HOLMES—LIBERAL—HUMANITARIAN—BELIEVER IN DEMOCRACY?

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IN THE past few months two articles¹ have appeared which purport to defend the philosophy and morals of Mr. Justice Holmes against the outrageous attacks of hecklers, disparagers and detractors among whom preeminence is accorded to two Catholic theologians. As I am named in both articles as one of the original misguided instigators of the abuse, I have no alternative but to reply. The learned professors who have pointed the accusing finger at me, however blinded by their zealous admiration of Holmes and a dense fog of scepticism, are, I believe, sincere. That very sincerity but adds heat to their sense of righteous indignation.

I am equally sincere and was so ten years ago when I wrote the article² which started this battle over Holmes' philosophy and morals. At that time I stood practically alone. But in a very short time two lawyer-theologians rallied to my support. During the last six years laymen, lawyers and non-lawyers, have joined the chorus of protest. The swelling volume and intensity of the attack has stunned, worried and irritated the short sighted admirers of the idol. In retaliating, Professor Rodell suggests that men read Holmes and the detractors.

And if the men who read Holmes read his detractors too, they will see which of the two conflicting views of life is more nearly fascist . . . and which is more deeply democratic. . .³

That is precisely what the laymen are now doing and their verdict is clear. That men would read and re-read Holmes was the unexpressed objective of my first article. Is Holmes' philosophy of law consonant

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¹ Howe, The Positivism of Mr. Justice Holmes, 64 Harv. L. Rev. 529 (1951); Rodell, Holmes and His Hecklers, 15 The Progressive 9 (1951).

² Lucey, S.J., Jurisprudence and the Future Social Order, 16 Social Science 211 (1941).

³ Rodell, supra note 1, at 11.
with Democracy or with that of Communistic and Socialistic States, was the very question I then proposed and answered. The views I then expressed I still hold with even firmer conviction. That men will read Holmes and learn what is being palmed off on Americans is still my fervent hope.

It may come as a surprise to Professors Howe and Rodell to learn that in the late twenties and early thirties I, like so many others, was a great admirer of Holmes. My admiration was based in part on the charm of his style, the novelty of his expression and his uncanny ability to turn a phrase that was pregnant with significance. However, it was based chiefly on the end results of his opinions and dissents in cases involving personal liberties. These cases seemed to express in epigrams a heart that welled with understanding and deep solicitude for the dignity of the individual and especially for the less fortunate. They appeared to express and champion the spirit of our democracy.

While I agreed with the end results of his opinions and dissents there were expressions here and there which puzzled me and left me with an uneasy feeling that there was something not only strange but wrong with the idol. That question mark in my mind could only be removed by reading everything judicial and non-judicial that Holmes had written. My spare time in the next few years was devoted to the task of reading and re-reading until I became certain that I fully understood the so-called great jurist. After the middle thirties the question mark in my mind was gone. But so too was the idol. In digging into that idol I discovered a philosophical skeleton of life and law, of man and morals, that was horribly deformed. The bones formed a well articulated whole, but the whole in relief was ugly and menacing. By 1936 I knew that, sooner or later, something had to be done about it.

Holmes was dead. Year by year the army of admirers grew. The chorus of acclaim was deafening. His philosophy of life and law was being endorsed or adopted, in part or in whole, by educators, legal and non-legal. To write a successful article or give an acceptable speech one had to do naught but quote liberally from Holmes' opinions or papers. To gain distinction and recognition one had but to publish a laudatory article or book on Holmes. Many little moons appeared on the horizon rendered discernible by the reflected light of the brilliant master. The followers of Holmes had formed a school of American Jurisprudence and its influence was increasingly perceptible in legal thought and judicial opinions. The tide was at its height at the turn of the forties when I decided to raise my voice in protest.
The opportunity came in the form of a paper read at the joint meeting of the Pi Gamma Mu Honor Society and the Academy of World Economics in March, 1941.\(^4\) Having learned from Holmes that if you will kill a king you must strike hard, I showed by excerpts from his writings that his philosophy was akin to Hitler's and that if adopted it would be the death knell of our democracy. I was not exaggerating nor over-emphasizing as this article will, I am certain, demonstrate. Professor Rodell may be consoled to learn that the most vicious attacks the paper and subsequent article elicited came from some Catholic theologians who chastized me severely for blackening the name and memory of the greatest liberal of our age.

Father Ford followed up with a slashing attack on Holmes in September, 1941.\(^5\) I read another paper at the December, 1941 meeting of the Association of American Law Schools,\(^6\) and Father Gregg published an article on Holmes' pragmatism in 1942,\(^7\) which seems to have gone unnoticed, but which I consider one of the most scholarly expositions published. Ben Palmer came out with his *Hobbes, Holmes and Hitler* in 1945\(^8\) followed by more articles in the American Bar Association Journal. That *Hobbes, Holmes and Hitler* article did more than any other to attract the attention of the legal scholars. In recent years the attack has been taken up by non-legal scholars. The truth of the matter is that the publicity given the attack has now reached such proportions that the devoted followers of the idol are now wondering whether they mistook a mole hill for Olympus.

This is not a mere battle of words. The question involved is a very serious one, one that gravely affects our concepts of morals, life, society, law and democracy. Actually there should not be any dispute as to what Holmes held in these matters. He is astonishingly frank and usually very clear in the expression of his views. His admirers should concede that we the critics have drawn a faithful picture of their idol and should make their stand rather on the ground that coercion alone is the order of the universe, for that in reality is the question involved. However, they insist on misinterpreting Holmes so I must take up the challenge on that ground.

\(^4\) See note 2, *infra*.
\(^7\) Gregg, S.J., *The Pragmatism of Mr. Justice Holmes*, 31 Georgetown L. J. 262 (1943).
Contrary to some other writers I hold that Holmes was a philosopher. This point is only incidental to the dispute, but it has some bearing on the subject. He was not a philosopher in the sense of one who has produced a comprehensive exposition of some branch or branches of philosophy. But it is an undeniable fact that his mind sought for ultimate explanations of things and formulated an articulated system of relationship and dependence of one class of concepts on another.

You cannot understand his external standard doctrine or clear and present danger norm, unless you know what he means by rights and duties. Rights and duties have no meaning except in relation to his concept of what law is. What law is necessarily springs from his concept of what civil society and authority are. His concept of civil authority and society springs from what he considers man to be. Holmes' man gets his meaning and significance from his relationship to Holmes' cosmos or universe. Holmes' cosmos or universe gets its meaning from the position he took as to whether there was, as he puts it, a campaign and a campaigner in the cosmos, namely a design and a designer, God. Whether there was a God or not flowed from the stand he took as to the human mind's ability or inability to know anything with certainty. He starts off with an epistemology, (the science of the validity of human knowledge), as indeed he should, and the rest of his tenets follow with tenacious logical consistency. Grant his absolute scepticism of the mind's ability to know any objective values (cosmic values as he termed it) and the rest is inevitable. If there were no God, Holmes' view would be the only alternative. Everything would follow right down to his dictatorship of the dominant force, the bad man theory of law and morals and the external standard.

Holmes' philosophy was the product of the times and is best understood in the light of the influences of the time. In the early 19th century a scepticism which grew out of Descartes, Hume and Kant had captured the enlightened of New England. The first wall to be breached was that of religion. There was a rebellion against the dogmas and absolutes of the puritan churches. When religious absolutes went, it was a foregone conclusion that all objective values would fall prey to the enlightened scepticism. Philosophical and moral absolutes were soon found wanting. To most of the new enlightened, Kant's metaphysics and categorical imperatives were just as repugnant as scholastic absolutes. They had no more time for Kant's unconditioned condition of conditions than they had for a natural law first cause, God. They were adamant in their conclusion that the human mind could not make value
judgments which were universal and necessary. It could not get at the nature or essence of things, or at causality. There was no necessity in the physical order or moral necessity (ought) in the moral order.

Later on, most of the enlightened accepted, at least pragmatically, August Comte's Positivism. According to Comte there were three stages in the development of man's attempt to explain things, the theological, philosophical and positivistic (scientific). As he explained it, primitive man, being a theological gullible, ascribed everything to God or some supernatural agency. When lightning flashed in the sky or a crude primitive artifact whizzed by his primitive nose, primitive man exclaimed, "there's God throwing fire or throwing stones at me." From this primitive stage, based more on emotional fright than reason, man, according to Comte, progressed to another level, the philosophical and metaphysical. Man no longer blamed everything on divine vengeance. When a stone whizzed by his nose he now jumped behind a bush, and from behind the thick foliage his eyes searched for a two-legged origin of the almost striking phenomenon. Man had noticed that quantitative and qualitative changes were the order of the world. His mind demanded a reason sufficient for the existence of these things. He had noticed that cats have kittens. Somehow or other he got the notion that kittens' existence depended on the cat and hence he concluded it was caused by the cat. The cat produced things. There were such things as causes. Changes revealed to man a story not only of sequences, but of consequences. Furthermore from the way a thing operated or produced things, men got the notion that they could get a pretty good idea of the nature and essence of things. They could get at the powers and some of the limitations of things. They decided cats had a power to produce kittens and stones had not the power. From the produced things, they reasoned back to an unproduced first cause. They decided that there was a campaigner and a campaign, that man was not just a baboon or a grain of sand, that his nature was subject to moral laws as well as physical, and his end was not just to get a kick out of functioning, but happiness here and hereafter. There were physical laws and physical necessity. There were moral laws and moral oughts expressed in universal necessary principles.

To Comte's way of thinking, man in the first stage (the theological) was not smart enough. In the second (philosophical) stage he got too smart for his shoes. Both were to him fallacious. He, Comte, had discovered the truth and would let the world in on his discovery. According to Comte, with the advance of scientific investigations, man had
reached a new stage in knowledge, the only correct stage, the scientific, positivistic stage. According to Comte's new enlightenment, the human mind can know nothing but phenomena and can state nothing about the phenomena which is not scientifically verifiable. Causes, nature, essences of things are not scientifically verifiable and so they are to be discarded as being beyond the reach of the human mind. Laws are merely descriptive. They state only sequences not consequences. Science knows nothing of necessity whether physical or moral. Propositions which express universal and necessary truths, whether pertaining to the physical or moral order, are untrue. Stones do fall but you cannot say there is a physical necessity that they fall. Men at present dislike murder but you cannot say that they ought not murder.

Principles expressing universal necessity or oughtness cannot be reached by the mind. Laws are only general propositions expressing "Is," i.e., what is happening at present in the world of phenomena. There are no laws that express what must or ought to happen or be done. Truth, if the world is to be used, is only relative to time and place. There are no necessary truths. There are cats and kittens but you cannot conclude that there is causality. Professor Howe classes Holmes as a positivist, and he was, but only in a hypothetical sense. He went Comte one better. He wasn't even sure the phenomena were there. The cats and the kittens and even he himself might be, as far as he could see, just a dream.

