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MR. JUSTICE BLACK VERSUS THE SUPREME COURT

On August 12, 1937, the President sent to the Senate for confirmation the nomination of Hugo L. Black to be an Associate Justice of the United States Supreme Court. Senator Hiram Johnson objected to immediate confirmation and action on the nomination was postponed. Five days later, after reference to the Judiciary Committee of the Senate, thence to a subcommittee, and after debate on the Senate floor for less than two days, the Senate confirmed the nomination by a vote of 63 to 16. The reaction that followed was remininscent of the furor incident to the nomination of Mr. Justice Brandeis nineteen years before, and had perhaps the same basic motivation; however, those events are too recent to permit appraisal or to require review.

Since that time we have nearly two volumes of the official reports of the Supreme Court; the court has been called upon to handle an ever increasing amount of litigation, and has quite completely run the gamut of judicial inquiry and constitutional interpretation. Enough time has passed for the "new" Justice to achieve judicial maturity and to point the direction of his constitutional philosophy. Taking justification from the belief that an analysis of the work of an individual justice affords an insight into the process of constitutional interpretation, and from the further belief that that process is affected by the views of the individual members of the court,[1] this article will attempt

1. See Powell, *Constitutionalism and Federalism*, (1935) 14 No. CAROLINA LAW REV. 1.

an analysis of the main problems of constitutional law upon which Mr. Justice Black has expressed an opinion.[2]

Judicial greatness, it has been said, depends upon opportunity. In spite of the fact that but few major cases have been assigned to him for the decision of the Court, analysis shows that Mr. Justice Black has borne his full share of the burden, and a recent survey published in the *New York Times* shows that he far out-distances the other Justices in the number of solitary dissents.

Six subjects have been selected for present consideration here: (a) Immunity of governmental instrumentalities from federal taxation; (b) State power over interstate commerce; (c) Rate making valuation; (d) The corporate person and the fourteenth amendment; (e) Legislative supremacy over judicial power of review; and (f) Patent monopolies and the anti-trust laws. On each of these subjects Mr. Justice Black expressed himself with vigor and independence, both in concurrence and in dissent. The method will be to let Mr. Justice Black speak for himself. Little attempt will be made to analyze the soundness of his position or to guess at the influence or impact that it may have on the future trend of decisions. Volumes have been written and will be written on each of the problems presented. The approach here will be to show that in all of his opinions a substantial controversy was involved and that Mr. Justice Black has revealed a grasp of social, economic and legal problems that must surprise those who base their opinions of him on the newspaper reports of 1936 and 1937. The opinions

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2. "To understand what manner of men they were who have sat on the Supreme Bench is vital for an understanding of the Court and its work * * * And legal opinions are not conducive to biographical revelation * * * They are symphonies, not solos." FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938), p. 13.

illustrate his point of view and his methods. They do more: they show the man behind them.

IMMUNITY OF GOVERNMENTAL INSTRUMENTALITIES

The demand for new sources of tax revenue, coincidentally with recent extension of governmental activity, State and Federal, has caused an unprecedented interest in the intergovernmental immunity of the salaries of public officers and of the interest on government bonds.[3] Within his first year on the bench, Mr. Justice Black had an opportunity to pay his respects to the reciprocal doctrines of *McCulloch v. Maryland*[4] and *Collector v. Day*.[5]

In *Helvering v. Gerhardt*,[6] the court held taxable the salaries of employees of the Port of New York Authority. Mr. Justice Stone, speaking for the majority, announced a doctrine new in application to cases such as this. Previous cases[7] had proceeded on a theory which drew a distinction between governmental and non-governmental functions, but the emphasis in the *Gerhardt* case was placed upon the principle that intergovernmental immunity will be recognized only when a clear and substantial burden is imposed by the tax involved. Thus recognition of immunity is denied:

> " . . . when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible

3. Shaw, *Recent Cases on the Doctrine of Intergovernmental Tax Immunity*, (1938) 8 BROOKLYN LAW REV. 38.
4. 4 Wheat. 316 (1819).
5. 11 Wall. 113 (1870).
6. 304 U.S. 405 (1938).
7. Helvering v. Powers, 293 U.S. 214 (1934) and Brush v. Commissioner, 300 U.S. 352 (1937).

> protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons."

Mr. Justice Black, concurring in the result reached by the majority, but finding it difficult to reconcile the result with the principles announced in *Collector v. Day,* expressed impatience with fine distinctions and theoretical principles under which

> " . . . the tax status of every State employee remains uncertain until this court passes upon the classification of his particular employment,"

and concluded that the Sixteenth Amendment terminated intergovernmental tax exemptions so far as federal taxation was concerned. Taking his cue from Mr. Justice Holmes, that uniform taxation upon those equally able to bear their fair shares of the burden of taxation is the object of every just government, Mr. Justice Black was of the opinion that,

> "The language of the . . . Sixteenth Amendment empowering Congress to 'collect taxes on incomes, from whatever source derived'—given its most obvious meaning—is broad enough to accomplish this purpose."

This approach is reminiscent of the dissenting opinion of Mr. Justice Holmes in *Evans v. Gore.*[8] In that case, decided

8. 253 U.S. 245, 40 Sup. Ct. 550 (1920). Evans v. Gore is not of course a case of intergovernmental immunity, involving as it does the application of the Federal income tax to a Federal Judge whose tenure antedated the statute. The Court held that the tax would result in diminishing the compensation of the judge, and that the 16th Amendment did not operate to validate such a diminution. The case is cited to show that Black's attitude is like Holmes', and that both believed with Stone "that language, even of a constitution, may mean what it says." U. S. v. Butler (A.A.A. Case.)

shortly after the passage of the amendment, a seven-to-two majority of the court held exempt from the federal tax the salary of a Federal District Court judge. The decision was placed, *inter alia,* on the ground that

> " . . . the genesis and words of the amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one source or another "

Mr. Justice Holmes, with Mr. Justice Brandeis concurring, was of the opinion that the amendment justified the tax, whatever would have been the law before it was applied, and confessed that he could not

> " . . . see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived."

