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SLOPPINESS IN THE SUPREME COURT, O.T. 1935 - O.T. 1944

Mark Tushnet *

Recently I made a fool of myself in the pages of the *New York Review of Books*. Arthur M. Schlesinger, Jr., had written an affectionate and interesting memoir of Edward Prichard.¹ Among the anecdotes he related was one about Prichard's service as a law clerk to Justice Frankfurter. According to Schlesinger, Prichard had allowed Frankfurter to cite an opinion that had in fact been overruled; after reading the petition for rehearing, Prichard fearfully stayed away from the Justice's chambers.

I had become skeptical of this kind of anecdote as a result of other research I had been doing.² Looking for documentary support for Schlesinger's anecdote, I examined, too briefly as it turned out, the back pages of the United States Reports for what seemed likely to be the relevant years. Failing to find either a "rehearing granted" or a "rehearing denied" that fit Schlesinger's description, I wrote a letter to the editor indicating my failure and suggesting that historians who rely on tales told by accomplished raconteurs should seek additional evidence.³ Displaying little of Frankfurter's generosity towards Prichard's error in research, Schlesinger replied rather snippily that I had not done enough research.⁴ Schlesinger

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1. Schlesinger, "Prich": A New Deal Memoir, N.Y. Rev. of Books, Mar. 28, 1985, at 21.

2. See, e.g., Tushnet, *Being First*, 37 STAN. L. REV. 1181, 1182 n.5 (1985). Perhaps the best example comes from R. KLUGER, *SIMPLE JUSTICE* 266 (1975), which relies on Thurgood Marshall, an accomplished raconteur, to assert that, in *McLaurin v. Board of Regents*, 339 U.S. 637 (1950), the NAACP "deliberately picked Professor McLaurin [as the plaintiff in the suit to desegregate the graduate school at the University of Oklahoma] because he was sixty-eight years old and we didn't think he was going to marry or intermarry. . . ." In fact, McLaurin and five other blacks had approached the NAACP to express interest in beginning a desegregation suit, and there seems to have been no selection at all. See G. CROSS, *BLACKS IN WHITE COLLEGES* 30-49 (1975). (Cross was the President of the University of Oklahoma when *McLaurin* was brought.)

3. Tushnet, Letter to Editor, N.Y. Rev. of Books, May 30, 1985, at 52.

4. *Id.* Schlesinger's memoir had been fuzzy on the relevant dates, which complicated my inquiry. And, in the end, I considered that I had done enough research for a letter to the editor which asserted only that I had failed to find support for the story, not that the story was false. But the fact remains, I screwed up.

had called Joseph Rauh, who supplied him with the relevant citation.⁵

Properly chastised, I decided to do some more research, having been struck by the number of cases in which the Court had ordered changes made in its already issued opinions. This comment reports on the results of an inquiry into some aspects of Supreme Court decisionmaking between 1935 and 1945.⁶ The Court during this period ordered two kinds of changes in what it had already done:⁷ revisions in published opinions and grants of rehearing after previous denials of review. It seemed to me that the present Court rarely made such changes,⁸ and that there should be some reason for this apparent shift in the quality of the decisionmaking process. The first section of this comment simply catalogues the kinds of changes the Court ordered. Next I explore some possible reasons for the pattern of sloppiness in decisionmaking; these explanations are based in large measure of the Court's underdeveloped bureaucracy in the 1930's and 1940's. Finally, I ask whether any broader conclusions can be drawn from this historical inquiry; as it turns out, the Court's behavior illuminates some aspects of judicial strategy and, I believe, of jurisprudence as well.

I. A CATALOGUE OF SLOPPINESS

A. CHANGES IN OPINIONS

Changes in opinions themselves fall into two general categories. The first group includes cases in which the Court ordered relatively small changes in the statement of the facts or in its characterization of some prior case. For example, *Bonet v. Yabucoa Sugar Co.*⁹ involved interpretation of Puerto Rico's tax law. At first Justice Black's opinion for the Court described the tax law as providing for a "refund" under specified circumstances; the modified

5. Actually, Schlesinger screwed up too, though less seriously. His reply cited *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940), and quoted what "Justice Frankfurter wrote in an opinion delivered on January 15, 1940." Schlesinger then quoted the Court's order withdrawing its prior opinion, which order appears at 308 U.S. 530 (1939).

6. I selected those dates so that my research would cover the transition from the pre-New Deal Court to the Roosevelt Court, to see whether instability in the Court's membership had any discernible consequences.

7. I refer to changes made by formal order of the Court and reported as such in the order list. For later developments, see *infra* text accompanying notes 34-39.

8. For example, since 1981 the Court has granted rehearing after a previous denial of review in only four cases. For discussion, see *infra* note 41. An informal survey of nine colleagues who clerked for Supreme Court Justice since 1960 revealed one instance of "fixing up a little bit a badly botched metaphor" at the Reporter's initiative.