This was the new enlightenment which surrounded Holmes and his close friends in the 19th century, an enlightenment which they fondly embraced. Absolutes, necessary principles of any kind, became what they called "the common enemy."

This scepticism of absolute values which they embraced was a philosophy of negations. It left Holmes and his friends of the time empty handed. It was a philosophy of despair. Their minds sought for a substitute for absolute values and principles, for something that might light the way out of the darkness. They couldn't accept natural law's principles of moral ought and physical necessity, nor Kant's metaphysics and his practical will with its absolute categorical imperatives. But they did discover something in Kant onto which they felt they could grab and save themselves from drowning in the sea of despair. Kant had distinguished pragmatic belief (judgments) from his absolute categorical imperatives of the practical reason. In addition to universal and necessary principles, Kant mentioned judgments whose value is antecedently unknown and uncertain and tested by results.
There are occasions when a man must make a decision as to which way to act when there are several possibilities. He must decide which he believes will operate or work. On which would he put a bet as to workability. The selected judgment he makes is, of course, only hypothetical. Others might make a different bet. He might be wrong. He can’t be sure, but he must do something. The hypothetically selected judgment is one he will take a chance and act on. Its value is therefore only pragmatic, the gamblers’ judgment value. If it is a judgment that is acted on, or will be acted on, it has value. This became for them the only test of truth and good.

Holmes and his friends, like drowning men, grabbed onto this plank. They reduced all values to merely tentative ones. Thus was born Peirce’s Pragmaticism, James’ Pragmatism and Holmes’ Bettabilityanism, followed later by Dewey’s Instrumentalism. All judgments became for them only pragmatic ones. There are no necessary principles. Values are no longer to be measured by known absolutes or ends, but by their workability. What works is good no matter what it works for or produces. A later advocate filled in the picture of Pragmatism by explaining that if you have enough force you can make anything work, so end and means are one and the same thing. Force becomes the ultimate. With that in mind one can understand Holmes’ definition of Truth as the majority vote of that nation which can lick all others. So if you have the force anything is true, because you can make it work. The Dominant have the force and therefore anything they like is truth.

Pragmatism took on as many forms as there were advocates because their gambling bets varied with their ideas as to the phenomena and their own likes. They barely agreed before they disagreed. But they all hung on desperately to the denial of absolutes, principles and the affirmation of mere pragmatic values.

A startling scientific announcement in the 1850’s and a later development of the same provided an equally great consolation to the enlightened sceptics of the time, Holmes and his friends. Darwin had announced that the idea of absolute species in the biological world was false. Animals and plants changed, he said, to meet the needs of changing environments. Those who could meet the new environmental demands survived. The rest perished. The survivors, the dominant, were the fit, the rest the unfit. The changes were reflected in a fight for existence. Darwin soon included man in the picture of evolution. Survival of the

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9 Cook, My Philosophy of Law (1941) p. 63.
fittest was the story of all living things. Evolution was on its way. It soon explained the whole universe.

To Holmes and his friends, Darwin's evolution was a great boon. By merely transferring this theory to ideas (evolutionism) they had a scientific confirmation of their pragmatism. First of all they decided that, like biological species, ideas had no absolute value. Secondly, there is nothing but a continual competition or struggle of ideas to survive, and those that do survive for the time and place are the only ones that have value. The surviving ideas will in time become unfit as more dominant types take their place. Absolute principles were thus buried with absolute species in the biological order. Truth became only that which survives or is dominant at the time and place. All of Holmes' Pragmatist friends incorporated Evolutionism into their philosophical system. The way it was applied, and the extent, varied as much as their pragmatism did. But to none was it more of a dynamic compelling force than it was to Holmes. Keep in mind survival of the fit, a fight for existence, competition of ideas, a continual appearance of new varieties to supplant the old, and you will get a new slant on those famous dissenting opinions, on the states being experimental chambers, on the Vegelahn and Northern Securities cases and the struggle between monopolies and organized labor, on freedom of speech, and on the question of property rights and attractive nuisances.

If you put universal scepticism, pragmatism and evolutionism together and add plenty of ice to make it chilly you get that dizzy cocktail which Max Lerner has ironically labeled the "Mind and Faith of Justice Holmes." What then did Holmes, under these influences, believe? What was his philosophy?

Universal Scepticism—No Truth—No Absolutes—No Principles

As I stated earlier he started with epistemology, with the validity of human knowledge. Being an universal sceptic he held that the mind could not know anything with certainty. The human mind could not make conclusive judgments as to the world of phenomena or as to the value of the same. Nothing was certain except that nothing was certain. He was not even sure that he himself existed. The whole thing might be nothing but a dream.

I noticed once that you treated it as a joke when I asked how you knew that you weren't dreaming me. I am quite serious, and as I have put it in an article

referred to above, we begin with an act of faith, with deciding that we are not God, for if we were dreaming the universe we should be God so far as we knew. You never can prove that you are awake. By an act of faith I assume that you exist in the same sense that I do and by the same act assume that I am in the universe and not it in me. I regard myself as a cosmic ganglion—a part of an unimaginable and don't venture to assume that my *can't helps* which I call reason and truth are cosmic *can't helps*.

However he had an unverifiable feeling that he existed and that there were other things besides himself. These feelings that could not be substantiated he accepted on blind faith. They were not certainties but merely *I can't helps* in his way of thinking, as he called them. They have no objective value. He cannot be sure they stand for anything outside his mind. In fact there may not be a world outside the mind.

I have not studied W. James's *Humanism* but it seemed to me on the way to my formula of truth—as merely my *can't help*, which has validity for my world—but which I can't assert concerning the world if there is one.

Being a sceptic, he will not deny the possibility of contradictories. So there is no law of contradiction. Simultaneous existence and non-existence under the same circumstances may be possible. Operations of the mind have no objective value whether they be ideas or judgments. Objective reality may not correspond to ideas or judgments about it. Man's feelings, or *I can't helps*, are merely the product of association.

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12 "Also some mystical works of men seeking to lift themselves by the slack of their own breeches, and demanding that the final compulsions under which we reason, love, etc., should be admitted as of cosmic validity. I stop short of that. All I mean by truth is the road I can't help travelling. What the worth of that *can't help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man." 1 *Holmes-Pollock Letters* (1941) pp. 99-100.
14 "I don't understand your seeming inclination to controvert my *can't helps*. I see nothing behind the force of reason except that *ich kann nicht anders*—and I don't know whether the cosmos can or not. I do not see what more there is in your law of contradiction, except to assert that the universe can't make nonsense sense. Even to that I should simply say I don't know. I can't imagine it—but I hardly think that a measure of the possible." 2 *Holmes-Pollock Letters* (1941) pp. 251-252.
15 "I wonder if cosmically an idea is any more important than the bowels." 2 *Holmes-Pollock Letters* (1941) p. 22.
16 "I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn." 2 *Holmes-Pollock Letters* (1941) p. 13.
17 "What we most love and revere generally is determined by early associations. I love
Accordingly, peoples' *I can't help* vary as widely as the associations which produce them. Ideas and judgments based on such a flimsy source are unreliable. Hence universal scepticism is the unhappy lot of man's mind. Having reduced ideas to mere feelings about things, and having placed the source of these feelings in variable unreliable associations, it is not surprising that he finds he cannot frame any predicates about the world of reality.\textsuperscript{18}

Since the value of ideas is not based on objective (cosmic) evidence, he has nothing left as a test of truth but the subjective feeling of others.\textsuperscript{19} If a majority's feelings are alike on any point that makes it truth.\textsuperscript{20} At one time most of the world had a feeling, or an *I can't help* in their way of thinking, that the world was flat. That was truth at that time in the pragmatic bible because the idea had value to the granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism." Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918).

\textsuperscript{18} "I frame no predicates about the cosmos. I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know I give them practical respect, love, etc., but inwardly doubt whether they have any importance except for us and as something that with or without reasons the universe has produced and therefore for the moment has sanctioned. We must be serious in order to get work done, but when the usual Saturday half holiday comes I see no reason why we should not smile at the trick by which nature keeps us at our job. It makes me enormously happy when I am encouraged to believe that I have done something of what I should have liked to do, but in the subterranean misgivings I think, I believe that I think sincerely, that it does not matter much." Shriver, *Holmes' Book Notices, Uncollected Letters and Papers* (1936) p. 185. See also: "I always start my cosmic salad by saying that all I mean by truth is what I can't help thinking and that I have no means of deciding whether my can't helps have any cosmic worth. They clearly don't in many cases. I think the philosophers usually are too arrogant in their attitude. I accept the existence of a universe, in some unpredictable sense, just as I accept yours—by an act of faith—or by another can't help, perhaps." 1 *Holmes-Pollock Letters* (1941) p. 126.

\textsuperscript{19} "If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps.*" Holmes, *Collected Legal Papers* (1920) pp. 310-311.

\textsuperscript{20} "The philosophical remarks I shall not deal with beyond saying that the 'I can't help' is the ultimate. If we are sensible men and not crazy on-ists of any sort, we recognize that if we are in a minority of one we are likely to get locked up and then find a test or qualifications by reference to some kind of majority vote actual or imagined." 2 *Holmes-Pollock Letters* (1941) pp. 255-256.
people. Now that people believe the world is round, the contrary becomes truth. Truth is not objective. Truth becomes merely a relative thing, relative to what the majority feels or wants. What is more, this relative view of truth is authoritarian. The minority must conform their likes or feelings to that of the majority or suffer the effects of Dominant Force. What the crowd wants is truth. Since truth is nothing but what the crowd wants backed up by their power, he clearly indicates what is the real test of truth for a pragmatist—physical force.

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others.21

We shall see this test of physical force applied by him to law and morals. This of course was Hitler's test. As I said in 1941, it must have been the theme song of the Storm Troops as they made their pragmatic functional approach to Poland, Czechoslovakia, Norway, Holland, Belgium and France.22 Mr. Palmer was perfectly correct when he wrote *Hobbes, Holmes, and Hitler.*23

Holmes thus reduced the function of the human mind to naught but that of a weather vane to indicate which way the Dominant Winds were blowing among the crowd at the time. All that man can do is place a gambling bet or prediction based on trends as he did in his dissent. Necessary universal truths were banished. So he called himself a bettabilitarian.