The concurring opinion of Mr. Justice Black in the *Gerhardt* case points to what may be the final stage in the evolution of the doctrine of intergovernmental immunity. To date, the evolution has gone from a total denial of power to tax, thru a stage of inquiry whether the exercise of the power produces "undue interference," and thence to the test of "actual and substantial burden". It has been said that the "total failure" stage belongs to a period of "hostile sovereignties" and the "undue influence" stage to a period of "assumed friendly relations and common purposes".[9] Unless there are to be created more zones

9. Dowling, Cheatam and Hale, *Mr. Justice Stone and the Constitution,* (1936) 36 COLUMBIA LAW REV. 351, at 357.

of "debatable ground within which the cases must be put upon one side or the other of the line"[10] by the process of judicial inclusion and exclusion, the next logical step in the process of whittling Marshall's "magnificent dogma" will be a denial of immunity under the Sixteenth Amendment.

Though not actually necessary to raise the issue, and though it will be directly at variance with the established construction of the Sixteenth Amendment, it seems inevitable that there will be a Congressional enactment to challenge the whole doctrine of intergovernmental immunity. The present Solicitor General has stated his belief that such a challenge would be successful in the Supreme Court.[11] Mr. Justice Black's vote in such a constitutional test is committed in advance.

It will be recalled that Mr. Justice Holmes said, "The power to tax is not the power to destroy while this Court sits".[12] Mr. Justice Black goes further, and instead of qualifying Marshall's maxim, seems bent on substituting a truer rule: That the power to destroy lies in the power to *discriminate,* not alone in taxation, but in any other governmental activity. Reexamination of *McCulloch v. Maryland* will show that the state was attempting, not the general application of a franchise tax, but a direct attack on the Bank by means of a discriminatory tax, and the case is therefore properly a precedent only for inhibiting discrimination. Considering the political and economic forces operating at the time[13] it seems not uncharitable to

10. Brush v. Commissioner, *supra* note 7, at 300 U.S. 365.

11. Legislation has already been passed by the House and has been favorably reported by the Finance Committee of the Senate, to abolish the immunity of Federal salaries to State taxation. *N. Y. Times,* March 7, 1939, p. 6. Such legislation differs from that mentioned in the text; the latter would be a direct attack on both aspects of intergovernmental immunity and would apply to interest as well as to salaries, without regard to reciprocity, which would in fact be impossible in states, like New Jersey, which impose no income tax.

12. Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (1928).

13. SWISHER: ROGER B. TANEY (1935), chapters IX-XV, incl.

assume that Marshall's Federalist predilictions played some part in the form of his decision.[14] It is significant and encouraging that Mr. Justice Black applies the test of discrimination in the first paragraph of his concurring opinion.

STATE POWER OVER INTERSTATE COMMERCE

The commerce clause is one of the great active fields of constitutional law. The enumerated power it confers has become "the most important nationalizing agency of the Federal Government".[15] Affirmatively applied, it confers federal control over transportation, over the instrumentalities of transportation, and over the human relations involved in commerce. In its negative prohibition, the clause is a denial of state action. The traditional test has been an inquiry whether the attempted interference is direct or indirect;[16] the problem has one of its most frequent applications in attempts by the States to impose taxes on businesses engaged in interstate commerce.

In *Adams Manufacturing Co. v. Storen*,[17] an Indiana statute imposed a tax, measured by the amount of gross income, derived from sources within the state, of all persons and companies who were not residents of Indiana, but who were engaged in business in the state. The appellant, an Indiana corporation, maintaining its home office in that state, but transacting more than eighty percent of its business in other states upon orders taken subject to approval at the home office, filed a petition in

14. *Cf.* Prof. Corwin's characterization of Marbury v. Madison as bearing "many of the earmarks of a deliberate partisan *coup*." Quoted in CARR, DEMOCRACY AND THE SUPREME COURT (1936), p. 17.

15. Frankfurter, *Constitutional Opinions of Mr. Justice Holmes*, (1916) 29 HARVARD LAW REV. 683, at 688.

16. Cook v. Pennsylvania, 97 U.S. 566; Fargo v. Michigan, 121 U.S. 230, 7 Sup. Ct. 857; The Minnesota Rate Cases, 230 U.S. 400, 33 Sup. Ct. 729; Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 39 Sup. Ct. 126.

17. 58 Sup. Ct. 913 (1938).

the state court contesting an imposition of the tax upon income received in interstate commerce. The Supreme Court of Indiana held that the tax demanded did not unconstitutionally burden the interstate commerce in which appellant was engaged.[18] On appeal, this decision was reversed by the United States Supreme Court. Mr. Justice Roberts, delivering the opinion of the majority, saw vice in taxing receipts derived from activities in interstate commerce on the ground that,

> " . . . if lawful, it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed and which the commerce clause forbids."

Mr. Justice Black, dissenting from this view, wrote an opinion in which he fully discussed the powers of a state over interstate commerce. The issue he deemed to be:

> " . . . whether—in the absence of regulatory legislation by Congress condemning state taxes on gross receipts from interstate commerce—the commerce clause, of itself, prohibits *all* such state taxes, as 'regulations' of interstate commerce, even though general, uniform and nondiscriminatory."[19]

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18. The opinion will be found in 7 N.E. (2nd) 941.

19. For historical discussion of the question whether the commerce power of Congress is exclusive, or whether it is merely paramount leaving to the States power unless and until Congress has spoken, see CORWIN, TWILIGHT OF THE SUPREME COURT (1934), pp. 15 *et seq.*

But in these and similar discussions, the power as against which that of Congress is exclusive, is taken to mean the power of the States; Mr. Justice Black in his dissent in the Gwin case warns his colleagues that the commerce power of Congress excludes any such regulatory power on the part of the Court.

He pointed out that the distinction between a tax measured by gross receipts and one measured by net income was based on the fact that in the former each transaction is affected in proportion to its magnitude and irrespective of whether it is profitable or not, and that this fact has as its sole virtue that it

> " . . . affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that it is only indirect and incidental."[20]

To Mr. Justice Black, since property and corporate franchises used in interstate commerce can be constitutionally taxed by the state of situs,

> " . . . it seems difficult to justify a constitutional test for state income taxes upon the existence or absence of profits."

As a matter of practical economics, he argued that such a test will result ultimately in exempting *all* enterprises engaged in interstate commerce from *all* state gross income taxes on interstate commerce, whether practical or not. Such a construction of the commerce clause

> " . . . actually serves to impose an unfair and discriminatory burden upon local *intrastate* commerce."

and,

> "It was not intended that interstate commerce should enjoy a preferred status over intrastate business or to re-

20. U. S. Glue Co. v. Oak Creek, 247 U.S 321, 38 Sup. Ct. 126 (1918).

> move those engaged in interstate commerce from the ordinary and usual burdens of government"

Paying close attention to the record, which admittedly failed to indicate any proof of a present multiple tax burden, Mr. Justice Black answered the argument of the majority that, carried to its "fullest extent," the tax may subject interstate commerce to a "double tax burden," by saying

> "It will be time enough for judicial protection when a litigant actually proves, in a particular case, that state gross receipt taxes levied against the litigant have resulted in unfair and unjust discrimination against the litigant because of engagement in interstate commerce."