9. 305 U.S. 505 (1939).

opinion said the law provided for "relief" under those circumstances.¹⁰ In another set of cases, the Court modified its summary of the disposition, to narrow the issues open on remand. For example, in *United States v. McShain*, the disposition was modified to limit the Court's reversal of the Court of Claims to the single item at issue rather than encompassing the judgment as a whole.¹¹

In another, more significant group of cases, the Court's modifications went to matters of substance. These range from the relatively minor to the rather important.¹² Minor alterations include

10. 307 U.S. 613 (1939). *See also* *Fisher v. Whiton*, 317 U.S. 602 (1942), amending description of statute in 317 U.S. 217 (1942); *United States v. New York*, 316 U.S. 643 (1942), altering "sum of assets available" to "total of such claims" in 315 U.S. 510 (1942); *Morton Salt Co. v. G.S. Suppiger Co.*, 315 U.S. 788 (1942), amending description of Clayton Act in 314 U.S. 488 (1942); *United States v. Chicago, Milwaukee, S.P. & P.R. Co.*, 313 U.S. 543 (1941), amending statement of claims in 312 U.S. 592 (1941); *Fashion Originators' Guild of America v. Federal Trade Comm'n*, 312 U.S. 668 (1941), amending statement of facts in 312 U.S. 457 (1941); *Equitable Life Ins. Co. v. Halsey, Stuart & Co.*, 312 U.S. 668 (1941), amending statement of facts in 312 U.S. 410 (1941); *United States v. Darby*, 312 U.S. 657 (1941), expanding description of statute in 312 U.S. 100 (1941); *Philadelphia Co. v. Dipple*, 312 U.S. 656 (1941), amending statement of party's contention in 312 U.S. 168 (1941); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 312 U.S. 654 (1940), modifying description of prior litigation in 311 U.S. 211 (1940); *Boteler v. Ingels*, 308 U.S. 521 (1939), changing summary description of statute in 308 U.S. 57 (1939); *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 618 (1939), modifying statement of facts in 306 U.S. 307 (1939); *Mackay Radio & Telegraph Co. v. Radio Corp. of America*, 306 U.S. 618 (1939), modifying description of patents at issue in 306 U.S. 86 (1939); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 573 (1938), modifying statement of facts in 305 U.S. 47 (1938); *Lone Star Gas v. Texas*, 304 U.S. 551 (1938), changing "interstate" to "intrastate" in 304 U.S. 224 (1938); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 546 (1938), modifying summary of facts in 304 U.S. 175 (1938); *United Public Gas Service Co. v. Texas*, 303 U.S. 625 (1938), adding qualifying clause to 303 U.S. 123 (1938), indicating that special issues submitted to jury addressed some, but not all, of issues that jury should have considered; *Groman v. Commissioner*, 302 U.S. 654 (1937), striking phrase "Glidden transferred nothing to them" in description of facts in 302 U.S. 82 (1937); *Stone v. White*, 302 U.S. 639 (1937), "recast[ing]" statement of facts in 301 U.S. 532 (1937); *Helvering v. Davis*, 301 U.S. 672 (1937), modifying statement of facts, and changing description of request for relief from "decree for an injunction" to "equitable remedy" in 301 U.S. 619 (1937); *Schwartz v. Irving Trust Co.*, 300 U.S. 636 (1937), modifying statement of facts in 299 U.S. 456 (1937); *Helvering v. Illinois Life Ins. Co.*, 299 U.S. 516 (1936), modifying 299 U.S. 88 (1936), to replace "unmatured" with "matured" in characterization of prior holding; *Legg v. St. John*, 297 U.S. 695 (1936), modifying 296 U.S. 489 (1936), to say that cash surrender value was "a common incident" of, rather than "a recognized incident" of legal reserve life insurance. As we will see, the Court's practice in later years makes it difficult to identify precisely what modifications it made by order.

11. 308 U.S. 520 (1939), *modifying* 308 U.S. 512 (1939). *See also* *Nathanson v. United States*, 321 U.S. 746 (1944); *Adams v. McCann*, 317 U.S. 605 (1942); *Seminole Nation v. United States*, 316 U.S. 647, 651 (1942); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 613, 616 (1939); *Eichholz v. Public Service Comm'n*, 306 U.S. 622 (1939); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 573 (1938); *Ickes v. Fox*, 300 U.S. 640 (1937), changing "The allegations . . . differ in some particulars; but whether these differences will affect the final disposition of the so [sic] suits as to require unlike decrees, we do not determine," to "whether these differences will affect the extent or measure of the rights of the respective respondents or the final disposition of the suits so as to require unlike decrees."

12. I must note that sometimes it is impossible to determine the exact significance of a modification. For example, the order in *New Negro Alliance v. Sanitary Grocery Co.*, 304

striking the phrase "it is conceded that," thus converting a concession by a party into a determination by the Court.¹³ The opinion in *Smith v. Allwright*¹⁴ was modified to change the characterization of the right to vote from "the great privilege of choosing his rulers," reminiscent of Hamilton, to the less elitist "great privilege of the ballot."¹⁵ The Court avoided embarrassment by striking the statement that Justice Frankfurter did not participate in the decision in *NLRB v. Fainblatt*, a case in which he did indeed participate.¹⁶

Revisions in other cases were more obviously substantive. *FCC v. Sanders Bros. Radio Station*¹⁷ raised two issues. The statutes regulating the ownership of radio stations were designed to serve the public interest. The first issue in *Sanders Bros.* was whether an owner's economic interest in avoiding competition was an element to be considered in determining the public interest. The Court said that it was not. The second issue was whether an owner who might be faced with economic injury had standing to raise other elements of the public interest. The Court said the owner did have standing. In describing the holding, the Court's opinion initially said only that "one likely to be injured" had standing to assert the public interest, which is insufficient to decide the case. The opinion was therefore modified to say that "one likely to be financially injured" had standing.¹⁸

U.S. 542 (1938), is so substantial as to seem substantive, but without comparing the slip opinion to the published version, I cannot determine the scope of the changes. See also *United States v. Meyers*, 321 U.S. 750 (1944); *Northwestern Electric Co. v. Federal Power Comm'n*, 321 U.S. 748 (1944); *Hysler v. Florida*, 316 U.S. 642 (1942), apparently modifying statement of facts regarding coerced confession in 315 U.S. 411 (1942); *Cudahy Packing Co. v. Holland*, 315 U.S. 788 (1942), striking footnotes from 315 U.S. 357 (1942).