Chauncey Wright a nearly forgotten philosopher of real merit, taught me when young that I must not say *necessary* about the universe, that we don't know whether anything is necessary or not. So I describe myself as a bettabilitarian. I believe that we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be. That leaves a loophole for free will—in the miraculous sense—the creation of a new atom of force although I don't in the least believe in it.24

**God—World—Man**

Since his sceptical mind had nothing to cling to but deep-seated impressions or bets, there was nothing left for him but to construct a descriptive picture of his imaginary world and its operations. His first bet was that there was no brooding omnipresence in the sky, no cam-

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24 *2 Holmes-Pollock Letters* (1941) p. 252.
paigner or campaign in the world, no God or Divine Providence. The world, if it does exist, is an unimaginable whole of evolving energies which somehow has the power to wag its tail or form a syllogism. In the evolution of cosmic energies, consciousness is a later phenomenon and purely an accidental one.

Whitehead talks and thinks like a mathematician and I am not in it. I like one thing—that he like Dewey begins his cosmos without any conscious ego and lets that come in later as quasi an accident.

Man, as part of the unimaginable whole of evolving energies, has no more importance or significance than any of the other phenomena of this energy, animate or inanimate. Stripped of a soul and innate dignity, man is only as significant as a baboon or a grain of sand.

I only mean that when one thinks coldly I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand.

Being only a predatory animal man has no innate right to life. Any right to life which he may acquire is a privilege granted to him by the state.

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25 "I think the proper attitude is that we know nothing of cosmic values and bow our heads—seeing reason enough for doing all we can and not demanding the plan of campaign of the General—or even asking whether there is any general or any plan. It's enough for me that this universe can produce intelligence, ideals, etc.—et superest ager." 2 Holmes-Pollock Letters (1941) p. 163.

26 "I think men even now and probably more in Goethe's day, retain the theological attitude with regard to themselves even when they have given it up for the cosmos. That is, they think of themselves as little gods over against the universe, whether there is a big one or not. I see no warrant for it. I believe that we are in the universe, not it in us, that we are part of an unimaginable, which I will call a whole, in order to name it, that our personality is a cosmic ganglion, that just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross, the meeting point can frame a syllogism or wag its tail. I never forget that the cosmos has the power to produce consciousness, intelligence, ideals, out of a like course of its energy, but I see no reason to assume that these ultimates for me are cosmic ultimates." Shriver, Holmes' Book Notices, Uncollected Letters and Papers (1936) p. 185.

27 2 Holmes-Pollock Letters (1941) p. 272.

28 "But as life draws near the end (one never quite believes it) I think rather more than ever that man has respected himself too much and the universe too little. He has thought himself a god and has despised 'brute matter,' instead of thinking his importance to be all of a piece with the rest." 2 Holmes-Pollock Letters (1941) p. 234.

29 2 Holmes-Pollock Letters (1941) p. 252.
But I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.30

Man by himself has no right to life but only an interest.31 The state can elevate that interest to a right by recognizing it and protecting it with its force. If for any reason the crowd wants to, they can do away with even the interest.32 The state can not only terminate the individual's life, but, if one group's tastes do not agree with another, the former can kill the latter. In fact, the lives of individuals may not be as valuable to the state as property.33 Those who have no value are unfit and the state should get rid of them.34

Holmes' "animal man" has nothing to look forward to or to aim at. He is bracketed by birth and death.35 Within the bracket the use of his

30 2 Holmes-Pollock Letters (1941) p. 36.
31 "The most fundamental of the supposed pre-existing rights—the right of life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell, and as, in any event, to those who do not think with Kant and Hegel it is only an interest, the sanctity disappears." Holmes, Collected Legal Papers (1920) p. 314.
32 "Formerly at least you were inclined with your German teacher to believe in a priori ultimates. I don't, except in the limited sense of human can't helps in the way of thinking, which may or may not have cosmic validity. I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough. When the Germans in the late war disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can." Shriver, Holmes, Book Notices, Uncollected Letters and Papers (1936) pp. 187-188.
33 "I hardly think of man as so sacred an object as Laski seems to think him. I believe that Malthus was right in his fundamental notion, and that is as far as we have got or are likely to get in my day. Every society is founded on the death of men. In one way or another some are always and inevitably pushed down the dead line. I think it a manifest humbug to suppose that even relative universal bliss is to be reached by tinkering with property or changing forms of government so long as every social improvement is expended in increased and unchecked propagation. I shall think socialism begins to be entitled to serious treatment when and not before it takes life in hand and prevents the continuance of the unfit." Shriver, Holmes' Book Notices, Uncollected Letters and Papers (1936) p. 181.
34 "Also it [Socialism] never proposes to begin by taking life in hand, which seems to me the only possible starting point for an attempt at social renovation." 1 Holmes-Pollock Letters (1941) p. 176.
35 "... from the point of view of the world the end of life is life. Life is action,
energies is the only thing that justifies itself.\textsuperscript{36} And so functioning is all there is, which, for the most part, is devoted to victuals, procreation, rest and eternal terror. Condemned to this bleak outlook, man’s only solace is to get a kick out of functioning while he may.

A platitudium has come home to me with quasi religious force. I was repining at the thought of my slow progress—how few new ideas I had or picked up—when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life—victuals—procreation—rest and eternal terror. And I bid myself accept the common lot; an adequate vitality would say daily: “God—what a good sleep I’ve had.” “My eye, that was dinner.” “Now for a rattling walk—” in short realize life as an end in itself. Functioning is all there is—only our keenest pleasure is in what we call the higher sort. I wonder if cosmically an idea is any more important than the bowels.\textsuperscript{37}

With these passages still vibrating in your memory re-read those much cited pagan addresses, The Soldier’s Faith and the Memorial Day address of 1884.\textsuperscript{38} Sounding brass and tinkling cymbals. To be a hero, to be eulogized as noble, is merely to function in the grand blind manner, to face annihilation for a blind belief, to die in a cause in which you did not believe, or which you did not understand. The superb functioning is the thing. That is nobility.

**No Moral Law—No Conscience—No Sin**

Because there is no God in Holmes’ book, there is of course no innate dignity in man, nor moral law which in conscience he should obey. Religion was to Holmes just as much of an opiate of the people as it was to Lenin. Morals are reduced to mere emotional attitudes of the time and place, much akin to good manners and rules of etiquette.

Our system of morality is a body of imperfect social generalizations expressed in terms of emotion.\textsuperscript{39}

He does not want morals that involve conscience, law, and a lawmaker. He was enough of a lawyer and a philosopher to know that “oughts” only come from duties and that duties as well as rights only

\textsuperscript{36} “Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.” Holmes, Speeches (1934) p. 86.

\textsuperscript{37} 2 Holmes-Pollock Letters (1941) p. 22.

\textsuperscript{38} Holmes, Speeches (1934) pp. 56, 1.

\textsuperscript{39} Holmes, Ideals and Doubts, 10 Ill. L. Rev. 3 (1915).
come from law, whether it be natural law or positive law. Morals therefore, that involve oughts and conscience were obnoxious to him as part of the "common enemy."

I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law. In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion Sin.40

Hence he banishes all absolute standards of morality.41 Even the law of charity is repudiated,42 as indeed it should be by one who makes self-preference and a kick out of functioning the ultimate ends of life.

What then are morals to Holmes once he has gutted them of conscience and an ought? They are nothing but the emotional tastes or likes of people at the time similar to one's like or dislike for sugar in his coffee. Since these likes change in the evolutionary process of blind competing tastes, a civilized person should not be shocked at anything, no matter what his own personal preferences may be. In short morals are relative not absolute, just crowd preferences.

I took much more [pleasure] in reading a book which describes unspeakable practices on the part of the heroine. One's jaw drops with amazement to find it assumed that two women can't be alone in a room together without exciting sinister suspicions—suspicions that in the particular case are supposed to be true. And yet, incredible, you like the woman (Claudine En Ménage). And there is humor, of a sort not usual in French books. Well, to be civilized is to be potentially master of all possible ideas, and that means that one has got

40 Holmes-Pollock Letters (1941) p. 200. "It would be well if the intelligent classes could forget the word sin and think less of being good. We learn how to behave as lawyers, soldiers, merchants, or what not by being them. Life, not the parson, teaches conduct." Id. at 178.

41 "I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side." Holmes, Ideals and Doubts, 10 Ill. L. Rev. 2 (1915).

42 "The ideas of the classics, so far as living, are our commonplace. It is the modern books that give us the latest and the most profound conceptions. It seems to me rather a lazy makeshift to mumble over the familiar. I was saying this to a lady the other day and she said where do you get such a scheme of life as in the New Testament? I replied that I didn't believe the economic opinion there intimated and that to love my neighbor as myself did not seem to me the true or at least the necessary foundation for a noble life, that I thought the true view was that of my imaginary society of the jobbists, who were free to be egotists or altruists on the usual Saturday half holiday provided they were neither while on their job. Their job is their contribution to the general welfare and when a man is on that, he will do it better the less he thinks either of himself or of his neighbors, and the more he puts all his energy into the problem he has to solve." Shriver, Holmes' Book Notices, Uncollected Letters and Papers (1936) p. 178.
Beyond being shocked, although one preserves one's own moral and aesthetic preferences. I regard the latter, however, as more or less arbitrary, although none the less dogmatic on that account. Do you like sugar in your coffee or don't you?43

Morals are personal tastes. His personal tastes do not represent his Darwinian universe which has no preferences as to good and bad.

I can't help preferring champagne to ditch water,—I doubt if the universe does.44

MAN'S END—A DARWINIAN FIGHT FOR EXISTENCE

Without any God-given dignity or value and without any moral law to aid him and protect him (against the dominant), the human baboon has nothing left but a Darwinian fight for existence.45 But there is a source of consolation, for above the roar of the battle for survival there rises, he says, a mystic spiritual tune that transmutes the battle into meaningful romance and spurs on the contestants to greater effort. Translated from the Holmesian dialect the tune runs as follows: Get in there and fight, cause you're not going anywhere buddy, you're just part of an unimaginable whole. How Spiritual! How Romantic! How Consoling!

For those of us who are not churchmen the symbol still lives. Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole.46

In this struggle for existence each man rightly puts his own interest above everything else just as the monkeys do.47 If our neighbor's in-

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43 Holmes-Pollock Letters (1941) p. 105.
45 "For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine." Holmes, Speeches (1934) p. 58. "But I know of no true measure of men except the total of human energy which they embody. . . . The final test of this energy is battle in some form. . . ." Id. at 73.
46 Lerner, The Mind and Faith of Justice Holmes (1943) p. 27.
47 "The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors." Lerner, The Mind and Faith of Justice Holmes (1943) p. 50.
terests are too antagonistic to ours, we just try to kill the other man rather than let him have his way.

Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.48

CIVIL SOCIETY—LAW

The fact that many of the human baboons have similar tastes or interests is the basis of his explanation of the origin of civil society.49 This group becomes the Dominant pattern holder. Since the Dominant have the power in their hands, their welfare is paramount.50 The Dominant make the minority give up their own interests by threatening to put the screws to them. The poor minority submit to the rule of the Dominant and in time accept their lot with sympathy and emotional affirmation. They then begin to talk about rights granted to them by the Dominant.

If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.51

Civil society is not due to the fact that man is social by nature; or that man recognizes he cannot develop and use his powers and faculties for his greatest self-perfection which he ought to seek, except by union with others. Instead of this rational explanation, Holmes tells us that society originates and continues on the basis of force. Force is the ultimate.

48 Holmes, Natural Law, 32 Harv. L. Rev. 40, 41 (1918).
49 "Of course the fact that mankind or that part of it that we take into account are subject to most of the same can't helps as ourselves makes society possible. . . ." 2 Holmes-Pollock Letters (1941) p. 256.
50 "If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands." Lerner, The Mind and Faith of Justice Holmes (1943) p. 51.
51 Holmes, Natural Law, 32 Harv. L. Rev. 40, 42 (1918).
I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force. I may add what I no doubt have said often enough, that it seems to me that every society rests on the death of men. . . .

Whose force? The force of the Dominant. A body of laws represents not reason and principles derived from and working on experience but merely the tastes of the Dominant. And hence Public Policy means only what the Dominant tastes demand at the time. Why must public policy or legislation represent only the Dominant's tastes? Because in the evolutionary process they are the ones fit to survive?

The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.

As Lerner said, Holmes' concept of society was that of masters and men. What becomes of minorities in Holmes' Darwinian view of Society, since they have no inherent God-given rights, not even a right to life? As natural law and moral oughts are excluded, the Dominant fit have no duty to minorities. He gives us the answer. The dominant baboons may from sympathy make some concessions to the unfit minorities. So they live by sufferance. Any guarantees given them may be taken away with a shift in sympathy. Freedom of speech and due process of law are only privileges not rights. The dominant may even use these privileges to destroy them and set up a dictatorship of the proletariat distinguished by complete censorship and star chamber proceedings.

All that can be expected from modern improvements is that legislation should

52 *Holmes-Pollock Letters* (1941) p. 36.
53 "So when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way. If a given community has a definite ideal, for instance, to regulate itself so as to produce a certain type of man, other communities would have a different one—and that community might change in a hundred years. But suppose the ideal accepted, there would be infinite differences of opinion as to the way in which it was to be achieved, and the law of a given moment would represent only the dominant will of the moment, subject to change on experiment or for deeper reasons. But I am beginning too far back. You assume a body of law in force and start to formulate the principles of juristic development. I should think the only principles worth talking about were the existing notions of public policy." Shriver, *Holmes' Book Notices, Uncollected Letters and Papers* (1936) pp. 187-188.
55 Id. at 44.
easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. 56

Of course minorities, by their cries, may elicit the sympathy of a number of the dominant and thus win them over to their side. In this way, they may become the new Dominant, and the old unsympathetic become the minority. In this way the fight for existence goes on and the fit survive. In this sense the pen is mightier than the sword but in the last analysis the sword is still the ultima ratio. The Dominant do not have to sympathize. They always have the power in their hands, as he says.

**LAW—RIGHTS—DUTIES**

This is the Yankee from Olympus to the measure of whose enlightened thought we are supposed to tread. But he is consistent. Having reduced civil society and authority to an authoritarian dictatorship of the force of a Dominant elite, fit to survive, he proceeds to define law, which as we saw signifies the taste of the dominant, in the jungle terms of force.

I know that much has been written on this subject, but taking law as what I called it in American Banana Co. v. United Fruit Co., 213 U. S. 347, 356: “a statement of the circumstances in which the public force will be brought to bear upon men through the courts, . . . .” 57

Rights and duties flow from law. They are products of law. What is a right then for Holmes? He coined the phrase “the hypostasis of a prophecy” 58 by which he meant the basis or grounds for a bet or prediction, that physical force of the dominant will come to one’s assistance. The term “right” is only an empty substratum. 59 Likewise a duty

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56 Id. at 50.
58 “. . . right [legal] is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it. . . .” Holmes, Natural Law (1918) 32 Harv. L. Rev. 40, 42. See also: “The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies.” Holmes, Collected Legal Papers (1920) p. 168.
59 “. . . As to hypostasis—I don’t remember ever using it but once; at first as an intentionally magniloquent and pedagogical answer to Pound’s question: What is a right? And then in an article, as a real reduction of a right to its rudiments. It starts from my definition of law (in the sense in which it is used by the modern lawyer), as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms. Of course the prophecy becomes more specific to define a right. So we prophesy that the earth and sun will act towards each
is defined in terms of force.\textsuperscript{60}

\textbf{LAW AND MORALS}

The law and consequently rights and duties have nothing to do with morality.

The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.\textsuperscript{61}

The law does not say that one ought not to murder, or commit assault and battery or keep his contractual promises. It does not so intend. It merely states that if you do kill, etc., there is basis for a bet that the physical force of the dominant may be brought to bear on you. The law just draws a line in the sand which represents the dominant tastes and merely says, if you cross that line you are apt to be apprehended and made to pay with your life, your liberty or your property. The law is only an external standard, an external deposit. It has nothing to do with morals or moral oughts.

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him.\textsuperscript{62}

\textsuperscript{60} "The primary duty is little more than a convenient index to, or mode of predicting the point of incidence of the public force." 1 Holmes-Pollock Letters (1941) pp. 20-21.

\textsuperscript{61} "But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right." Holmes, Collected Legal Papers (1920) p. 159.

\textsuperscript{62} Id. at pp. 174-175.
Mr. Justice Field was probably not merely joking when he used to say that Holmes didn’t value any title that was not based on fraud or force. The law being only a catalogue of external standards, Holmes believed a book on law could be written which omitted all terms that have a “moral ought” significance.

**BAD MAN THEORY—LAW AS PREDICTION**

Such a book would of course, as he had stated, stink in the nostrils of those who hold that law and morals cannot be divorced. But as law is only a possible incidence of physical force it should be looked at not as the good man looks at it but as the bad man looks at it. The bad man is not concerned with goodness or badness. He is a pragmatist who merely weighs what his chances are of getting away with it. He too is a bettabilitarian.

I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Which laws are good and which are bad? Since he has eliminated principles of reason and morality he has no criterion left but the tastes of the Dominant. Give the crowd what it wants. This again is one of those half truths with a proper place for application, which however is vicious as an ultimate universal criterion for law makers, (including, if not especially, judicial law makers).

The lawyer’s job is similar to that of the bad man, as Holmes sees it. The lawyer too is just a bettabilitarian. He bets which way the axe will fall.

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64 “I can imagine a book on the law, getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer’s sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as the hypostasis of the prophecy—in short, systematizing some of my old chestnuts.” *2 Holmes-Pollock Letters* (1941) p. 307.


66 “However I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants. Personally, I bet that the crowd if it knew more wouldn’t want what it does—but that is immaterial.” *1 Holmes-Pollock Letters* (1941) p. 163.
The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.  

**Law as an Experiment**

To my way of thinking, betting as to what the crowd would want and accordingly what the courts of the future would do played no little part in his (Holmes') famous dissents. They certainly were not based on any intrinsic goodness or badness of laws. By keeping in with youngsters he kept his finger on the pulse of new trends. The youngsters were the weathervane of the social climatic winds. A blind evolution of world energies keeps its thoughts to itself if it has any, and so Holmes' world has no values whether inside the law or outside of it. There are in this blind process no principles or ends. There is no campaign map. So anything can be tried. Since all values are uncertain, experiment for experiment's sake is permitted. Experiments have not objective truth as their object, because that for Holmes is unattainable. Truth is what the crowd wants. So any experiment the crowd wants is good and true. The crowd if it so chooses may limit itself by a constitution which too is an experiment.  

The ambit of experiment is governed only by what the Dominant wish, as expressed by their agents in the form of Public Policy, and not by any principles whatsoever.

I should think the only principles worth talking about were the existing notions of public policy . . . and personally I should not speak of justification which presupposes an absolute criterion, whereas I should think the only problem was: does this decision represent what the law-making power must be taken to want.

As the Constitution was only an experimental self-imposed limitation he applied his evolutionary philosophy to stretch it as far as he could. It is not his construction of the Fourteenth Amendment in *Truax v. Corrigan* that was dangerous, but the real philosophy behind it, a

68 "It [our Constitution] is an experiment, as all life is an experiment." Abrams v. United States, 250 U. S. 616, 630 (1919). (Dissenting Opinion).  
69 Shriver, *Holmes' Book Notices, Uncollected Letters and Papers* (1936) p. 188.  
70 "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." *Truax v. Corrigan*, 257 U. S. 312, 344 (1921). (Dissenting Opinion).
philosophy of unrestricted experiment. Getting rid of the unfit would have been just as noble an experiment for Holmes, if the crowd wanted it. If the Constitution could have been stretched to cover it, his Malthusian conscience would have probably conceived it as one of the pleasures of a higher sort. After all, his intelligent elite are not to be shocked at any of the phenomena of an aimless evolution.

EQUALITY—PROPERTY RIGHTS—FREEDOM OF SPEECH

Those who think that Holmes’ stand on equality and on property rights are a mark of inconsistency have failed to note the terrific impact of Darwinism and scepticism on the whole stream of his thought. He didn’t believe in equality of men, because of those two cogent reasons. In his evolutionary theory of a fight for existence there are classes, the Dominant fit and the non-dominant unfit, or as Lerner puts it, Masters and Men. In short those who are just men and those who are masters of other men. In this evolutionary classification there is rank not equality. But there is another cogent reason why he abhors equality. No one holds that men are equal in physical, intellectual and what we sometimes call moral qualities or character. But for those who hold on to Natural Law and believe that man has a soul, man has a certain God-given innate dignity of his own, and hence a little bundle of inherent rights which puts him on a par with others in the very fundamentals of his existence. By his very nature he is fundamentally independent and lives by right, not sympathy. All of this was of course part of the “common enemy” to Holmes. To admit it would be to admit that the human mind can know something about causes and the nature of things with certainty. It would mean the abandonment of his universal scepticism and all that followed from it.

Also, if there is a form of speech for which I have less sympathy than another it is the talk about “exploitation,” as a hostile characterization of modern commercial life, and an implication that dominant brains are to blame. I think it drivelling cant and I have a standing war with my dear friend Laski, as to his passion for Equality, with which I have no sympathy at all.\footnote{See note 69 supra, at 197.}

The same cogent reasons made him dislike tinkering with property rights while he was willing to see Socialism get rid of the unfit. The dominant class, since they have the power in their hands, have a right to the things which create power.