The dissent is vigorous and is again illustrative of an impatience with fine legal distinctions. Not every tax on interstate commerce is condemned. In the *Oak Creek*[21] case, the Supreme Court had already sanctioned the subjection of income from interstate commerce to a general state income tax measured by net income from all sources. There, the court emphasized the point that, in the absence of discrimination, the effect of such a tax on interstate commerce is "indirect" and therefore "constitutionally innocuous."[22] It would not have been difficult for the majority in the principal case to have extended the doctrine of the *Oak Creek* case to uphold the state tax upon gross receipts.

From the maze of precedent, there is logical justification for the views of both the majority and the dissent. Mr. Justice Black's protest against the imposition of an "unfair and dis-

21. *Ibidem.*

22. For a discussion of the problem involved see, Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the States,* (1919) 32 HARV. LAW REV. 634.

criminatory burden" which the majority opinion placed on those engaged in local commerce, seems to be valid. Freedom from the tax gives to interstate business a decided advantage in its competition with local business. A leading authority in the field has stated what seems to be a just conclusion: "The states must tax something, and if they could not in some way partake of the fruits of interstate commerce, they would have to take larger bites from the fruits of local commerce. So long as interstate commerce is not discriminated against, it ought to pay for the protection it receives as local commerce has to pay."[23]

The dissent from the majority's test of "multiple taxation," with its conclusion that the court went beyond the problem presented when it invalidated the tax on this ground, presents interesting problems and appears to be sound. The test is derived from cases which came to the court under the due process clause wherein it was held that, as to jurisdiction, multiple taxation was forbidden by the Fourteenth Amendment.[24] But a valid distinction is to be drawn between jurisdiction to tax and power to tax interstate commerce. It has been pointed out that when multiple taxation is forbidden under the due process clause, this does not mean that the particular subject of the tax cannot be taxed at all, but that the tax will be limited to one state.[25] In effect the prevailing opinions in both the *Adams Manufacturing* case and the *Gwin* case, infra, approve State income taxes on gross income provided that gross income from interstate commerce be apportioned and excluded. The dissent on the question of possible double taxation is based on several grounds, (1) There is no present threat. (2) The court should not interfere because the regulatory power belongs to Congress—not to

23. Thomas Reed Powell in the article cited *supra* note 22.

24. See Frick v. Pennsylvania, 268 U.S. 473, 45 Sup. Ct. 603 (1925).

25. See Lowndes, *Taxation and the Supreme Court,* (1938) 87 UNIV. OF PENNA. LAW REVIEW 1, at p. 17.

the Court. (3) If the Court must make the rules, it would be better to approve full income taxes in the state of origin, since taxation in the state of sale has already been forbidden by the Court. Mr. Justice Black points this out in his argument. The saving grace of the majority opinion is that its distinction does afford a "convenient and workable basis."

In a very recent case, *Gwin, White and Prince v. Henneford,*[26] the Court and Mr. Justice Black again split on this question of state power over interstate commerce. Again a gross receipts tax was involved. A Washington statute imposed a tax for the privilege of engaging in business activities in the state upon every person, including corporations, calculated on a percentage of gross income. An attempt was made to apply the tax to a Washington corporation engaged, as a marketing agent for fruit growers' cooperative organizations, in making sales and deliveries in other states, of fruit grown in Washington. The majority of the court, through Mr. Justice Stone, found that such an attempt constituted a burden on interstate commerce, since, the tax not being apportioned to corporate activities within the state, it created the risk of a multiple tax burden in case other states enacted similar tax laws.

Mr. Justice Black, dissenting, found that

> " . . . the judgment here, framed to prevent conjectural future, possible—not present and actual—discrimination against interstate commerce, makes of this statute, with equality as its theme, an instrument of discrimination against Washington intrastate businesses. . . . Washington intrastate commerce thus will 'pay its way'; interstate commerce need not."

And, enlarging his line of dissent in the *Adams Manufacturing Co.* case, felt that,

26. 59 Sup. Ct. 325, decided January 3, 1939.

> "Only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a state so as to provide against conjectured taxation by more than one state on identical income. A broad and deliberate legislative investigation—which no court can make—may indicate to Congress that a wise policy for the national economy demands that each state in which an interstate business operates be permitted to apply a non-discriminatory tax to the gross receipts of that business either because of its size and volume or partially to offset the tendency toward centralization of the nation's business. Congress may find that to shelter interstate commerce in a tax exempt refuge —in the manner of the judgment here—is to grant that commerce a privileged status over intrastate business, contrary to the national welfare."

The opinion is cogently argued, pays close attention to the record presented, and shows a clear grasp of the principles involved. It also shows a feeling that commerce among the states should be left free from discriminatory and retaliatory burdens imposed by the states and, of equal importance, that the court should "scrupulously observe its constitutional limitations," leaving Congress alone to adopt a broad national policy of regulation if necessary, under the power granted to Congress—not to the Court—in the Commerce Clause.[27]

Rate Making Valuation

After a change from the salutory position that the courts

27. Query: What will be the effect on State gross receipts taxes if the Supreme Court applies in such cases the very broad definition of interstate commerce enunciated in the National Labor Relations Act cases of April, 1937?

should not interfere in public utility rate making because it is a legislative, rather than a judicial, matter,[28] to a strict limitation of the legislative power,[29] the Supreme Court in the famous case of *Smyth v. Ames*[30] established the power of judicial review and conceived "fair return on fair valuation" as a standard by which to supervise state control over utility rates. The essence of that standard was that rates are to be considered reasonable when they permit a utility to earn a fair return upon the fair value of the property being used by it for the convenience of the public. The Court enumerated a number of factors that were "all matters for consideration" in ascertaining the value of the property:

> "And in order to ascertain that value, the original cost of construction, the amount expended in public improvements, the amount and market value of its (the company's) bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for considertion . . . "

No indication of the weight to be attached to the several factors was given, and the Court in the *Minnesota Rate* case recognized that the ascertainment of fair value "is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."[31]

