



1939

## Justice Pierce Butler

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### Recommended Citation

(1939) "Justice Pierce Butler," *North Dakota Law Review*. Vol. 16 : No. 7 , Article 6.  
Available at: <https://commons.und.edu/ndlr/vol16/iss7/6>

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creditors petition dismissed the proceedings on the ground that there was no probability of rehabilitation, even though the debtor had offered to pay in cash the rent as determined. The Circuit Court stressed the necessity of safeguarding rights of creditors as well as of debtors, but reversed lower court and ordered further proceedings. However, the court stated that after administration had started, it was up to the district court to determine how long debtor should be allowed to retain possession. *Paradise Land & Livestock Co. v. Federal Bank* 108 F. (2d) 832 (1939).

JIM MILLER,  
Law Student.

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#### JUSTICE PIERCE BUTLER

Recently in Kansas City, memorial services were held for the late Justice Pierce Butler of the United States Supreme Court by the United States Court of Appeals for the Eighth Circuit.

Chief Justice Kimbrough Stone, of the Eighth Circuit Court of Appeals, made the principal address.

It follows:

Were this an occasion when those things which are essentially personal should be said, I would try to voice something of my estimate of this man for whom I held a genuine affection and whom it was my precious privilege to have had as a friend. However, I may say that as I deeply valued that friendship during his life, so shall the memory of that association be to me a benediction always. What I wish now is to try, from the more impersonal position of an American judge and citizen, to point out one meaning of his loss as a justice of our supreme tribunal.

The death of Justice Butler would have been a pronounced loss to the Nation at any time. It would have signified always the passing of a great man from important public service. But such loss is far accentuated by his passing when he did; and, therefore, his high worth is brought out in clearer outline. This arises from the situation in the Court at that time and his relation thereto.

The situation has to do with the attitudes of the members of the Court toward decisions involving social or economic matters coming before it. For convenience in stating these attitudes, I employ the indefinite and changeful terms of "conservative" and "liberal."

A few years after Justice Butler became a member of the Court, it came about that there were, as to decisions on social and economic matters, four members who might be regarded as conservative; two who were liberal; and three who were not definitely either. The result was, generally speaking, that such decisions of the Court were conservative, as that term is now understood. Shift in personnel exactly reversed that situation before Justice Butler died. There were then two conservatives, four liberals, and the same three intermediates.

It is from this changed attitude of the Court membership and from his place therein, that the additional significance of the passing from the Court of Justice Butler emerges. Not alone was he one of the only two conservatives then on the Court, but upon him fell most of the burden of formulating and expressing that viewpoint. His importance to the welfare of the country in such situation finds explanation in the way we function our form of democracy.

Our theory of democracy is based primarily upon rule by the people, but always without violating the fundamental liberties of the individual. This conception creates the ever present conflict between the power of the majority and the liberties of the individual. Therefore, our method of realizing this theory is not simply by majority rule but by restrained majority rule. The Constitution declares those restrictions. The Supreme Court determines, finally, the definition of those constitutional restraints. Narrow definition of these restraints tends to limitation of individual liberty. Broad definition tends to limitation of the power of the people to work out what, for the time, they deem their public welfare. Hence, it is of far-reaching consequence if the general attitude of the members of that Court be toward loosening or toward tightening those constitutional limitations.

To avoid too great a movement toward either danger, the best protection is in a balanced Court—at very least, in a minority ably represented. A representation, which, by discussion in conference of the Court and by pointing out the character and effect of majority opinions through dissenting opinions, will exercise the inevitable restraint upon extreme action which logic and patriotism exert on other honest and patriotic minds. That such effects are very real, judges know full well. They know that if extreme care is ever used in reaching a judicial conclusion and in stating the reasons therefor in an opinion, that care is present when such action is to be faced by a dissent from an able judge.

Is any thoughtful American not mindful of the dissents of the great liberal Holmes when the Court was conservative? Can any lawyer believe his views had no effect upon the deliberations of the Court in conference or upon the opinions to which he dissented? The American people sense, at least in part, his service in putting before them the danger signals, as he saw them, of too great a trend toward limitation of the power of the governments (National or State). Because of these services, his fame is secure. It does not rest upon the fact that he was a liberal. There is no sanctity either in liberalism or in conservatism. His fame is because he was a great liberal in the right place at the right time—because there was then the need of a great liberal on the Court and he met that need.

The Court changed, so that, before Justice Butler died, he was fulfilling a precisely similar public service on the Court. There was then need of a great conservative as a restraining in-

fluence on the liberal majority. There was need to have pointed out to the people the possible dangers to their liberties who might lurk in the views of the majority. A swing too far to the left may be as fateful as one too far to the right. Just as Justice Holmes placed his weight on the side of governmental power when a majority of the Court was inclined to broaden individual liberty, so Justice Butler put his weight on the side of individual liberty when the Court was inclined to broaden governmental power. The preservative effect of each was and will be the same: To prevent the beam from tipping too far out of true balance between the two opposed and vital components of democratic rule—governmental power and individual liberty.

Had Justice Butler been mediocre, the loss were different. No current is affected by a bending reed on river edge, but by the granite boulder in midstream. He stood immovable against the flow of what he saw as dangers to those liberties of the individual under our fundamental law. Of all the men I have known, none more perfectly typified strength. Massive and rugged in face and form, great in mind and pure in heart, lover of truth and basic things, he was strength in its best human personification.

He brought this superior strength into full use at a time when his country needed it. One result was that those efforts threw into bold relief the outlines of his noble character and of his fine ability where all who looked must see. His high place in the history of the Court and in the history of the Nation is secure. He was a great Justice and he was a great American.

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### OUR SUPREME COURT HOLDS

In *Jewel Tea Company, Incorporated, a corporation, Pltf. and Applt., vs. State Tax Commissioner of the State of North Dakota, Deft. and Respt.*

That taxation is neither a penalty imposed on the taxpayer, nor a liability which he assumes by contract. It is an apportionment of the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.

That Chapter 249 of the Session Laws of 1937, known as the "Sales Tax Act" imposes the tax upon the consumer in this state, and not upon the retailer, even though the retailer is required to add the tax, or its average equivalent, to the sales price or charge, and to collect the same and remit the tax to the tax commissioner.

That such law is applicable to a foreign retailer doing a retail business in this state when the goods purchased are forwarded by such retailer to himself in this state, the original package opened, the contents thereof assembled by his agents resident in this state, and by such agents delivered to the customers, who have previously ordered the goods and who pay for them upon delivery. Such law does not impose an unconstitutional burden upon interstate commerce, nor is the tax levied a tax upon interstate commerce.

That where such retailer, for a period of two and one-half years, filed with the tax commissioner the quarterly reports required by the Sales Tax Act, showing the gross sales of the retailer in this state during such quarter, and at the same time, in good faith, claimed the statutory exemption permitted on "gross receipts from sales of tangible personal property which this