The same two cogent reasons explain his attitude toward freedom of
speech. While he had a personal liking for it, he could not accept it as a universal principle and right of man.

It is one of the ironies that I, who probably take the extremest view in favor of free speech, (in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it), that I should have been selected for blowing up.72

Because of his scepticism he could not admit freedom of speech either as a principle or a natural right. Because of his Darwinism, an elite dominant, e.g., a proletariat can abolish it. Freedom of speech for Holmes is merely a concession flowing from the sympathy of the authoritarian dominant. We hear much of his "clear and present danger" test taken from the Gitlow case.73 We hear much of his freedom of thought even for the thought we hate. We hear much of "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."74 But few, even of our judges really comprehend what Holmes was driving at. Truth for Holmes has not a cosmic value. It is not something the human mind can attain. For Holmes, truth is merely that which the Dominant want. By competition in the market place one can find out the Dominant wish, and since it is their wish, it should have its way. Moreover if the Dominant, even in our Democracy, wish to abolish freedom of speech they may do so by its very use. We only understand Holmes' "freedom of speech" by keeping in mind what he means by "truth" and by adding what he added in the Gitlow case.

If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.75

There is no freedom of speech in a dictatorship of the proletariat and Holmes knew it. For him to admit freedom of speech as a principle which could not be whittled away nor abrogated by the Dominant would be abdication of his entire philosophical system. Man has no natural rights in Holmes' system since man has no inherent God-given dignity. The individual is a chattel for the Dominant to use as their tastes suggest. Man may have natural interests and likes but all his rights

72 2 Holmes-Pollock Letters (1941) p. 29.
75 See note 73 supra, at 673. (Dissenting Opinion).
come from the Dominant. This is Holmes, the great Yankee from Olympus.

**Holmes—Liberal—Humanitarian—Believer in Democracy**

How then is Holmes the great Liberal, the great humanitarian and the great lover of Democracy as his admirers proclaim? In his philosophy the only beneficiaries of liberalism are the Dominant. The rest of the baboons (the non-dominant) enjoy a precarious existence which depends for everything upon an uncontrollable, arbitrary, educated, animal sympathy of those who have the power in their hands. Neither the individual nor the dominated have a right to the benefits of liberalism in Holmes’ philosophy. Their only hope is that the Dominant may feel that their own self-preference status is better secured by a little sympathetic liberality to the unfit minority. In *Vegelahn v. Guntner* he seemed to champion minorities. But if we compare the *Vegelahn* case with the *Northern Securities* case we get a more correct insight into his thinking. In the one case he sides with struggling labor and in the other with a powerful monopoly. There is no contradiction because to Holmes all life is but a Darwinian fight for existence. A fight demands two or more of the competing varieties. If all lines become equal the on-going fight ceases. His interest was not based on any human liberal feeling. It merely reflected his interest in a continuation of a fight for survival in which the individual has no value. Lerner in commenting on these cases is correct in stating: “Holmes acted from the image of a philosophic universe,” and again “Roosevelt [Theodore] might have anticipated Holmes’ *Northern Securities* dissent if he had studied Holmes’ Massachusetts labor dissents. Taking into account Holmes’ Darwinism and the sense of accepting the limits that the universe imposed upon him, they might well have given warning to any President hell-bent on anti-trust enforcement.”

What I have said of Holmes’ liberalism is equally true of his humanitarianism. Holmes has no interest in the individual because the individual has no significant importance in the evolutionary process. The individual is just a bundle of cosmic evolutionary energies to be pushed down the dead line if the interest or likes of the dominant variety of

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77 Northern Securities Co. v. United States, 193 U. S. 197 (1904).
79 *Id.* at xxxv, xxxvi.
the time and place are thus better secured or advanced. In his philosophy of evolution which he tried to work into his opinions and dissents wherever he could, the only thing of value is the dominant variety of the human species. They alone (can survive) meet the climatic changes that at the time represent the aimless evolution of unknowable and unpredictable cosmic energies. Lerner, one of his great admirers, admits that Holmes saw himself as an "evolutionist."80 This is an understatement. Evolution was to Holmes an absolute which pervaded his opinions and dissents as a strong undertone and gave to them more of a philosophical than a legal character. He was not a lawyer's lawyer in the sense of a Cardozo. He was more intent on selling his philosophy of evolution than administering justice according to law. Lerner, who in my opinion has the keenest and most psychoanalytical mind of all his admirers, in a statement, albeit rather diluted and watered down, reveals nevertheless the tough knuckles underneath the kid glove.

Holmes' perspective of law as civilization was that of a generation which had sat at the feet of Charles Darwin, Herbert Spencer, Walter Bagehot. Life was a struggle for existence, and Holmes had a healthy respect for the survivors, whether men or institutions. Life was a matter of social law, and Holmes was skeptical of the reformist tinkering with what was an inherent part of human society. Life was a clash of power, and law in the main was the rationalization of the interests of the dominant group. Thus there is a blend in Holmes of a gentlemanly Darwinism (society is a jungle, but men have ideals as well as appetites), a reluctant economic interpretation (classes do exist—the masters and the men), and a deep institutionalism (the coating of custom is baked hard, and only a strong thrust from below can break it).81

Again:

. . . who [Holmes]—anticipating Pareto by many years—sees legal systems as the outer vestments of the power of a dominant (although always changing) elite.82

The only difference between Holmes and Hitler was that Hitler decided that the elite was not always changing but instead was limited to a particular race. It is true that Holmes was a gentlemanly Darwinian. He too would like, as he often repeated, to get rid of the unfit but he would be more apt to do it by sterilization or gas chambers than with a butcher's cleaver. His was a kid-glove Darwinism.

80 Lerner, The Mind and Faith of Justice Holmes (1943) p. 91
81 Id. at 44.
82 Id. at 45.
Again Lerner tells us:

There was another element in Holmes' perspective of law as civilization, related and equally “tough,” yet separable. That was the sense that law, like society, is careful of the species, careless of the individual fate; that it must serve the uses of the generality of men, even though it entail hardship for the particular person. It was this sense that formed the source of the doctrine of the “external standard” for liability, which was first developed by Holmes in his Common Law, which was more fully developed in “Privilege, Malice, and Intent” and in his liability decisions on the Massachusetts Court, and which keeps cropping up in the Holmes-Pollock correspondence as one of the legal convictions the two men had in common. It was this sense also which underlay several of Holmes’ “Draconian” decisions that have been much criticized, particularly the “poisoned pool” decision and the railroad-crossing decision.

This does not mean that Holmes did not have in him a basic humanism. He did. Holmes usually upheld social legislation on the doctrine of the not unreasonable legislator. But note the similarity between this doctrine and that of the external standard. In both instances Holmes is refusing to go into the subjective question of motivation. In both instances he avoids the imposition of moral patterns on the flux of law. In both instances he leaves the basic decision to the common sense of the community, externalized in a standard of liability according to consequences rather than motive, or in the choice of representatives to determine the direction of public policy. But when these standards clashed with humanitarianism in the sense of sympathy for particular individuals, Holmes did not hesitate to override the latter. In fact, one may guess that he even took some satisfaction in the sense that he was subordinating merely humanitarian considerations for the more arduous and exacting demands of “our mistress, the Law.”

Lerner fails to tell us that when the law on the books clashed with his evolutionary theory Holmes could stretch the law and try to work off his theory. He was not a Brandeis with an almost patriarchal zeal for the lot of individuals and minorities. He wouldn't go around to factories to see how workers lived. He wouldn't even read the newspapers to see what was happening in the world, or go to the slums to see how the lower third lived. He spent his spare time with youngsters whom he felt were the smart minds of their generation and the elite of the future. Their young ideas would, he felt, dominate in the near future. He saw in their new ideas the dominant views of tomorrow on which he could place a bet. He was indeed a bettabilitarian. My own impression is that his dissenting opinions were engendered by such bets as to future trends. They certainly did not spring, in personal liberties cases, from any belief in principles connected with inherent rights or the dignity of the individual.

83 Id. at 45, 46.
Holmes' interest and respect was not for the unfit but the elite. Even his distinguished brothers on the Supreme Court bench were not exempt from classification. He wrote concerning his colleagues to Pollock in 1925:

I am very hard at work... preparing small diamonds for people of limited intellectual means.84

Lerner suspects, and I believe with reason, that Holmes pulled tricks on his colleagues in order to get his social philosophy past their notice. He says:

Holmes' draft opinions not infrequently came back with sharp and sometimes shocked comments from his brothers. They felt often that his language was too strong. "The boys," he wrote Pollock in 1918, apropos the draft opinions, "generally cut one of the genitals out of mine, in the form of some expression that they think too free." One suspects that Holmes knew this beforehand, and that with a shrewd Yankee eye for the weaknesses of his colleagues he often put in things that were "calculated to give the brethren pain," so that in the end he could retain what he had all along intended.85

So this was the man who was supposed to be a humanitarian. His humanitarianism applies only to the dominant elite as did his liberalism. Neither has any meaning except in the jungle.

His concept of Democracy, like that of liberalism and humanitarianism, embodies a strong jungle odor. All rule for Holmes is by a dominant group whether the Dominant be a majority or a minority. A dictatorship is still a dictatorship whether it is exercised by a majority or a minority. The only way in which a rule of a majority can be prevented from devolving into a dictatorship of a majority is by guaranteeing to minorities certain rights which even the majority cannot invade. Unless these rights are guaranteed absolutely, a democracy soon becomes government of all the people by some of the people. If a government is to be by all the people, all the people must have some fundamental rights which are absolutely irrevocable. Those who equate Democracy to Majority Rule do not understand the very fundamentals of Democracy. A majority rule or a two-thirds rule or any fractional rule is only a practical device made necessary by the fact that ordinarily it is humanly impossible to get a unanimous agreement on the wisdom or the prudence of a proposed measure. The Rule gets its validity—not from the fact that it represents the physical power of a majority, but from

84 2 Holmes-Pollock Letters (1941) p. 173.
the fact that all the people agree to abide by it in regard to matters which fall within its scope. The existence or non-existence of inherent fundamental rights do not fall within its ambit. The application of such principles may change, even though the principles themselves do not change. The principle that murder is wrong does not change, but our knowledge of when an act constitutes murder or does not constitute murder may change. By science and experience we have learned that a man may be insane on a point and yet not fulfill the requirements of the old wild-beast theory. We know now that men were convicted of murder who were not guilty because of insanity. The idea is similar to that expressed by Cardozo in *MacPherson v. Buick Motor Co.* "The principle that the danger must be imminent does not change, but the things subject to the principle do change."86

Now, Holmes completely rejected absolute principles and absolute guarantees in his philosophy. The only absolute for him is the Dominant Force. The Dominant can abolish any right or supposed guarantee if it chooses to do so. Holmes would turn over in his grave if he could learn that people were interpreting him to mean that the Dominant even in our Democracy could not, if they so wished, abolish freedom of speech or religion, or the press, or due process of law. He thought he had made that clear when he said that the Dominant could use freedom of speech to bring about a dictatorship of the proletariat if they so desired. Principles that were necessary and universal were abhorrent to him. They were part of the detested "common enemy" which he and his early enlightened sceptical and pragmatic friends had determined to exterminate. He had a strong personal taste or liking for freedom of speech just as he liked rocks and barberry bushes, but he made it very clear that it was not a part of his philosophy of man or society. So too with equality.