But *Smyth v. Ames* has always been taken to stand for the proposition that the "cost of reproduction" theory is the proper one under which to ascertain the utility rate base. The rule has

28. 94 U.S. 113 (1876).
29. 116 U.S. 307, 6 Sup. Ct. 334 (1886).
30. 169 U.S. 466, 18 Sup. Ct. 418 (1898).
31. 234 U.S. 352, at p. 434.

not escaped criticism.[32] One writer has said that it "contemplates an imaginary community in which an imaginary corporation makes imaginary estimates of the cost of an imaginary railroad."[33] Mr. Justice Brandeis has said,

> "The experience of the twenty-five years since (*Smyth v. Ames*) . . . was decided has demonstrated that the rule there enunciated is delusive. In an attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves the door open to grave injustice . . .
>
> "The rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of a utility be determined by capitalizing its net earnings, since the earnings are determined, in a large measure, by the rate which the company will be permitted to charge; and, thus, the vicious circle will be encountered."[34]

To Mr. Justice Brandeis, the rule has always been faulty, vague, and uncertain in its results.[35] Consequently, he developed the theory that the amount prudently invested in a company constituted a much more satisfactory criterion of value than the

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32. See JONES and BIGHAM, PRINCIPLES OF PUBLIC UTILITIES, (1932) p. 209-239. For recent discussions of the problem see, NERLOVE, VALUATION OF PROPERTY, A REVIEW; BONBRIGHT, A REPLY; and Smith, *A Constitutional Rate Base* in (1939) 6 CHICAGO LAW REV. 157 *et seq.* See also Hale, *The Fair Value Merry Go Round,* (1939) 33 ILL. LAW REV. 517.

33. Quoted in Jones and Bigham, *supra,* note 32, at p. 238.

34. Dissenting opinion in Southwestern Bell Telephone case, 262 U.S. 377, at 299 (1923).

35. See Mason, *Mr. Justice Brandeis and the Constitution,* (1932) 80 UNIV. OF PENNA. LAW REV. 799, 815-823.

"legally and economically unsound" so-called rule of cost of reproduction.[36]

In *McCart v. Indianapolis Water Co.*[37] all of the members of the court, except Mr. Justice Black, (Mr. Justice Cardozo not participating due to illness), adhered to the view thus criticised by Mr. Justice Brandeis. In that case, the majority reversed a decision of the lower court, which had dismissed a bill assailing water rates, on the ground that it ignored an upward price trend between the date of the valuation of the property and the entry of the decree. Mr. Justice Black's dissent is one of his best opinions and is written with realistic and comprehensive understanding of the problem presented.

The overgrowths of legalistic learning and the maze of judicial precedents are cleanly excised. Viewing the case as one establishing the "complete unreliability of the 'cost of reproduction' theory," Mr. Justice Black observed,

> "Wherever the question of utility valuation arises today, it is exceedingly difficult to discern the truth through the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of these who seek inflated valuations to support excessive rates. Even the testimony of engineers, with wide experience in developing this theory and expounding it to the courts, is not in agreement as to the meaning of the vague and uncertain terms created to add invisible and intangible values to actual physical property. Completely lost in the confusion of language—too frequently invented for the purpose of confusing—commissions and courts passing upon rates for public utilities are driven to listen

36. See dissenting opinion in Southwestern Bell Telephone case, *supra*, note 34.

37. 302 U.S. 419, 58 Sup. Ct. 324 (1938).

> to conjectures, speculations, estimates and guesses, all under the name of "reproduction cost".

In the best Brandeis manner, Mr. Justice Black argued with figures and tables that no confiscation had been shown because no substantial investment had ever been made by the stockholders, and insisted that stockholders were not entitled to a return on an investment represented by borrowed capital, in excess of the interest paid on it.

Disparities between the actual cost of the utility's property and its "imaginary" reproduction value are vividly ilustrated. One of the illustrations will bring out what Mr. Justice Black had in mind, and will at the same time show the force of the irony he used in denouncing the accepted position. The utility took the position that so-called "water rights" should have been given a higher value than the commission placed on them. The company claimed that the element of greatest value in the water rights was the "diversion right," based on the theory that for a number of years the company had diverted water from a nearby river and that the stream offered possibilities of scenic beauty if there were adequate water for navigation by small pleasure craft To this contention, Mr. Justice Black replied.

> "It does not appear that this formula evolved as a result of anyone's expressed or frustrated desire to sail this stream. From the possibility, however, that the stream could be used for this purpose if imaginary people should so desire, an imaginary damage to these imaginary sailors is discovered. Based upon this potential menace to these imaginary people and their imaginary desire to use this stream, an imaginary value of $200,000 is suggested as to the cost which the company might incur in discharging its

> imaginary duty to improve the stream for these imaginary sailors"

It had taken six years for the commission's order to reach the Supreme Court. The majority opinion remanded it for a further hearing with instructions to take into account in the valuation a recent upward trend of prices. As this was bound to be somewhat speculative, Mr. Justice Black argued that the human "fallacy of prophecy" would bring the case back to the Supreme Court in another six years. Reasoning that such regulatory impotence is paid for by the consumer, along with "the luxury of shuttling cases back and forth," he preferred to settle the case then and there.

The subject has given rise to much discussion. A comprehensive review of principles underlying the theories of "cost of reproduction" and "prudent investment' is not within the purview of this article. Mr. Justice Black's opinion is in line with intelligent progressive condemnation[38] of a theory of mystical cost that has made of rate regulation "a series of long, drawn out lawsuits which encourage fictitious write-ups in property value".[39] He goes further than Mr. Justice Brandeis in his treatment of the problem, taking the view that the determination of rates is fundamentally a legislative function and that the due process clause does no more than give to the federal courts the limited jurisdiction "to determine whether a given state rate is so low as to be confiscatory"; but along with Mr. Justice Brandeis, he believes that substantial weight must be given to in-

38. See RIPLEY, MAIN STREET AND WALL STREET (1927) 337; Cohen, *Confiscatory Rates and Modern Finance* (1929) 39 YALE LAW J. 151; Willis, *Has Government Regulation of Utilities Proven a Failure* (1930) 6 IND. LAW J. 111; Hale, *Conflicting Judicial Criteria of Utility Rates* (1938) 38 COLUMBIA LAW REV. 959; Hamilton, *Price By Way of Litigation* (1938) 38 COLUMBIA LAW REV. 1008.