13. See, e.g., *Morgan v. Commissioner*, 309 U.S. 626 (1940). See also *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 665 (1941), striking "so it was claimed" from 312 U.S. 502 (1941); *Just v. Chambers*, 312 U.S. 668 (1941), striking "and do not appear to be disputed here" from 312 U.S. 383 (1941). An example of the reverse phenomenon, a modification restricting the scope of the Court's decision, is *Opp Cotton Mills v. Administrator*, 312 U.S. 657 (1941), adding the phrase "On the record before us" in discussion of propriety of agency's definition of industry at 312 U.S. 126, 149 (1941).

14. 321 U.S. 649, 662 (1944).

15. 322 U.S. 718 (1944). See *Powell v. McCormack*, 395 U.S. 486, 547 (1969), quoting Hamilton on the people's right to "choose whom they please to govern them." A similar arguably stylistic alteration occurred in *Clearfield Trust Co. v. United States*, 318 U.S. 744 (1943), which struck the sentence "Its facts [i.e., those of another circuit court decision] are practically on all fours with those of the present case" from 318 U.S. 363 (1943).

16. 307 U.S. 609 (1939).

17. 309 U.S. 470 (1940).

18. 309 U.S. 642 (1940). See also *Swift & Co. v. United States*, 316 U.S. 649 (1942), changing statement about "use" of stockyards to "establish[ing] or becom[ing] interested in" stockyards, thus expanding scope of 316 U.S. 216 (1942). Similarly, Justice Frankfurter was forced to retract an unacceptable statement about statutory interpretation in *Toucey v. New York Life Ins. Co.*, where the Court changed the statement that the rationale of certain decisions was that "the Removal Acts have *pro tanto* amended" the Anti-Injunction Act of 1793,

Two cases illustrate the Court's handling of issues about the interaction between congressional power to regulate interstate commerce and state power over the same commerce. By the mid-1930's, Congress had the undisputed power to preempt state regulations of interstate commerce even if those regulations were justified on the ground that they promoted important health and safety interests of local residents. Thus, any challenge to state authority to regulate required consideration of the scope of congressional action in the area. For example, *South Carolina State Highway Department v. Barnwell Bros.*,¹⁹ a celebrated case, involved South Carolina's effort to impose weight and size limitations on trucks using its highways. There was some congressional action regarding truck use of highways, and Barnwell Brothers might have claimed that Congress had preempted state regulation of weight and size. In its initial opinion in the case, the Court held that Congress had not preempted such regulation, writing, "But as the district court held, Congress has not undertaken to regulate" those matters. Apparently concerned that this holding was not a fully considered one, the Court later modified the opinion to say, "But appellees do not challenge here the ruling of the district court that Congress has not undertaken to regulate."²⁰

A similar issue arose in *Cloverleaf Butter Co. v. Patterson*,²¹ but here a divided Court held that Congress had preempted state regulation. The majority opinion initially stated that "the entire process of manufacture [in the regulated field] comes under federal supervision," that federal agents "watch" the process, and that manufacturing here was "subjected to" federal scrutiny. State officials contacted the Department of Agriculture, the federal regulatory authority, and persuaded the Department's Solicitor to ask the Solicitor General to support a petition for rehearing. The Department of Agriculture stated that the Court appeared to believe that it inspected the entire manufacturing process continuously. In fact, however, the Department had only one inspector, who went into the field at four to six weeks intervals.²² The Court denied rehearing, but modified its opinion to state that the manufacturing process

to a statement that the Acts "qualify *pro tanto*" the Anti-Injunction Act. 314 U.S. 585 (1941), amending 314 U.S. 118 (1941). See also *Holiday v. Johnston*, 313 U.S. 550 (1941), rewriting prior opinion discussing reasons for avoiding merits, and role of Rule 53 in the case; *L.T. Barringer & Co. v. United States*, 319 U.S. 729 (1943), adding paragraph to end of 319 U.S. 1 (1943), stating that Court had considered the sufficiency of the evidence and found it adequate to support judgment.

19. 303 U.S. 177 (1938).

20. 303 U.S. 625 (1938).

21. 315 U.S. 148 (1942).

22. Mastin G. White, Solicitor, Department of Agriculture, to Charles Fahy, Solicitor

“is subject to” federal supervision, that the Department of Agriculture “has authority to watch” the process, and that the process was “subject to” federal inspection. The effect of these changes is substantial: the Court found preemption even though the Department was not exercising its authority to inspect, thus leaving the area entirely unregulated as a practical matter, the state’s authority being preempted and the federal authority going unexercised.

In another celebrated case, *Sibbach v. Wilson*,²³ the Court upheld a provision of the Federal Rules of Civil Procedure allowing a court to require that a plaintiff submit to a physical examination. The plaintiff claimed that requiring a physical examination altered a substantive privacy right, in violation of the Rules Enabling Act, which bars rules altering substantive rights. After disposing of the claim that she had some general privacy right, Justice Roberts’s opinion for the court turned to the Rules Enabling Act issue. Originally, the opinion offered two reasons for finding no violation of the Enabling Act: first, that, as the prior analysis showed, no privacy right was invaded, and, second, that “a litigant need not resort to the federal courts unless willing to comply with the rule.” This is a fairly standard use of the right-privilege distinction: one who seeks to enjoy a privilege must comply with the conditions attached to its exercise. But the Court must have been troubled by the implication that the use of the federal courts in a diversity case was a privilege, for it ordered this alternative justification deleted from the opinion.²⁴

B. GRANTS OF REVIEW

The second large category of apparent errors by the Court included cases granting review after it had been previously denied. These cases fall into two groups. As it turns out, the first group does not involve “errors” of the sort I have already discussed, but the Court’s disposition of the cases does reveal something about the decisional process in the 1940’s. This group contains cases in which rehearing was granted because a conflict in the circuits developed after the denial of review. The second group of cases involves something akin to “errors,” and these too are revealing.

