed of by Justice Frankfurter, 316 U. S. 11: "The search for significance in the silence of Congress is too often the pursuit of a mirage."

134. *American Surety Co. v. Bethlehem National Bank* (1941) 314 U. S. 314. The court held that the surety which has satisfied its obligation to the creditor is entitled by the equitable doctrine of subrogation to dividend payments on the basis of the original indebtedness. The case is commented in (1942) 15 So. Cal. L. Rev. 527.

135. *Merrill v. National Bank of Jacksonville* (1899) 173 U. S. 131.

136. *American Surety Co. v. Bethlehem National Bank* (1941) 314, 319. The *Merrill* decision was criticized by Clark, Proof by Secured Creditors in Involving and Receivership Proceedings (1920) 15 Ill. L. Rev. 171.

137. *Commercial Molasses Corp. v. New York Tank Barge Corp.* (1941) 314 U. S. 104.

138. See Comments (1943) 41 Mich. L. Rev. 693 (1942) Col. L. Rev. 699, footnote 15.

139. The decision of the court contributes toward greater uniformity in the law of carriers. Under the doctrine enunciated by the majority, the distinction between common carriers and private carriers is given importance as it is in the law relating to land carriers, with correspondingly different degrees of responsibility to the owner of the goods transported. The discussion of the elusive subject *burden of proof* is illuminating.

140. *Commercial Molasses Corp. v. New York Tank Barge Corp.* (1941) 314 U. S. 104, 117: "If such a distinction had existed, the 'new lights' shed by the awareness of ever increasing complexity in modern shipping, a

In the *Aldrich* case<sup>141</sup> an unsuccessful plea for *stare decisis* was made by Justice Jackson in a vigorous dissent in which he was joined by Justice Roberts. The majority, through Justice Douglas denied the existence of constitutional immunity from inheritance taxation of intangibles by states other than the domiciliary state,<sup>142</sup> thus expressly overruling *First National Bank v. Maine*,<sup>143</sup> and carrying into law repeated dissents of the then Justice Stone.<sup>144</sup>

Characterizing this decision as "the proverbial leap from the frying pan into the fire,"<sup>145</sup> Jackson emphasizes the practical disadvantages which will result from the court's holding, which is probably the most remarkable change of front of the 1941 October Term.

## 2. Legal Formulas.

In a strong as well as learned dissent, Justice Frankfurter blamed the majority in *United States v. Bethlehem Steel Corp.*<sup>146</sup> for holding

"\* \* \* that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, 'daylight robbery', exploitation of the 'necessities' of the country at war, must be consummated by this Court."<sup>147</sup>

Backing his conclusion with analogies from other fields of law, and with his usual resort to English authorities, Justice Frankfurter asserts his main contention that courts should "not permit themselves to be used as instruments of inequity and injustice."<sup>148</sup>

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complexity equally incomprehensible to the shipper whether he deals with a private or common carrier, could, perhaps not without propriety, have been taken by this Court as a reason for erasing it."

141. *State Tax Commission v. Aldrich* (1942) 316 U. S. 174.

142. In a concurring opinion, Frankfurter carries into application his often noted basic principle that the Constitution does not support easy withdrawals of state rights.

143. (1932) 284 U. S. 312.

144. In *Baldwin v. Missouri* (1930) 281 U. S. 586, Stone joined Brandeis in Holmes' dissent, and in the now overruled *Maine* case, Stone wrote the dissent in which Justices Holmes and Brandeis concurred.

145. *State Tax Commission v. Aldrich* (1942) 316 U. S. 174, 186.

146. (1942) 315 U. S. 289. The court denied the government's contention that a World War I contract for the construction of 13 ships by the Bethlehem Steel Corp. had been entered by the Government under "duress," caused by war conditions which made it imperative to have new shipping.

147. *Ibid.* p. 326.

148. *Ibid.* pp. 326 and 337. Frankfurter dismisses as unrealistic the majority's argument that the government could have commandeered the

With the Chief Justice and Justices Jackson and Roberts unable to participate in the decision, the majority opinion was delivered by Justice Black, with Justice Murphy filing a concurring opinion, and Justice Douglas dissenting on a different ground than Justice Frankfurter.<sup>149</sup> It is rather unfortunate that a reduced court should have weakened its holding by splitting three ways. Particularly so, coming as it did at a time of such great need of an authoritative statement of relations between the Government and private contractors.

The members of the court agreed only in condemning the moral inequities of the transaction, with the majority indicating that it is the responsibility of Congress to deal with these situations, the while Justices Frankfurter and Douglas were trying through different means to support their moral indignation with applicable legal principles.

Thus the dissents have revolved around problems chiefly concerned with the rights of man, not much about the rights of private property. State police power untrammelled; regulation of commerce by the Congress with a minimum of judicial restraint; executive power channeled through agencies with broad rule making authority and liberal procedures; the modern demands for these objectives are assented to. The dissents mark differing degrees of tolerance toward legislative freedom and executive discretion. There are transient signs of conservatism visible here and there, slightly reminiscent of the days when property rights were more the concern of the court. Attorney General, now Justice Jackson, had observed that the sustained pressure of work on the Court (even a liberal Court) itself tends to influence the Justices toward conservative attitudes.<sup>150</sup> It may be said that not a great deal of this influence is discernible from the work of the Court at the October, 1941, term.

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Bethlehem plant and that the existence of this alternative defeated the possibility of "duress." For some examples of the practical difficulties of commandeering see Rava, *Procedure in Emergency Price Fixing* (1942) 40 Mich. L. Rev. 937, at pp. 957-8.

149. Douglas agreed with the majority on the point of duress and coercion, but believed that the bonus-for-savings provisions of the contracts whereby \$12,000,000 were awarded to the Bethlehem Steel Co. were severable from the rest of the contracts. He seems doubtful, however, about the value and propriety of the authorities cited in support of his contention, for he adds, *id.* at p. 339: "Precedents, to be sure, are of little aid since each case turns on its special circumstances."

150. Jackson, *The Struggle for Judicial Supremacy* (1941) (preface) p. vii.