39. Fraenkel, *Constitutional Issues in the Supreme Court,* 1937 *Term* ,1938) 87 UNIV. OF PENNA. LAW REV. 50, 56.

creased reproduction cost. What was said by an eminent legal scholar of Mr. Brandeis' view of the question is now applicable to Mr. Justice Black.

> "He still insists that if the court allowed actual cost as the rate base much of the difficulty with reference to the determination of reasonable rates and depreciation allowances would be avoided. He urges this rule because he understands that the use of either reproduction cost or present value is quite as likely, through the fluctuation of values, to operate at one period against the public and in favor of the utilities, at another period against the utilities and in favor of the public. He sees in the adoption of the original cost the only means of securing a stable and practicable base for steady use in rate case adjudications."[40]

In view of this conclusion, it is somewhat surprising that Mr. Justice Brandeis failed to concur in Mr. Justice Black's condemnation of the present method of ascertaining the value of utility properties

THE CORPORATE PERSON AND THE FOURTEENTH AMENDMENT

The most famous of Mr. Justice Black's dissents is found in the case of *Connecticut General Life Insurance Co. v. Johnson.*[41] California imposed a tax upon the gross premiums received by insurance companies on contracts entered into outside the state with other insurance companies authorized to do business in California, reinsuring the latter companies against loss on policies of life insurance executed by them in California.

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40. Professor Alpheus T. Mason of Princeton University in an article entitled *Mr. Justice Brandeis and the Constitution* (1932) 80 UNIV. OF PENNA. REV. 799, at 823.

41. 303 U.S. 77, 58 Sup. Ct. 436 (1938).

A California concern reinsured with Connecticut General and claimed its deduction. Connecticut General paid the tax and sued for a refund on the ground that the California premiums were now beyond the reach of California law. The majority of the Supreme Court allowed the refund on the ground that the due process clause denies to a state power to tax or regulate a corporation's property and activities elsewhere.

Mr. Justice Black dissented on the ground that it had not been proved "beyond all reasonable doubt" that the California tax was in violation of the Constitution. The interesting phase of the case, and one which has excited much comment,[42] revolves around the question of the corporate person. Mr. Justice Black said,

> "I do not believe the word 'person' in the Fourteenth Amendment includes corporations. . . . Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included in its protection."

To sustain this belief he reviews the history of the amendment from the *Slaughter House Cases*,[43] decided shortly after the proclamation of its adoption, to the decision in the case of *Santa Clara County v. Southern Pacific Railroad*,[44] where the court decided for the first time that the word "person" did in some instances include corporations, and finds the theory of corporate personality to be based on

> " . . . an argument . . . made in this court that a journal of

42. Martin, *Is a Corporation a Person?* (1938) 44 W. VA. LAW Q. 247; Snyder, *The Corporate Person and the Fourteenth Amendment* (1938) 8 BROOKLYN LAW REV. 4; Boudin, *Truth and Fiction About the Fourteenth Amendment* (1938) 16 N. Y. U. LAW Q. REV. 19; see notes in (1938) 24 AMER. BAR ASS'N J. 223; 86 UNIV. OF PENNA. LAW REV. 543; 24 VA. LAW REV. 686; *N. Y. Times*, Feb. 2, 1938, p. 8, col. 2.

43. 16 Wall. 36, 21 L Ed. 394 (1873).

44. 118 U.S. 394, 6 Sup. Ct. 1132 (1886).

> the joint Congressional committee which framed the amendment, secret and undisclosed up to that date, indicated the committee's desire to protect corporations by the use of the word 'person'."[45]

And to Mr. Justice Black

> "A secret purpose on the part of members of the committee, even if such be the fact, however, would not be sufficient to justify any such construction. The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments."

Nor was it thought from the language of the amendment itself that it was "passed for the benefit of corporations". Mr. Justice Black points out the many instances in the amendment in which the word "person" or "citizen" does not include corporations. For example, corporations are not allowed the protection of the privileges and immunities clause;[46] and likewise it has been held that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process is the liberty of natural and not artificial persons".[47] The conclusion is stated:

> "If the people of this nation wish to deprive the state, of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business,

45. As to the validity of this kind of authority in constitutional interpretation, see *Letters and Other Writings of James Madison* (1867) IV, 211, cited by CORWIN, COMMERCE POWER VERSUS STATES RIGHTS, p 28.

46. Selover, Bates and Co. v. Walsh, 226 U.S. 112, 33 Sup. Ct. 69 (1912).

47. Western Turf Ass'n v. Greenburg, 204 U.S. 359, 27 Sup. Ct. 384.

> there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An amendment having that purpose could be submitted by the Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose."

And to the anticipated argument that the question is academic because the personality of a corporation has become an integral part of our constitutional law, Mr. Justice Black says,

> "The doctrine of *stare decisis,* however appropriate, and even necessary at times has only a limited application in the field of constitutional law. . . . A constitutional interpretation that is wrong should not stand."

A brief history of the problem will be helpful to an understanding of the purport of Mr. Justice Black's argument. In the famous *Slaughter House Cases,*[48] decided in 1873, a majority of the court held that the Fourteenth Amendment was intended merely to protect the rights of negroes and did not effect any substantial change in the conventional police power of the states.[49] The problem of corporations was not involved; the Court was called upon merely to decide whether the amendment should be construed narrowly, limiting protection to negroes, or broadly, extending protection to fundamental rights. Mr. Justice Miller, who delivered the opinion of the majority, construed it narrowly. A few years later, in *San Mateo v. South-*

48. *Supra,* note 43.

49. For a critical analysis of the decision and the impact of the amendment on the individual justices, see Boudin, *supra,* note 42, at 27-29.

ern Pacific Railroad,[50] Roscoe Conkling delivered his famous argument to the court. Producing the manuscript journal of the committee which drafted the amendment, of which he had been a member, Conkling, who had twice declined appointment to the Supreme Court, conveyed the impression that the drafters intentionally used the word "person" in order to include corporations.[51] The court did not decide the question thus presented, but so impressive was Conkling's argument that shortly thereafter the court broadened its interpretation of the amendment and affirmed his proposition that corporations were persons within the meaning of the due process and equal protection amendments.[52] Since then the court has never deviated from the holding.[53]

The subject has been a fertile field for historians and constitutional scholars. Arguments have raged pro and con throughout the pages of the law reviews. Professor Beard and his wife, in their book "The Rise of American Civilization," thought the whole idea was a "conspiracy" on the part of shrewd railroad lawyers and captains of industry to "smuggle" into the amendment "a capitalistic joker".[54] Beard's theory has been accepted by some scholars and disapproved vigorously by others;[55] Mr. Justice Black's dissent seems to be based on an acceptance of it.