General, Feb. 17, 1942, in Box 67, *Cloverleaf Butter* file, Harlan Fiske Stone Papers, Library of Congress.

23. 312 U.S. 1 (1940).

24. 312 U.S. 655 (1941). A modified version of Justice Roberts’s thought made an appearance recently in *Seattle Times v. Rhinehart*, 104 S. Ct. 2199, 2207 (1984), in which the Court wrote that “as the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.”

The Court sometimes granted review when, after a previous denial, a conflict in the circuits developed. For example, review was denied on January 15, 1940, in *Crane-Johnson Co. v. Helvering*,²⁵ six weeks before a different circuit expressly rejected the reasoning in the lower court's opinion in *Crane-Johnson*. The Court granted rehearing, vacated the previous denial of review, and subsequently affirmed the decision below.²⁶ This procedure seems straightforward enough, but, as I will argue in the next section, it does illuminate some aspects of the Court's conception of its role.

More interesting are the cases of true "errors." Here the Court denied review on procedural grounds; for example, that the federal question had not been properly presented in the lower courts,²⁷ or that the decision below was not final.²⁸ Petitions for rehearing persuaded the Court that the procedural defects did not actually exist, and the Court then considered the petition for review on the merits. I call these cases of error because, in most instances, the petitions for rehearing did not say very much new. In one,²⁹ the petition for rehearing demonstrated the error by merely quoting from the lower court opinions.

25. 308 U.S. 627 (1940).

26. 311 U.S. 54 (1940). *See also* Colgate-Palmolive-Peet Co. v. United States, *cert. denied*, 319 U.S. 758, *reh'g and cert. granted*, 319 U.S. 778, 320 U.S. 422 (1943); Neuberger v. Commissioner, 311 U.S. 83 (1940), (*cert. denied*, 308 U.S. 623, Jan. 2, 1940; conflict arose Feb. 5, 1940; *reh'g and cert. granted*, 310 U.S. 655, May 27, 1940); New World Life Ins. Co. v. United States, *cert. denied*, 308 U.S. 612 (1939), *reh'g and cert. granted*, 310 U.S. 654, 311 U.S. 620 (1940); Fairbanks v. United States, 306 U.S. 436, 438 (1939). For similar examples with respect to conflicts about the validity of particular patents, see Automatic Devices Corp. v. Sinko Tool & Mfg. Co., 312 U.S. 711 (1941); Toledo Pressed Steel Co. v. Standard Parts, *cert. denied*, 305 U.S. 600, *reh'g and cert. granted*, 305 U.S. 667 (1938), 307 U.S. 350 (1939). A variant is Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50 (1938), where the Sixth Circuit had upheld the validity of a patent used primarily in that circuit, the alleged infringer said that the patent holder had the opportunity to challenge the patent in other circuits but failed to do so, the holder responded at first that it was waiting for the proper occasion, and the infringer filed a motion for leave to file a second petition for rehearing when, seven months after the first, the holder had done nothing to challenge infringements in other circuits. A similar case is Exhibit Supply Co. v. Ace Patents Corp., 315 U.S. 126, 128 (1942), where the petition for rehearing pointed out that 100% of the goods using the patent were made in the Seventh Circuit, thus eliminating the possibility that a conflict would arise. *See also* Thompson v. Magnolia Petroleum Co., *cert. denied*, 308 U.S. 613, *reh'g and cert. granted*, 308 U.S. 630 (1939), 309 U.S. 478 (1940), in which a conflict arose between the Seventh and Eighth Circuits over the proper interpretation, under Illinois law, of certain deeds to the same tract of land; the conflict arose on November 6, 1939, and review was initially denied on November 22, presumably too soon for the conflict to have registered on the Court's processes.

27. *See, e.g.*, Cafeteria Employees Union v. Angelos, 319 U.S. 753 (1943).

28. *See, e.g.*, Brady v. Terminal Rwy. Ass'n, 302 U.S. 688 (1937).

29. Cafeteria Employees Union v. Angelos, 319 U.S. 778 (1943).

II. ACCOUNTING FOR SLOPPINESS

The pages of today's United States Reports are not sprinkled with orders granting rehearing or correcting prior mistakes. One reason may be that the increasing bureaucratization of the Court has reduced the chance that errors will find their way into slip opinions or preliminary prints of decisions and has allowed the Court to develop alternative methods of correcting those errors that do occur. If so, this might reduce concern that bureaucratization of the courts is undesirable.³⁰

We can begin by distinguishing between the bureaucratization of the chambers of the Justices and that of the Court as an institution. With respect to the former, two points seem particularly important. First, the time between argument and decision has lengthened. In many instances, opinions were handed down in the 1930's and 1940's within a month of argument.³¹ Today, opinions routinely take several months before they emerge.³² Obviously, time pressure reduces the possibility that minor errors will be detected before an opinion is released. On the other hand, because review is so rarely granted today, it makes little sense to single out a procedural ground for denial. Thus, the Court's orders denying review do not give litigants the opportunity to write a petition for rehearing correcting the Court's misimpression about the case's procedural posture.