Consonant with Holmes' Dictatorship Democracy is the slogan of his followers, that the Constitution is a tool, not a testament. Like giving the crowd what it wants, and life being a fight for existence, it is one of those half truths which has application in the proper circumstances. The evil comes from making these things ultimates and universal and in applying them to destroy things which really are absolutes, universal, and ultimates. Undoubtedly many of the provisions of our Constitution convey such broad powers that the application can be restricted or enlarged to meet the needs of Society at the time. Some of the provisions of our Constitution and the amendments, as is also true of our legislative enactments, are of value only as to the time and place and

circumstances. Trial by jury is not an absolute. Even the Founding Fathers knew that it was only the best means known at that time for securing a just trial. A just trial was the end, jury trial but a means towards that end. Whether we have high tariffs or low tariffs or any tariff at all is merely a question of relative value. But it is a far cry from such regulations to, let us say, the prohibition of murder. There does exist a hierarchy of values. Some values are absolute and some are only of importance in reference to the current welfare of Society. Some of our constitutional values are essential to the existence and continuance of Democracy, and some are only incidental thereto.

At the time our forefathers were drawing up our Constitution their minds were filled with a vivid memory of a war of rebellion which they had fought on the grounds of a God-given natural human right to resist unjust rulers and unjust laws. It is irrelevant to point out that some of the Founding Fathers may not have subscribed to God-given natural rights. The real point is that all knew that people believe in natural rights and that there is no surer way of starting discord and rebellion than by an invasion of those rights. They knew that for those rights men will fight and die. They knew that the bloodiest wars were those where men fought not as conscripts marched up to a line to die in a cause in which they did not believe, but wars where men fought from deep conviction, as in religious wars. They knew that no Democracy would long survive which did not absolutely secure to people rights which the people held by nature from God. They had no intent to set up a dictatorship of a majority or a minority or a government which could degenerate into such. And so, after absolutely guaranteeing a republican form of (democratic) government to the states\(^87\) they added provisions which implemented natural rights. Not all of these implementing provisions are absolute. Some, however, are absolutely indispensable for man as an individual and as a social being. Others are only provisions which, to the best of their knowledge, (at that time), would secure those natural rights. These are not immutables nor absolutes. But the important point to keep in mind is that they recognized that absolutes had to be secured if a civil society was to endure and not degenerate into a sort of a Holmesian authoritarian dictatorship of a majority.

Holmes' philosophy is that any law lawfully passed by the Dominant

\(^87\) Const. U. S., Art. 4, Sec. 4.
is law. The question of good or bad has no place in his system. To the contrary, the Founding Fathers held that laws may be passed which are unjust and bad and do not have to be obeyed, and that people may rebel against a government that persists in trying to enforce such laws. They placed that privilege on a natural right.

In the very recent past we took the same stand as the Founding Fathers. We, jointly with our allies, blamed the German people for not rebelling against their Government. We sentenced men to death as criminals for not disobeying the laws and commands of their rulers. We accepted it as a principle that men not only have a right but a duty to disobey laws and commands that are against nature. We politely called them crimes against humanity. The whole supposition of our position was that there are some universal and necessary moral wrongs, and that we punished them because they are moral wrongs.

While one may seriously doubt the wisdom and the legality of the procedure followed in the above instance, one thing stands out clearly: that we ourselves, and the people of the world do not accept a Holmesian separation of law and morals, nor the concept of government as an unrestricted power of a Dominant elite.

Holmes and his Darwinian followers would have explained the German incident in a pragmatic way as follows: Hitler's tastes just differed from ours. While Hitler and his followers had the power, whatever they ordered was good and truth. When we won the war we had the power so our tastes became the good and the truth. Since we didn't like their tastes and had the power in our hands, we killed them. Just a matter of tastes and power. The clubs of the Dominant is trumps in any form of Government. That is Holmes' Democracy.

This then is the story of the Philosopher become King, the Yankee from Olympus, the man to the measure of whose thought men for centuries to come are supposed to tread. Theologians can't goose-step so they are disparagers, detractors and arrogant cowards. This is the story that reduces men to a pestilence-driven multitude, the prey of a blind evolutionary climate; the story of what is left for man in the hands of scepticism, evolutionism, positivism and pragmatism. It also is the proof of what can happen to a brilliant mind that gets lost in the fog of the new enlightenment. It is the story of the lot of man when he tries to go it alone. This is the man whom Professors Howe and Rodell and their friends will have us substitute for God.
Professor Howe has published an article that has for its object the defense of Holmes against those who have slurred and disparaged Holmes and his philosophy. While he professes to be directing his fire at Professor Fuller he takes some warm-up shots, that went low, at me and a few others. As his real thesis is to try to prove that Holmes believed in moral oughts and not merely a positivistic "Is," he asks the question "how is it possible to accept Professor Fuller's statement that Holmes' 'avowed purpose' was 'to cut the law loose from the ethical considerations that have shaped it'?" If you leave out the space devoted to the warm-up shots, that devoted to a long historical review of the factors that made Holmes what he was, and the space devoted to warning Professor Fuller that he is giving aid and comfort to Natural Law advocates, and that if he doesn't watch out the bad one, God, will get him, there is very little of importance left to the article except a despairing cry, that if he (Howe) and his friends don't find a substitute for God the terrors of their bleak scepticism will overwhelm them. It recalls to mind the saying, that if there were no God we would have to invent one. Since Professor Howe is out to prove that Holmes held moral oughts and not merely an "Is," you expect to find excerpt after excerpt from Holmes' writings establishing the point. What do you find? Actually only one excerpt really to the point. I am sure that from memory I could have supplied Professor Howe with many passages from Holmes, which, with his sophistical artistry, he could have so twisted as to achieve the same purpose. An author's statement only has meaning in accordance with the meaning which he gives to the terms used in the statement. The passage quoted by Professor Howe if made by a Catholic or a Protestant or a Jew who believes in God and morals with a prick of conscience, means one thing. Made by Holmes who does not believe in God, or morals with a conscience kick, it means something entirely different. Here is the shop-worn passage which Professor Howe uses:

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. . When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things.

88 Howe, The Positivism of Mr. Justice Holmes, 64 Harv. L. Rev. 529, 542 (1951).
89 Id. at 541.
90 Holmes, Collected Legal Papers (1920) p. 170.
After this quotation Professor Howe asks:

Is this the language of one who sought to make law a matter not of reason but of fiat and who was not concerned with questions of the *ought* and only interested in the *is*? Does it indicate a repudiation of the conviction so firmly stated in *The Common Law* that "rules of law are or should be based upon a morality which is generally accepted"?91

Professor Howe has the audacity to pose that question when he knew what Holmes meant by *Morals* and especially what he meant by *External Deposit*. He knew well when he penned those words the passages which in previous pages I have quoted. He knew that morals for Holmes are only generalizations based on the emotions of the dominant at the time and place, a question of whether or not you like sugar in your coffee. He knew that Holmes would like to rid morals of conscience and the notion *Sin*. He knew that Holmes held that law was only an external standard (an external deposit) and wanted to get rid of all the terms of a moral significance in law, and to reduce law itself to the mere necessity of force, coercion, which is the *ultima ratio*, as he said. A moral ought (a moral necessity) was part of his "common enemy." Has Professor Howe forgotten that Holmes learned from Chauncey Wright not to say *necessary* about anything? An ought is moral necessity if it is anything. Holmes was a pragmatist and pragmatism holds only gambling bets as to things. Yet, that is Professor Howe's defense of a supposed King, whose reputation and renown are at stake. I would hate to have my life depending on a defense such as that.

Professor Howe, after begging us to believe that his idol, Holmes, believed in moral oughts, forgets himself and a few pages later upbraids us for not having stomachs strong enough to accept the bitter pill which Holmes tendered us.92 And what is the bitter pill? Holmes' pill was that man has no more significance than a baboon or a grain of sand. Is there a moral ought that one baboon should not kill another, or deceive him, or grab his food? Is there a moral ought that one grain of sand should not commit assault and battery on another? Holmes was not so inconsistent. It is true he held that men were nothing but baboons and predatory animals. But he was consistent and interpreted law and morals in the terms of the jungle, *force*, not a moral ought.

Professors Howe and Rodell have to have some escape from the terrors of universal scepticism, so they hysterically grab onto something

91 Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529, 541 (1951).
92 Id. at 545.
to replace real morals. The procedure is something akin to what psychoanalysts used to call the escape mechanism of substitution. So in place of traditional morals they talk about decencies.\textsuperscript{98} The real difference of course is that there are no problems of conscience connected with decencies. That, for them, keeps God and moral law out of the picture. In this way they figure they can sleep in their bed of scepticism without nightmares. To make it seem better they even call it \textit{innate} decencies.\textsuperscript{94} Of all words for a sceptic to use! So then, to murder or cheat or rape or to perjure oneself is just not the decent thing for baboons to do.

\textbf{RODELL AND HOLMES}

Professor Rodell’s article adds little or nothing to Professor Howe’s except that he is not quite as smooth and snide in his remarks. The article gives ample indication that the protest against Holmes’ philosophy has hit him in a vital spot. According to Professor Rodell, those who know they exist, and know that their minds can know something with certainty, including absolutes, are arrogant and lacking in humility.\textsuperscript{96} Of course they are also authoritarians,\textsuperscript{96} an epithet which he throws out as if it were a threat. He, like Professor Howe, admits that Holmes had no religion; that he was an agnostic in religion and a sceptic in philosophy.\textsuperscript{97} He tells us that Holmes had the moral courage to accept uncertainty and the intellectual humility to know that he could not know.\textsuperscript{98} If all this means anything, it means that Holmes had no belief in the power of the human mind to know anything with certainty. Yet on the previous page he accuses us detractors of slurring over and ignoring Holmes’ deep democratic faith in man’s power of reason. That kind of double talk leaves me flat. I just can’t follow it. As Holmes would say, “I’m not in it.” That kind of talk is one of the characteristics of universal sceptics.