Doubt can be raised as to the relevancy and importance of the dissent registered. First, the proposition of corporate per-

50. 116 U.S. 138.

51. For details of Conkling's argument and the meetings of the committee drafting the amendment, see Graham, *The Conspiracy Theory of the Fourteenth Amendment* (1938) 47 YALE LAW J. 371; Boudin, *supra,* note 42. See also BEARD, THE RISE OF AMERICAN CIVILIZATION (1927).

52. Santa Clara v. So. Pacific Railroad, 118 U.S. 394 (1886).

53. For a list of the numerous decisions holding that corporations are within the meaning of the amendment, see USCA, Const., Part 3, pp. 51-52.

54. See E. S BATES, STORY OF CONGRESS, at pp. 233-234.

55. Louis Boudin, who has done a great deal of research in the field, is

sonality has become so deeply embedded in constitutional jurisprudence for the past fifty years that Mr. Justice Black's argument is likely to be nothing more than what one writer called "a courageous gesture," although the dynamic character of the dissenting justice and the comment excited by his opinion suggest that more will be heard on the subject.[56] And it can hardly be an answer to say that the question is already answered. *Erie Railroad v. Tompkins*[57] has shown us the fallacy in the argument of Matt H. Carpenter that "When the court has made a decision, it is like a decree of Venice, irrevocable; the decision of the court is the end of the law; God grant the decision may always be right, but right or wrong it must stand forever".[58]

The real issue in the *Johnson* case lay, not in the construction of the Fourteenth Amendment, but simply in an application of an older principle that no state may levy taxes on property not situated within its borders.[59] Mr. Justice Black's discussion of the corporate personality was therefore theoretically irrelevant.

Those who agree with Mr. Justice Black's position may well feel that he stopped short of a desired goal; that the occasion was opportune for a frontal attack on the whole problem of the tendency of courts to arrogate power to themselves and that the opinion should have insisted that the due process clause

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considerably irritated by the "legendary history of the Fourteenth Amendment" and has called it a "muck-raking theory." See his article noted *supra*, note 42. It has been said that the theory "endows the captains of a rising industry with a capacity for a forward plan and deep plot which they are not usually understood to possess." Walton, *Property According to Locke* (1932) 41 YALE LAW J. 864, 875. The most impartial study is that of Graham's *The Conspiracy Theory and the Fourteenth Amendment* (1938) 47 YALE LAW J. 371, cited by Mr. Justice Black in his dissenting opinion in the Conn. Gen. Life Ins. Co. case.

56. See Snyder, *supra*, note 42.

57. 304 U.S. 64 (1938).

58. HUGHES, THE HISTORY OF THE SUPREME COURT (1928) at p. 71, quoted in Snyder, *supra*, note 42.

59. Fraenkel, *supra*, note 39, at 58.

be interpreted only to cover procedural safeguards and not "substantive determinations of social policy".[60]

LEGISLATIVE SUPREMACY OVER THE JUDICIAL POWER

In the analysis of Mr. Justice Black's opinions on the question of state power over interstate commerce, we have seen that he is possessed of a strong conviction of the supremacy of the law-making bodies over the powers of the courts. There he was of the opinion that, in the absence of constitutional prohibitions, all questions of policy were for the legislatures to determine. In the case of *Indiana ex rel Anderson v. Brand*[61] that conviction is brought to a head.

In 1927, the state of Indiana enacted a "Teachers Tenure Act" providing that anyone who had taught for five years became a permanent teacher by entering into a contract for further service. In 1933, an amendatory act was passed omitting township school corporations from the provisions of the 1927 act. In a mandamus proceeding brought by a teacher who had attained tenure status in a township school corporation, the Indiana court held that the statute gave, not a contractual right, but merely a privilege to continue in employment under given conditions. The decision was reversed by the United States Supreme Court, Mr. Justice Black dissenting, on the ground that the petitioner had acquired a valid contract with the defendant, the obligation of which was impaired by the 1933 Act.[62] Speaking for the majority of the court, Mr. Justice Roberts recognized that

"As in most cases brought to this court under the con-

60. Lerner, *Mr. Justice Black Dissenting,* THE NATION, March 5, 1938.

61. 303 U.S. 95, 58 Sup. Ct. 443 (1938).

62. See comment in (1938) 38 COLUMBIA LAW REV. 1088, and note in (1939) 37 MICH. LAW REV. 430, discussing the principal case at p. 439.

> tract clause, the question is as to the existence and nature of the contract, and not as to the construction of the law which is supposed to impair it,"

and after an inquiry into the terms of the statute itself and prior Indiana decisions construing the statute, to the effect that the right to continue employment by virtue of the statutory indefinite contract *was* contractual in nature, concluded that a contract was made out and the obligation thereof was impaired.

Mr. Justice Black, after arguing that no federal question was presented because a non-federal ground of decision had been available to the state court, insisted that no contract right had been created. He could not reconcile the decision in the instant case with the prior holding of the court in *Phelps v. Board of Education*,[63] to the effect that under the New Jersey tenure act,[64] the status of tenure teachers, while in one sense contractual, was in its essence dependent upon statute. Nor did he agree with the majority's construction of the Indiana statute and decisions. The argument is then advanced that the Indiana Constitution forbids the legislature to barter or give away its power to change educational policies. If this construction of the state constitution is correct, and to Mr. Justice Black "it must be accepted as correct," the argument is that "there could have been no *definite* contracts to be impaired" and the contracts designed to be protected by the Constitution

> "... are contracts by which perfect rights, certain definite, fixed private rights of property, are vested."

Believing that the merits behind the policy of establishing

63. 300 U.S. 319, 57 Sup. Ct. 483 (1937).

64. Rev. St. 1937, 18:13-16.

teacher tenure laws are not for judicial consideration, Mr. Justice Black says,

> "We are here dealing with the constitutional right of the people of a sovereign state to control their own public school system as they deem best for the public welfare. This court should neither make it impossible for states to experiment in the matter of security of tenure for their teachers, nor deprive them of the right to change a policy if it is found that it has not operated successfully."

This is the crux of the dissent. Mr. Justice Black, ever zealous of legislative authority and ever ready to cut down judicial control over that authority, felt that the people of Indiana had a right to entrust the educational policy of their state to their elected representatives "rather than to the courts," observing that "democracy permits the people to rule".