Second, the staff in each chambers has increased, and the Justices now delegate substantial authority in drafting and revising opinions to their law clerks. This has several effects. Within each chambers, more people examine an opinion before it goes out, providing several points at which errors might be detected. More interesting, perhaps, is the psychological fact signalled by the anecdote about Prichard that provoked my research. Law clerks are relatively young people, who are probably in their first important position. It is also a position something akin to serfdom, in which the employee is subject to rather direct personal supervision by a much more important person. Law clerks who draft and revise opinions are therefore likely to be rather painstaking about their jobs. In contrast, the Justices are, in the main, people who have held high

30. See, e.g., R. POSNER, *THE FEDERAL COURTS* (1985). Jay, Book Review, 73 *GEO L.J.* 1507 (1985), points out that though Posner treats bureaucratization as an almost unalloyed evil, he neither provides nor uses a consistent definition of bureaucracy.

31. See, e.g., *Philadelphia Co. v. Dipple*, 312 U.S. 168 (1941) (argued Jan. 9, decided Feb. 3); *United States v. McShain*, 308 U.S. 512 (1939) (argued Oct. 20, decided Nov. 6); *Groman v. Commissioner*, 302 U.S. 82 (1937) (argued Oct. 21-22, decided Nov. 8).

32. For example, during the 1983 Term, only four opinions, all in cases argued in early October, were issued before January 1.

positions before, for whom the job of Justice of the Supreme Court is on some level merely another high position. When such people spend their time drafting opinions, as did the Justices in the 1930's and 1940's, I suspect that they are likely to be relatively inattentive to detail. Finally, of course, there is the inevitable fact that no one is perfect: even Homer, or Justice Frankfurter, sometimes nods.

The bureaucratization of the Court as an institution also may affect the rate at which errors occur. Here one relevant subdivision of the Court is the office of the Reporter. What seems to have occurred is a delegation of authority from the Court as a whole to a specialized subdivision. As it happens, this delegation seems to have begun in the mid-1940's.

Ernest Knaebel had been Reporter from the 1916 Term of the Court.³³ Until the 1940's, the Reporter apparently had authority to correct typographical errors and identify them on an "errata" page.³⁴ But more substantive modifications in opinions had to be made by order of the Court. Knaebel retired in 1944, his name last appearing as Reporter in volume 321 of the United States Reports. Not until volume 326 does the name of a new Reporter, Walter Wyatt, appear. In the interim the Court changed its practices. It still was necessary that modifications in opinions be made by order of the Court. But instead of indicating what the changes were, the order began to read, "Order entered amending the opinion in this case."³⁵ Sometimes these changes were substantive. For example, in *United States v. Saylor*,³⁶ the opinion was "inaccurate in attributing to the defendant election officials the duty to count the votes, as well as to receive and return them." Instead of noting the scope of the changes in the order, the Court made a journal entry indicating that specified changes were made with the agreement of the Justices who joined in the opinion.³⁷ With the arrival of a new and obviously vigorous Reporter, it seems likely that even more was delegated to that office.³⁸ Today the Reporter's office undoubtedly corrects opinions, with the agreement of the Justices, as a routine

33. His name first appears on the title page of 242 U.S.

34. See, e.g., 299 U.S. ii (1937).

35. The first such order I have found is *United States v. Saylor*, 322 U.S. 718 (1944).

36. 322 U.S. 385 (1944).

37. See Owen Roberts to Chief Justice, copies to the Court, Box 109, *United States v. Saylor* file, Wiley B. Rutledge Papers, Library of Congress.

38. Wyatt's vigor is revealed in letters he sent to Justice Rutledge and other members of the Court. See Reporter file, Box 156, Wiley B. Rutledge Papers. For example, Wyatt obtained and sent to each chambers copies of the Harvard *Uniform System of Citation*, to standardize practices. Wyatt to Rutledge, Mar. 3, 1947. *Id.*

matter.³⁹

The Court itself has changed in ways that have affected its practices regarding rehearings. In the 1940's, the Court granted rehearings when a subsequent circuit court decision created a conflict. It justified its practice on the ground that review "enables us to do justice to the party if it appears that he has the right of the controversy."⁴⁰ Yet it is striking that the Court almost invariably affirmed the decision of the court below. Thus, its prior denial actually would not have done an injustice to the party had the Court waited until the conflict-creating decision was presented to it for review. Apparently, the Court desired to clarify these areas—which tended to involve patents or taxes—at the first opportunity. In the 1940's the Court seemingly believed that the interim costs of waiting until the conflict-creating decision was presented for review exceeded the institutional burdens on the Court caused by its obvious receptivity to the practice of petitioning for rehearing. As the Court's caseload increased, the balance shifted, the costs of considering petitions for rehearing now outweighing the costs of waiting until the second case reached the Court.⁴¹

The gradual transformation of the Court's practices regarding correction of its errors indicates that the Court is becoming more like the other bureaucracies of modern American government, a process that has its benefits as well as its costs. But can we see anything further about the Court's decisionmaking processes in these materials?

III. JUDICIAL DECISIONMAKING: STRATEGY AND JURISPRUDENCE

Because I teach the course in federal jurisdiction, I found the

39. See, e.g., Dressler, *A Lesson in Caution, Overwork, and Fatigue: The Judicial Mischief of Segura v. United States*, 26 WM. & MARY L. REV. 375, 407 (1985).

40. *R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 229 (1944).