According to Professor Rodell, Catholics, Protestants and Jews who believe in God, are cowards\textsuperscript{99} who, because of emotional need, turn to

\textsuperscript{93} Rodell, \textit{Holmes and His Hecklers}, 15 The Progressive 9, 11 (1951); Howe, \textit{supra}, note 91, at 545.
\textsuperscript{94} \textit{Id.} at 11.
\textsuperscript{95} \textit{Id.} at 11.
\textsuperscript{96} \textit{Id.} at 10.
\textsuperscript{97} \textit{Id.} at 10; Howe, \textit{The Positivism of Mr. Justice Holmes}, 64 Harv. L. Rev. 529, 537-538 (1951).
\textsuperscript{98} Rodell, \textit{Holmes and His Hecklers}, 15 The Progressive 9, 11 (1951).
\textsuperscript{99} \textit{Ibid.}
some sort of absolute outside and beyond the mind of man for presumable comfort; that Holmes instills in them fear,\textsuperscript{100} because of his (Holmes') doctrine of self-sufficient baboons who need no God or God-given morality. Man needs no outside source of morality, he tells us. Morality has a wholly sufficient basis in man himself, namely in what Professor Rodell calls innate decencies. Professor Rodell then elevates these so-called decencies to a moral ought and claims that Holmes held such oughts. It smells almost like a new form of Kantian autonomic man with supposed decencies substituted for Kant's categorical imperatives.

Poor Holmes would turn over in his grave if he could know how Professor Rodell is distorting his philosophy of the unimaginable evolving universe. Holmes, the man who learned from Chauncey Wright that he should not say "necessary" about anything (that certainly includes "oughts" as part of the "common enemy"); the man who said that morals were only a matter of subjective tastes (sugar or no sugar); and that his universe did not prefer champagne to ditch water; the man who held that his personal likes (as for example freedom of speech) were not part of his philosophy of the universe or of human beings; the man who held that man \textit{rightly} prefers his own personal interests and will kill for that preference, is now, by Professor Rodell, made to do a complete somersault and hold that the human baboon has necessary, natural, inborn (innate) decencies; that man ought to obey these instead of his preferences; that these decencies are not based on emotion but the knowable and known nature of man. Such use of words has all the earmarks of an attempt to distract and confuse the reader.

And we who actually hold that man by reason alone can know some things with certainty; we who hold that reason can know the existence of God and a moral law, we are arrogant cowards. We lack humility, because we dare to proclaim that we know we exist and that the human intellect is not a blind faculty. They on the other hand possess humility, because they are not sure they exist, and they \textit{are sure} they can't be sure of anything. This they proudly proclaim in abject humility. Because of their humble, but complete distrust of the human mind they live by a democratic faith, whatever that is. We, who profess to know that we know we exist, are authoritarians and arrogant cowards.

Humility, as I understand it, is truth. To say, "I doubt I can walk," when there is conclusive evidence that I can walk, is not humility. I

\textsuperscript{100} \textit{Id.} at 10.
am a realist. I know I exist. According to Professors Howe and Rodell I lack humility and am arrogant if I make such an assertion. I know I exist, that other things exist, and that my mind is sure of it. If I propose to teach that to others, I am an authoritarian. But they whose minds are professedly blind can tell me all about myself and the world, and I am supposed to accept it on their uncertain blind faith. And they say they are not authoritarian. I, as a realist, resent those who, admitting they are blind by birth and nature, insist that I accept their description of a beautiful sunset or the rest of the phenomena of the universe.

The chief objection of Professors Howe and Rodell is that theologians should attempt to give an objective evaluation of their idol, the Yankee from Olympus. For some unknown reason theologians are supposed to be incompetent witnesses. It is suggested that their minds are warped by preconceived and misconceived ideas. They suffer from fixations. They live in a cloud of misty abstractions. They have not reached the psychoanalysts, adult stage. They are not realists.

Do Professors Howe and Rodell and the admirers of Holmes forget who formed and fashioned the common law? Surely they remember that the common law was formed and fashioned by means of original writs from the chancellor's office, and by decisions of the common law courts. And who were these chancellors who controlled and fashioned the original writs? Down to the time of St. Thomas More all but two were theologians. And who were the most influential judges on the common law courts? Maitland tells us that when the popish clergy no longer sit on the common law courts the creative period of the common law is over.101

Do the admirers of Holmes forget that the men who formed and fashioned our Democracy subscribed to Natural Theology concepts expressed in a Declaration of Independence?

They even forget that Holmes had a natural (philosophical) theology. To be sure it was brief, because it consisted of negations: there is no God; there is no Divine Providence; there is no moral law. But it was one of the basic starting points of his whole philosophy. We theologians have only argued from philosophy. We have not used revelation. Yet Holmes is competent to explain the world, and we are incompetent.

THE CONSEQUENCES OF HOLMES' PHILOSOPHY

As I stated before, this is not just an inconsequential battle that I started in 1941. It involves a grave question for us Americans and for the entire world. If universal scepticism and agnosticism prevail, all principles will be discarded and truth and values will become relative only to what the crowd, who have the power in their hands, desire at the time. The ultima ratio and emphasis will be on force. Internationally it means not a conflict as to basic principles but, as one Darwinian writer recently suggested as to ourselves and Russia, merely a survival fight of force between two dominants.102 That and nothing more. Nationally looked at, it will mean the end of Democracy because there can be no Democracy without absolute protection of some absolute natural rights.

There are clear signs that the Holmesian philosophy has infiltrated into our educational system and even higher. It comes with a shock to find the Chief Justice of the United States proclaiming in an official document:

Nothing is more certain in modern society than the principle that there are no absolutes . . . we must reply that all concepts are relative.103

The following comment of Mr. Felix Morley on that passage is a sound warning:

So it becomes definitely dangerous to the spiritual welfare of this Republic when the chief law officer of its Government declares, irrelevantly and even irreverently, that "all concepts are relative."104

Mr. Morley puts his finger on the source of such relativism when he adds:

It stems back to Justice Oliver Wendell Holmes and before that . . . to the "positivist" school of philosophy.105

We cannot pass Chief Justice Vinson's statement off as just obiter dicta. Obiter dicta are one of the best indications of the philosophy of a judge. Everyone knows that, and everyone knows that the philosophy of a judge or a court plays a very important part in deciding cases. Mr. Justice Frankfurter has correctly stated:

102 Brown, Ghosts at Commencement, 1 The Freeman, 521, 524 (1951).
104 Felix Morley, Affirmation of Materialism, Barron's, June 18, 1951, p. 3.
105 Ibid.
New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy.106

The unwritten norm of the reasonable and the fair lies back of decisions. Back of the reasonable and the fair lies the court’s philosophy as to what is reasonable and fair, in short a philosophy of justice and morality. It is pure nonsense to say that judges and courts have nothing to do with the morality of laws. Even our trial courts despite stare decisis kick some cases upstairs. Not all cases that go up to the higher court get there because of the sublime ignorance of the court below. Not infrequently the court below is trying to give the court above a chance to use its philosophy and change the law to meet the needs of individual or social justice.

Since the philosophy of a court does make a tremendous difference it is unfortunate that the chief officer of a court, especially the highest Court in the land, should officially profess a philosophy that we should expect only from communistic sources. I say unfortunate because I do not believe that the Chief Justice really realized the implications to which he was committing himself, some of which were indicated by Mr. Morley. I am more inclined to believe that he confused principles with the variability which may occur in their application. As I stated before we may be so attracted by the thick foliage that we forget about the less noticeable branches and trunk from which the foliage draws its being.

It will be a sad day for our Democracy when our courts abandon natural rights and absolute principles and adopt as an ultimate criterion the Holmesian absolute of give the crowd of dominant elite what it wants. It will be a sad day when the Supreme Court gives its official endorsement to scepticism and agnosticism as ultimate objectives and ideals of our Democracy. It has gone pretty far toward making our public schools fortified centers for the dissemination of scepticism and agnosticism and thereby placing serious obstacles in the way of parents who wish to instill into their children a belief in God, and morals and conscience. It is a far cry from the public schools I attended as a boy where my teachers (all Protestant ladies), directly and indirectly, imbued their pupils with a respect for God, morals, conscience and authority. It is not surprising that Mr. J. Edgar Hoover, who certainly

106 Frankfurter, The Early Writings of O. W. Holmes, Jr., 44 Harv. L. Rev. 717 (1931).
knows the part that force must play in any system of law, when testifying before the Kefauver Committee, stated that we are in a moral depression, and added, apparently as one of the reasons, that the name of God cannot be mentioned in many of our schools. 107

It is impossible to divorce law and morals as Holmes and his admirers would have us do. Even Kelsen, who agrees with Holmes that law is only coercion (force), had sense enough to realize that people actually obey laws from religious and moral motives. What both Holmes and Kelsen failed to realize is that people do not divorce law and morals. People feel that they have a moral duty to respect and obey lawful authority within the proper scope of its power, and a moral duty to obey laws so enacted and administered. In short, people believe that such laws embody a moral duty effective either before or after judgment. That is precisely too what theologians teach.

What would Holmes and his friends of the new enlightenment have us tell people in and out of our schools? The Bad Man Theory?; that civil officials (legislative or judicial) are nothing but agents of an organized gang of ganglia who impose their tastes on the people by means of force?; that people have no moral duty to respect them or their laws?; that government officials are parasites who have been able to survive only on the people’s charitable but dumb offerings of religious and moral respect? No government has, or can live long on that unnatural enlightenment.

It may all be inconsequential to Holmes and his enlightened admirers as all life is nothing to them but a Darwinian evolutionary experiment where values are unknowable. Holmes’ friends, and all of us, will profit by reading what Henry R. Luce said at the opening of the new Legal Center at Southern Methodist University:

...we have arrived at the point historically where we can no longer proceed with any health or happiness on the blithe assumption that it doesn’t matter what any of us believe—or whether there is really anything to believe.