The main point of departure with the majority was not over the construction of local laws and decisions, but over "the extent of state sovereignity as against the overriding sanctity of contract".[65] Mr. Justice Black's strongest conviction is his belief in legislative supremacy, state or federal, over the power of courts and "the rigid control of the contract doctrine". To him, our democratic order can only be kept "fluid" by legislative change, and if this policy is impeded by the institutions of property or contract, they must yield. There is some merit to the contention; its vice is that carried to extremes it does away with all constitutional inhibitions and safeguards.

This point of view is again brought out in his dissent to a *per curiam* opinion rendered during the present term of the court. In *Polk v. Glover*,[66] a suit was brought to enjoin the

65. Lerner, *supra*, note 60.
66. 59 Sup. Ct. 1939. (1938)

enforcement of a Florida statute regulating marking and labeling of canned citrus fruit. The District Court, on motion, had dismissed the bill, but the Supreme Court was of the opinion that the facts alleged were sufficient to entitle plaintiffs to an opportunity to prove their case, and remanded the cause for further proceedings. Mr. Justice Black was vigorous in dissent. To him,

> "The important consequences of this remand raise far more than mere questions of procedure. State laws are continually subjected to constitutional attacks by those who do not wish to obey them. Accordingly, it becomes increasingly important to protect state governments from needless expensive burdens and suspension of their laws incident to Federal Court injunctions issued on allegations that show no right to relief. The operation of this Florida law has been suspended. Complainants seeking to invalidate and suspend the operation of state laws by invoking the vague contours of due process can irreparably injure State governments if we accept as a 'salutary principle' the rule that all such complaints—though failing to state a cause of action—raise 'grave constitutional questions which require that the essential facts shall be determined'."

The statute under consideration contained a legislative finding that fraudulent practices were injuring Florida producers and contained a statement that the act was passed to remedy this evil. To Mr. Justice Black, this legislative finding was conclusive:

> "The legislators of Florida are peculiarly qualified to determine policies relating to one of their state's greatest industries. Legislatures, under our system, determine the

> necessity for regulatory laws, considering both the evil and the benefits that may result. Unless prohibited by constitutional limitations, their decisions as to policy are final."

To Mr. Justice Black, remanding the cause

> " . . . makes it necessary for the court to weigh and pass upon the relative judgment, pose and reasoning ability of the one legislator who voted against the law, as contrasted with the ninety-four legislators and the governor who favored it."

To Mr. Justice Black our order is conceived as a nation adequate to cope with great national duties, but composed also of confederate states possessed of dignity and power adequate to "the diverse uses of a civilized people". This power, when exercised through the medium of elected bodies should not be disturbed unless *clearly* contrary to constitutional limitations. To him the presumption of constitutionality must prevail in the absence of factual material in the record for overthrowing the statute. The burden of proof is on those who oppose an enactment and not on the state that upholds it; and for the courts to consider the case, the record must present facts that show a good chance of this burden being carried. To him an investigation of the facts that give rise to legislation is proper only for the legislature; and for the Court to substitute their own findings, is to put an unjustified barrier in the path of legislation of great social and economic import.

PATENT MONOPOLIES AND ANTI-TRUST LAWS

The current investigation by the Federal Government into the scope of monopolistic enterprise, has brought about an

inquiry into the patent system, prompted by a knowledge that in the past two decades the patent has emerged as "the greatest single monopolistic device".[67] The result of the investigation to date has been to show that a conflict exists between the basic philosophies of the patent and the anti-trust laws.

In *General Talking Pictures Corp. v. Western Electric Co.*,[68] suit was brought to restrain violation of license agreements covering patents for inventions in vacuum tube amplifiers. American Telephone and Telegraph owned the patents on the amplifiers, which were used in two different fields: *commercially,* as in talking picture equipment for theaters, and *privately,* as in radio broadcast, amateur reception and radio experimental broadcast. The American Transformer Co. held a non-exclusive manufacturing license under which the patented equipment could be used "only for radio amateur reception, radio experimental reception, and radio broadcast reception". The General Talking Pictures Corporation acquired vacuum tube amplifiers with knowledge of this attempted restriction, and thereafter used them not for radio purposes but as parts of talking picture sound equipment. The majority of the court, through Mr. Justice Butler, upheld the validity of the restriction and affirmed the decision of the Circuit Court holding the picture company liable to the Telephone Company for infringement. Mr. Justice Black dissented, and viewed the case as resulting in a "sweeping expansion of the statutory boundaries constitutionally fixed by Congress to limit the scope and duration of patent monopolies". The area of monopoly was expanded because it permitted the inventor's corporate assignee "to control how and where the device can be used by a purchaser who bought it in the open market".

The majority opinion emphasized the facts that the owner

67. Feuer, *The Patent Monopoly and the Anti-Trust Laws,* (1938) 38 COLUMBIA LAW REV. 1145.

68. 304 U.S. 175, 58 Sup. Ct. 849 (1938).

of the patent did not *sell* the amplifiers; it had merely granted a license and the use of the patent by the assignee was outside the scope of the license. To Mr. Justice Black, the license agreement, embodying contractual rights, was not involved. The question, he said, was one involving a consideration of the scope of the patent monopoly, and to him,

> "The patent statute which permits a patentee to 'make use, and vend' confers no power to fix and restrict the uses to which a mercantile commodity can be put after it has been bought in the open market from one who was granted authority to manufacture and sell it. Neither the right to make, nor the right to use, nor the right to sell a chattel, includes the right—derived from patent monopoly apart from contract—to control the use of the same chattel by another who has purchased it."

The importance of the question involved, the broad consequences of the majority's approval of the legality of such restrictions, and the conflict with the federal anti-trust laws, is strikingly brought out:

> "Patent articles are everywhere. Those who acquire control of numerous patents, covering wide fields of industry and business, can—by virtue of their patents—wield tremendous influence on the commercial life of the nation. If the exclusive patent privilege to 'make, use, and vend' includes the further privilege after sale to control—apart from contract—the use of all patented merchantable commodities, a still more sweeping power can be exercised by patent owners. This record indicates the possible extent of a power to direct and censor the ultimate use of the multitudinous patented articles with which the nation's daily life is concerned."