41. Since 1981 the Court has granted rehearings in four cases. In each the Court vacated its prior denial of review and remanded for reconsideration in light of one of its own recent decisions. *Leverson v. Conway*, 105 S. Ct. 3471 (1985); *California v. Howard*, 105 S. Ct. 64 (1984); *Simmons v. Sea-Land Services*, 462 U.S. 1114 (1983); *Florida v. Rodriguez*, 461 U.S. 940 (1983). In all but *Simmons*, the Court had reversed the decision to which attention was directed. In three of the cases, there was a relatively short interval between the denial of review in one case and the granting of review in the other. (In *Leverson*, review was initially denied in October 29, 1984, and review granted in the parallel case on December 10; in *Simmons*, the dates are October 12, 1982 and November 15; and in *Rodriguez*, they are May 26, 1981 and November 30, a period extended by the summer recess.) However, in *Howard*, review was initially denied on April 30, 1984 and rehearing granted on October 1, vacating and remanding for consideration in light of a case decided on July 6, 1983. Presumably this is what led Justice White, who had joined in the July 6 decision, to dissent from the grant of rehearing.

substantive revision in *Railroad Commission v. Rowan & Nichols Oil Co.*⁴² most striking. The Texas Railroad Commission, as students of federal jurisdiction know from *Burford v. Sun Oil Co.*,⁴³ regulated the amount of oil that could be taken from each well in an oil field. Rowan & Nichols were unsatisfied with the allocation they received from the Commission. They sought a federal injunction against the allocation on the ground that it was so low as to deprive them of their property in violation of both the due process clause and a Texas statute requiring that allocations be on a "reasonable basis." The Court, in an opinion by Justice Frankfurter, had no difficulty rejecting the constitutional claim. In the course of the opinion, the following remarkable sentence appears:

Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power.⁴⁴

This denies the existence of a doctrine of pendent jurisdiction, established in the Court since at least 1909.⁴⁵ What could Justice Frankfurter, a specialist in federal jurisdiction, have been thinking about?

Frankfurter was not opposed to the doctrine of pendent jurisdiction per se, and the Court properly modified its opinion to delete the sentence casting doubt on the doctrine. In its place it substituted an analysis of the Texas law. The modified opinion concluded that the standard for determining when an allocation was reasonable under Texas law was identical to the federal due process standard.

What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondents may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial . . . of an injunction in the federal courts.⁴⁶

The modification directs our attention to the Court's concern about the use of substantive due process to interfere with state economic regulation.

Several letters between members of the Court suggest that Frankfurter's initial effort in *Rowan & Nichols* was aimed at limit-

42. 310 U.S. 573 (1940).

43. 319 U.S. 315 (1943). As we will see, this citation is not entirely irrelevant to the story.

44. 310 U.S. at 580.

45. *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909).

46. *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 614, 615 (1940).

ing the scope of the doctrine of pendent jurisdiction, not at eliminating it entirely. Shortly after the opinion was revised, Harlan Fiske Stone wrote Frankfurter that, in his view,

[W]e have not exposed fully enough our reasons for not dealing with the state question. . . . [W]here relief is sought in equity the federal courts do not have to give relief on the basis of state law where the plaintiff fails to show what the state law is or that it adopts any ascertainable standard on the basis of which relief should be given. I hope some day the Court will be persuaded to say just that or its equivalent.⁴⁷

That is, pendent jurisdiction should be denied where the litigant seeks to use a state law that resembles the “vague contours” of the due process clause. In this connection it may not be amiss to note that the Court created the doctrine of abstention in cases involving unclear state statutes one year later.⁴⁸

While Frankfurter was attempting to draft an appropriate revision of the opinion in *Rowan & Nichols*, he wrote Stone that he had spent “literally hours of discussion” with Justice Hugo Black on the proper phrasing.⁴⁹ Black, too, was concerned about the use of the federal courts to enforce economic due process. During the same year, the Court struggled with the opinion in *Beal v. Missouri Pacific R.R. Co.*,⁵⁰ in which the scope of the doctrine of *Ex parte Young*⁵¹ was at issue. *Young* had held that federal injunctive relief was available to enjoin a state officer from enforcing a state law, notwithstanding the eleventh amendment, where the enforcement threatened a sufficiently grave harm. In *Young*, the Court identified one form of grave harm as the presence in the statute of a penalty structure so severe as to deter any reasonable person from seeking to challenge the statute by disobeying it and interposing his or her federal claims as a defense to a prosecution. In *Beal*, the plaintiff’s lawyer apparently represented to the Court that the state had agreed to treat a single prosecution as a test case to determine the constitutionality of the state’s regulation. The Court relied on this representation to find that the standard required by *Young* had not been met. But the opinion contained a reference that might have been read to approve the general doctrine of *Ex parte Young*. Justice Black objected to that: “Personally I would have preferred that nothing be said which required the citation of *Ex parte Young*. . . . I

47. Stone to Frankfurter, Jan. 1, 1941, Box 74, *Railroad Comm’n v. Rowan & Nichols* file, Harlan Fiske Stone Papers, Library of Congress.

48. *Railroad Comm’n v. Pullman*, 312 U.S. 496 (1941).

49. Frankfurter to Stone, Oct. 17, 1940, Box 74, *Railroad Comm’n v. Rowan & Nichols* file, Harlan Fiske Stone Papers, Library of Congress.

50. 312 U.S. 45 (1941), decided Jan. 20.