The same month the decision was handed down, the Court agreed to hear a reargument.[69] Reargument was had on October 19, 1938, and the second decision came down on November 21, 1938.[70] This time Mr. Justice Brandeis delivered the opinion of the majority, which reaffirmed its previous position and gave effect to the restriction imposed in the license. Mr. Justice Black again dissented, viewing the decision as a "departure from the traditional judicial interpretation of the patent laws". This time, Mr. Justice Reed joined in the disapproval of the majority's position.

Logically, the majority decision does represent somewhat of a departure from pronouncements contained in previous decisions.[71] A seeming anamoly is created when the opinion is compared with that of the court in *U. S. v. General Electric*[72] wherein it was held that beyond the sale of the device, the patentee "can exercise no future control over what the purchaser may wish to do with the article after his purchase".

Economically, the question involved is of the very first moment. If the owner of a patent may legally manufacture and dispose of it with a restriction that dictates to the purchaser what use he may make of it, obviously he has acquired control over the manufacture, marketing and use of all *other* devices of which his invention is only a component but essential part. To Mr. Justice Black, such a result was never contemplated by the patent laws. To the Department of Justice, "it is in violation of the anti-trust laws".[73]

The majority opinion will necessitate further statutory amendment to harmonize the patent and anti-trust laws and to

69. 304 U.S. 587, 58 Sup. Ct. 1051 (1938).

70. 59 Sup. Ct. 116 (1938).

71. The whole problem is adequately surveyed in Feuer, *supra*, note 67.

72. 272 U.S. 476 (1926).

73. Public Statement, Department of Justice, Division for Enforcement of Anti-Trust Laws, released October 19, 1938.

accomplish the apparent intent of Congress in enacting those laws. The purpose of the patent law is to "Promote the progress of science and useful arts" by giving inventors limited rights to their discoveries for a limited period. If the policy of that law is to be accomplished, the full statutory rights must continue to be available to the owner of the patent. They should not be curtailed, but the owner should be restricted to his exclusive right to "make, use, and vend" his invention. When he has marketed his article, his control should end:

> "When he seeks to control the use of his patented article after it has passed into the possession of dealers and the public, he is not seeking the legitimate exploitation of his invention, but is seeking to restrain and control trade, and this violates the fundamental policy of the anti-trust laws."[74]

The question is one of public policy. The ultimate decision is for Congress; the immediate step is for the Courts. The conflicting philosophies of the patent laws, which employ "the language of complete monopoly,"[75] and the anti-trust laws, "to which monopoly is anathema"[76] must be reconciled, or the patent will become, if it has not already become, a convenient means of cloaking illegal monopolistic practices. The majority of the Court, in the *General Talking Pictures* case refused to discuss the question of monopoly. To Mr. Justice Black, that phase of the case was the important one; exactly as it is important to discuss the scope of the patent monopoly in cases arising under the anti-trust laws.

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74. *Ibidem*, at p. 6.

75. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 423 (1908).

76. See Feuer, *supra*, note 67, at p. 1146.

Conclusion

The fundamental impression derived from a study of his work is that the new member has brought to the Court a dynamic and informed intelligence, which will sway its future deliberations if only by forcing on his colleagues a re-examination and a re-definition of the conventional postulates of our constitutional theories.

We live in a world ruled by slogans and labels, some descriptive, some barren of content;[77] if it were necessary to describe in a phrase the attitude revealed in this study, it would have to be compounded by an expert from the central ideas of realism, impatience, (in its proper sense), audacity, and a passion for democracy in the economic as well as the political field

Realism—the pragmatic, functional attitude—is not a novelty on the Court. Marshall himself shaped his decisions to the requirements of statesmanship, and it was Brandeis, at the Bar and on the Bench, who introduced the "economic brief". But Brandeis has gone, and in an age of change, when predictability must share honors with the test "How does it work?" it is well that we have on the Court at least one justice able to face an array of precedents and realize that even gravestones can lie.

Even detached and impartial critics may well feel that impatience is the most obvious if not the most significant characteristic of the opinions just reviewed, for every one of them, including the nominal concurrence in the *Gerhardt* case, is in fact a dissent. Then, is the impatience justified? We submit that it is, for in each case the Court was faced with problems with which it is inherently unfitted to deal (valuation of utility property, and supervision of rates; investigation, and matters of

77. The Chambers of Commerce are currently promoting a campaign under the slogan: "What Helps Business Helps You!" But, just exactly what *does* help business? Whose business? Who are "you' ?

policy in general), or with problems caused basically by past mistakes which it is not yet ready to correct (intergovernmental immunity, especially since the 16th Amendment; perversion of the 14th Amendment to defeat regulatory state statutes).

It is easy to admit that the Court went astray in such cases, since corrected, as *Scott v. Sandford*[78] *and Pollock v. Farmers' Loan & Trust Co.*;[79] it requires courage for a single justice to attack venerable errors in the perpetuation of which substantial interests have become vested. It would not be unfair to say that this courage in Mr. Justice Black has bordered on rashness, and that his attack would be more effective if better timed; the same may be said of many inspiring leaders in other fields. The Court, at its 1938 Term. overruled an ancient precedent by its decision in *Thompkins v. Erie Railroad, supra,* and has executed an even sharper *volte face* as to certain New Deal legislation. It is too early to evaluate the influence of Mr. Justice Black on the Court, in the correction of attitudes that he obviously believes are also erroneous; it is enough to say that his vigor coupled with his technical ability will demand more of his opponents than the conventional appeal to precedent.

Another noteworthy aspect of the last two terms has been the almost evangelical passion for democracy exhibited by Mr. Justice Black. The newspapers have been filled with exhortations and lamentations over democracy, its decline, its vitality, its causes and its defects. The opinions herein do much more; they seek by a positive effort to remove the judicial shackles with which the democratic process has been burdened, accepting without hesitation the premise that "independence" in the courts is a virtue in inverse ratio as those courts abjure the policy-forming function. This attitude raises anew the whole problem of judicial supremacy and judicial review—a problem

78. 19 How. 393 (1857).

79. 158 U.S. 601 (1895).

that has in no wise been solved by the discretion shown by the Court since February 5th, 1937.

In form the opinions tend toward repetition; they appear labored by comparison with the flashing strokes of Holmes or with the literary charm which in Cardozo made brevity no virtue. But, after all, we should not expect too much; Mr. Justice Black has had an active rather than a scholarly preparation for the bench, and will have ample time in which to develop. Regardless of future potentialities we cannot but acknowledge the present contribution of his freshness, his vigor, and his devotion to the democratic process.

RICHARD F. GREEN.

ELIZABETH, NEW JERSEY