51. 209 U.S. 123 (1908).

do not agree with the discussion . . . on the point for which [it is] cited. . . ."⁵²

Taking these bits of information together, we can see that *Rowan & Nichols* is part of a larger picture, the struggle on the part of some Justices to develop an appropriate method for interring the doctrine of economic due process. Of course they were engaged in attacking the doctrine directly, and one might have thought that by 1940 the attack had succeeded. But lower court judges do not always get the message from the Supreme Court and sometimes enter judgments that, as a practical matter, the Court could not review. Thus, the Justices sought to develop a set of jurisdictional doctrines that would reinforce the substantive law they were developing.⁵³ Frankfurter slipped in *Rowan & Nichols* by overstating the limitation that he wished to place on the doctrine of pendent jurisdiction. But his error, and the way it fits into a wider picture, reminds us that substantive and jurisdictional doctrine go hand in hand.⁵⁴

Something similar occurred in *Buchalter v. New York*.⁵⁵ Buchalter and two other notorious figures associated with organized crime were sentenced to death for arranging and carrying out a mob-connected murder. Numerous trial errors had occurred in the midst of a public outcry against the defendants. After review was denied, Justice Frankfurter prepared a memorandum quoting extensively from the petition for rehearing. He was, he said, uncomfortable with refusing to review a capital case in which such errors were alleged to have occurred.⁵⁶ Today this memorandum would probably appear as a dissent from denial of review, but in the 1940's it occasioned a rehearing. After the Court heard argument, it affirmed the convictions on the ground that the trial errors did not amount to a violation of fundamental fairness and so did not violate the Constitution.⁵⁷ At the end of the opinion, Justice Black noted

52. Hugo Black to Stone, Jan. 2, 1940, Box 261, Opinions of Other Judges file, Hugo L. Black Papers, Library of Congress.

53. See also Laycock, *Federal Interference With State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979).

54. Obviously a more recent example, drawn from the same area, is the Court's restriction of the doctrine of pendent jurisdiction in *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984), which surely is explicable more by the Court's discomfort with structural relief in cases challenging the on-going operations of the large-scale institutions of the bureaucratic state than it is by concern for an appropriate allocation of business (in the abstract) between federal and state courts. See Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). See also *Allen v. Wright*, 104 S. Ct. 3315 (1984).

55. 318 U.S. 766 (1943).

56. See Memorandum of Justice Frankfurter, *Buchalter v. New York*, Miscellany File, Box 75, Harlan Fiske Stone Papers, Library of Congress.

57. 319 U.S. 427 (1943).

that he would have dismissed the grant of review. Surely here was a preview of the controversy over the proper scope of the due process clause that erupted more visibly in *Adamson v. California*⁵⁸ and subsequent cases.⁵⁹

Uncertainty or disagreement about substantive doctrine thus appears to have caused some of the sloppiness in the Court's work. It seems that uncertainty also affected the rehearing process, not just by inducing members of the Court to reconsider their positions on the merits, but also by allowing them to reconsider preliminary procedural points. Here it seems significant that a number of the "errors" regarding the proper presentation of the federal question occurred in cases raising contentious issues about the constitutional limits on state authority to regulate picketing by labor unions.⁶⁰ Plainly the concept of the "proper" presentation of a federal question was flexible enough to let a Justice use the requirement first to avoid a difficult case and then, on reconsideration, to decide it on the merits.⁶¹

Finally we come to the case that started me off. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*⁶² was a "rate controversy,"⁶³ which, as the discussion of *Rowan & Nichols* suggests, may be significant. Oklahoma Gas & Electric challenged a rate determination by appealing to the Oklahoma Supreme Court, which rejected the challenge in 1930. Pending that decision, Oklahoma Gas & Electric had given a bond. After the challenge was rejected,

58. 332 U.S. 46 (1947).

59. Something similar might have occurred in *Robinson v. United States*, *cert. denied*, 323 U.S. 789 (1944), *reh'g and cert. granted*, 323 U.S. 808, 324 U.S. 282 (1945), also a capital case. *See also* *Vernon v. Alabama*, *cert. denied*, 311 U.S. 694 (1940), *reh'g. and cert. granted*, 313 U.S. 540, *summarily rev'd*, 313 U.S. 547 (1941). These cases might illustrate a judgment by the Court that "important" cases not otherwise satisfying the requirements for discretionary review ought to be heard. For what might conceivably be a similar case, see *Kellogg Co. v. National Biscuit Co.*, *cert. denied*, 302 U.S. 733, *reh'g denied*, 302 U.S. 777 (1937), *reh'g and cert. granted*, 304 U.S. 586, *rev'd*, 305 U.S. 111 (1938), in which the petition for rehearing provided no new information but simply stressed the importance of the case to consumers of shredded wheat.

60. *See, e.g.*, *Bakery & Pastry Drivers Union v. Wohl*, *cert. denied*, 313 U.S. 572, *reh'g and cert. granted*, and *judgment rev'd summarily*, 313 U.S. 548, *reh'g granted*, 314 U.S. 704 (1941), *rev'd*, 315 U.S. 769 (1942); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, *cert. denied*, 308 U.S. 596 (1939), *reh'g and cert. granted*, 310 U.S. 655 (1940), *aff'd*, 312 U.S. 287 (1941). *See also* *Martin v. Struthers*, 319 U.S. 141, 142 n.2 (1943).

61. The papers available to me leave inexplicable some of the grants of rehearing, in cases where the petitions presented nothing that did not appear in the original request for review. *See, e.g.*, *McCullough Co. v. Kammerer Corp.*, 323 U.S. 327 (1945), *dismissing cert.*, on the ground that the issue on which review was granted had not been presented on the record; *Crenshaw v. United States*, *cert. denied*, 312 U.S. 703, *reh'g and cert. granted*, 313 U.S. 596, *dismissed by stipulation*, 314 U.S. 702 (1941).

62. 309 U.S. 4 (1940).

63. *Id.* at 5.

a beneficiary of the bond sued in state court. Attempting to secure a federal determination of the validity of the rate order, Oklahoma Gas & Electric filed suit in the federal district court, seeking a declaration of the order's invalidity, an injunction against its enforcement, and an injunction against the action seeking to enforce the bond. Eventually, in 1938 the court of appeals affirmed the district court's decision granting the requested relief.

The case presented three issues. First, the Court held, relying on a recent case, that venue was proper in Oklahoma because of the defendant's appointment of an agent for service of process there. Second, the Court addressed a plea of *res judicata*. The validity of that plea depended on the characterization of the Oklahoma Supreme Court's 1930 decision. If that decision was made in the court's "legislative" capacity, it was not a judgment to which *res judicata* attached.⁶⁴ Not until 1935 did the Oklahoma Supreme Court hold that its rate decisions were made in its judicial capacity. The consequence of that decision, if applied retroactively, was to confer preclusive effect on the 1930 decision, despite the inability of Oklahoma Gas & Electric to anticipate that holding. Third, the Court had to decide whether the injunction against the enforcement of the bond violated the Anti-Injunction Act.⁶⁵

Justice Frankfurter (or perhaps Prichard) was obviously taken with the retroactivity issue. He wrote an opinion exploring the jurisprudence of retroactivity in some detail, attempting to show that invoking *res judicata* imposed no substantial hardship on Oklahoma Gas & Electric. Because the 1935 decision "did not profess to make new law or to change the old," what happened to Oklahoma Gas & Electric was "part of the price paid for the overriding benefits of a system of justice based on more or less general principles as against *ad hoc* determinations." He cited *Gelpcke v. Dubuque*⁶⁶ in support of the claim that refusing to "adhere to a state court's declaration of its own law even though it has had a checkered unfolding" produced a "discouraging history of . . . juristic sport."⁶⁷ Chief Justice Hughes, joined by Justices McReynolds and Roberts, disagreed with this analysis, finding "manifest injustice" in holding Oklahoma Gas & Electric to be bound by a decision rendered three years after its lawsuit had been filed. He would have interpreted the Oklahoma

64. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

65. 28 U.S.C. § 2283.

66. 68 U.S. (1 Wall.) 175 (1863).

67. 309 U.S. at 706 (appendix to volume). The opinion then disposed of an objection to its *res judicata* analysis based on an intervening decision by the Oklahoma Supreme Court, which was "a generous application of the doctrine of comity between state and federal courts," not a decision on the characterization issue. *Id.* at 707-08.

law of res judicata not to “so far depart from the plain requirements of justice as to preclude in these circumstances a review of the federal question.”⁶⁸

Unfortunately for Frankfurter and Prichard, they had overlooked a more recent decision by the Oklahoma Supreme Court squarely holding that its 1935 decision did not have retroactive effect.⁶⁹ As a result, the Court substituted a paragraph holding that the plea of res judicata was not available, because the 1930 decision was indeed legislative (though decisions on the same issues after 1935 were judicial). But Justice Frankfurter had another string in his bow. Both the initial opinion and the revised one offered an alternative ground for denying relief to Oklahoma Gas & Electric: The injunction against the enforcement of the bond violated the Anti-Injunction Act. Chief Justice Hughes agreed, but would have found it permissible directly to enjoin the enforcement of the rates.⁷⁰ The Court replied that a prior decision had “eliminated” the ratemaking commission “as a party to this action,” presumably with the effect of making it impossible to enjoin enforcement of the rates.⁷¹

I suggest that to understand this case, we must keep in mind two facts. First, it was a challenge to a state agency’s rate-setting, brought in federal court. We have already seen that the Court was attempting to rid the federal courts of such cases, seeing them as a legacy of the era of substantive economic due process. Second, despite the Court’s erroneous initial reliance on the retroactivity of the 1935 case, the outcome of the case was not altered. And indeed, it seems to me significant that in none of the cases in which the Court made substantive alterations in its already-issued opinions was the result changed. It may be that the Justices believed, or understood, that they always had available to them the materials for fashioning the result they desired to reach, and that, therefore, on the deepest level, getting the details right did not really matter.⁷²

This, in turn, raises a final question about jurisprudence and

68. 309 U.S. at 11 (Hughes, C.J., concurring in the judgment).

69. The intervening decision therefore did not “overrule” the prior one, as Prichard’s story stated. But the details are sufficiently technical, and not that different from an overruling, to make it understandable why Prichard, and later Schlesinger, told the story as if it involved an overruling.

70. *Id.* at 12-13 (Hughes, C.J., concurring in the judgment).

71. *Id.* at 8.

72. In *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), a subsequent order corrected Justice Frankfurter’s description of the legislative history of the Clayton Act. 338 U.S. 808 (1949). Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 933-37 (1952), argued that the correction ought to have impelled a rethinking of the underlying argument. (Wendy Perdue brought these references to my attention.)

history. If my speculation about the Justices' unconcern for detail is correct, it would be interesting to know whether they lacked that concern because they were influenced by their contemporaries, the Legal Realists,⁷³ or because the Legal Realists actually had their jurisprudence right.

73. I put it this way, rather than saying that the Justices were Legal Realists, because virtually every Justice made some substantive revisions, and one would not want to call them all Legal Realists. It does seem to me that Justice Frankfurter appears in this comment rather more often than he ought to. Perhaps he was indeed a true Legal Realist. Or perhaps he was so wound up in his extrajudicial activities that he devoted less attention than his colleagues did to the details of the job of judging.