I submit to you today that we ought to believe what is true, and that the truth is that we live in a moral universe, that the laws of this country and of

107 “We are in a state of moral depression. The breakdown of the home is both a cause and a result. The bad state of affairs in too many of our schools is another result. In many instances any semblance of religious training is barred and the mentioning of God is frowned upon while espousers of godless communism carry on under the guise of academic freedom.” Testimony of J. Edgar Hoover, Director, Federal Bureau of Investigation, Hearings before the Senate Special Committee To Investigate Organized Crime In Interstate Commerce, pursuant to S. Res. 202, 81st Cong., 2d Sess. (1950); 82d Cong., 1st Sess. (1951), part 12, pp. 524, 531.
any country *are* invalid and will be in fact inoperative except as they conform to a moral order which is universal in time and space. Holmes held that what I have just said is untrue, irrelevant, and even dangerous.108

The only thing that will preserve our great Democracy is that which gave it strength at its birth, a firm belief in the God-given dignity of each man and the fundamental principles connected with man's God-given nature. There are countless other things about whose value, as means to attain the general welfare, even the best minds may have doubts and differences. But the strength of our Union stems from our unity on first principles. Doubt our first principles, doubt everything, and we are doomed to division, distrust, discord, despair and destruction. Doubt first principles, and we as a nation are doomed to that confusion and lack of concord which, as history has shown us, is the happy hunting ground of some form of Holmesian dictatorship.

Such was the Philosophy of Holmes, a man who was not a liberal, not a humanitarian, not a believer in Democracy. If his friends are ever going to set him on Olympus they will have to pray hard for some tremendous upheaval of nature which will sink Olympus below sea level. *Facilis est descensus.*

THE POWER OF CONGRESSIONAL COMMITTEES OF INVESTIGATION TO OBTAIN INFORMATION FROM THE EXECUTIVE BRANCH: THE ARGUMENT FOR THE LEGISLATIVE BRANCH*

PHILIP R. COLLINS**

CONGRESSIONAL committees of investigation have, in recent decades, become a part of our national scene. These committees, their members and tactics make good copy for column one, page one of our large metropolitan newspapers. More than one member of Congress has won favorable notice and political advancement by reason of his activities on such committees.¹

A participation in the ever-current debate as to whether a congressional committee is a force for good or for evil in our democratic form of government is not the purpose of this article.² Nor are we concerned with the right of a witness or an "accused", as he may be popularly called, to representation by counsel and to cross-examination of witnesses. This question has been properly and fully examined by other writers.³ Nor need there be a discussion of a question fully covered by both the courts and writers in legal periodicals through the years—the right of congressional committees of investigation to punish for con-

*A more elaborate treatment of this subject and related problems is contained in a doctoral dissertation submitted to the Department of Political Science, The Graduate School, Georgetown University. See, Collins, A Problem in American Constitutional Law: The Power of Congressional Investigating Committees to Require Information from the Executive (Georgetown University, June 1950).

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¹ Senators Mundt of South Dakota and Nixon of California are examples of Congressmen who have risen to the upper chamber because of the publicity received from their service on congressional investigating committees.

² Boudin, Congressional And Agency Investigations: Their Uses and Abuses, 35 Va. L. Rev. 143 (1949).

³ E.g., Lord, The Lawyer and the Congressional Investigation, 21 So. Calif. L. Rev. 42 (1948); Wyzanski, Standards for Congressional Investigations, 3 The Record, N. Y. C. Bar Assn. 93 (1948).
In this article, the writer merely proposes to discuss the power of these committees to obtain information and documentation from the executive branch of our government.

**INTRODUCTION**

The problem, then, which confronts us, may be restated in one question: Should Congress, through the medium of its investigating committees, be allowed to require the executive branch of our government to furnish them with information which is deemed necessary by the legislative branch, in order to legislate wisely and in the public interest? This problem, which has seemingly remained unresolved through the years, and which usually lies dormant in times of war or national emergency, was resurrected during the Eightieth Congress.

Over the years, the executive branch has developed a stock answer or argument to such requests when it has not desired to furnish the requested information or documents. This stock response of the executive branch will be referred to herein as the "precedent" argument, because, prior to a citation of examples which supposedly buttress his position, the head of an executive department will respond substantially as follows to the committee requesting the information: To conclude that the public interest does not permit general access to these reports, I am following the conclusions reached by a long line of distinguished predecessors in the executive branch of the Government who have taken the same view.

The writer will then cite and, if the matter is of major importance, will elaborate on a series of incidents in which the executive branch refused to submit information to congressional investigating committees. According to the usual method, these examples will begin with the refusal of President Washington's Secretary of War to furnish certain original letters and documents, on Washington's advice, to a congressional committee investigating the failure of the campaign of General St. Clair and could continue down to the refusal of the Department of Commerce, during the Eightieth Congress, to furnish informa-

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4 E.g., McGrain v. Daugherty, 273 U. S. 135 (1927); In re Chapman, 166 U. S. 661 (1897); Dimock, Congressional Investigating Committees (Johns Hopkins Press, 1938); Eberling, Congressional Investigations (Columbia Press, 1927); Landis, Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

5 E.g., the statement of Vincent C. Burke, Acting Postmaster General, delivered before a sub-committee of the Senate Post Office and Civil Service Committee, 80th Cong., 2d Sess., Thursday, May 20, 1948 (unpublished).
tion to the committees concerning the F. B. I. loyalty report on Dr. Edward U. Condon, Director of the Bureau of Standards.6 The executive branch argues further that no Congress has dared to endeavor to force the head of an executive department to submit information, once there has been a formal refusal by the executive department to do so.

The second argument advanced by the executive branch is that the courts have repeatedly held that the executive cannot be required to produce such papers when their production is, in the executive's opinion, contrary to the public interest. This argument states further that whether or not the production of such papers is in the public interest is a question for the executive and not for the courts to determine. Citations of federal and state court decisions are used to buttress this statement. The genesis of this legal argument is to be found in a formal opinion of Attorney-General Robert H. Jackson, a member of the Roosevelt Cabinet in 1941, in response to a request for information from a congressional investigating committee.7

The tendency of the American press and public has been to uncritically accept these arguments of the executive branch. The fact is that the concept of the "inquisitorial" tribunal, does not fit comfortably into the minds of Americans raised in a tradition of Jeffersonian or Lincolnian liberalism. Nor was the popular view rendered more cordial toward

6 Random examples usually cited by the executive branch include: (1) President Washington's refusal to give the House copies of his instructions to Minister John Jay concerning the negotiation of a treaty with Great Britain in 1796; (2) the refusal of President Jefferson to turn over information on the Aaron Burr incident to the House; (3) President Jackson's refusal to send to the Senate copies of the charges made against Gideon Fitz, the Surveyor-General; (4) President Tyler's refusal to disclose to the House the names of applicants and their mode of application for office; (5) the refusal of President Tyler to communicate information concerning Colonel Hitchcock's negotiations with the Cherokee Indians; (6) President Polk's refusal to forward an accounting to the House of all payments for contingent expenses of foreign intercourse; (7) President Buchanan's protest against a resolution creating a committee to investigate his attempts to influence Congress; (8) President Grant's reply to the House when it demanded to know whether he performed executive functions while away from the seat of the government; (9) the message of President Theodore Roosevelt informing the Senate of his instructions to the Attorney-General not to reply to a resolution directed at the latter inquiring as to his inaction in not prosecuting the U. S. Steel Corp. because of its absorption of the Tenn. Valley Coal and Iron Corp.; (10) the refusal of J. Edgar Hoover to testify as to certain matters, relating to the internal security and the activities at Pearl Harbor, at the direction of the Attorney-General's Executive Assistant, during an investigation of the F. C. C. See also the Burke statement, supra note 5; Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. B. J. 107 (1949).

investigating committees by the Kleig light and Hollywood ballyhoo technique which, with dubious judgment, was employed by congressional investigating committees of recent memory.

The arguments of the executive branch, under the microscope of careful examination, are not unimpeachable. The "precedent" argument can be countered, as the following paragraphs will attempt to show, by strong arguments on the part of the legislative branch. And the "legal" argument is equally questionable.

THE REPLY OF THE LEGISLATIVE BRANCH TO THE PRECEDENT ARGUMENT OF THE EXECUTIVE BRANCH

The answer of the legislative branch of our government to the claim of the executive branch is to be found in the debates and proceedings of the two houses of our Congress. There are two series of debates to be considered,—one of the Senate during the Forty-ninth Congress, First Session, in March, 1886, and the other in the House of Representatives during the Eightieth Congress, Second Session, in May, 1948.

The discussion in the Congressional Record for the Forty-ninth Congress, First Session, on the proposed resolutions to censure the Attorney-General for refusing to give the Senate certain information furnishes interesting data pertinent to the position of the legislative branch on the issue which is the topic of this study. In the Eightieth Congress, Second Session, there was introduced House Joint Resolution 342:

Directing all executive departments and agencies of the Federal Government to make available to any and all standing, special, or select committees of the House of Representatives and the Senate, information which may be deemed necessary to enable them to properly perform the duties delegated to them by the Congress.

The legislative history of this resolution, and allied documents,
furnishes the material for the second part of the response to the "precedent" argument of the executive branch.

During President Cleveland's first term, in March 1886, the Senate censured the Attorney-General, Mr. Garland, a former Senator from Arkansas, for his failure to furnish the Senate Judiciary Committee with information and papers relating to the suspension of George N. Duskin, a Republican, as United States Attorney in an Alabama District. The Truman Administration, in its recent struggle with the Congress, cited the debates in 1886 on this subject as a victory for their position, since Cleveland's Department of Justice was not forced in any way to submit the requested information. It is to be noted, however, that the action of the Attorney-General was condemned by the Senate in four separate resolutions, the most important of which probably was the second, in which the Senate stated expressly:

...its condemnation of the refusal of the Attorney-General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the 25th of January, and set forth in the report of the Committee on the Judiciary, as in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof. 13

An attempt by Senator Morgan of Alabama, after the passage of the four resolutions, to amend the same by a tricky procedural move, failed. The attempted amendment, submitted in the form of a resolution, read as follows:

Resolved, That nothing in these resolutions contained is to be construed as declaring that the conduct of the Attorney-General renders him liable to impeachment, and the Senate disclaims the right or power to punish him by imprisonment or otherwise than by impeachment for the offense charged against him in the second resolution, which the Senate has just adopted. (Emphasis supplied.) 14

This resolution was defeated by a sly maneuver of the Majority Leader, Senator Hoar of Massachusetts. When Hoar's point of order that the amendment was not timely, failed, and the President pro tem ruled that Senator Morgan clearly had the right to offer the amendment, Hoar then asked that this be allowed by unanimous consent, rather than by order, for he felt that "it would embarrass the Senate... very much

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13 17 Cong. Rec. 2211 (1886).
14 Id. at 2814.
to establish such a precedent."15 Then, hastily, Senator Hoar moved to lay the resolution on the table. His motion carried by a vote of thirty-three yeas to twenty-six nays with sixteen members absent. The effect of this motion was to reject the resolution to amend.16 By such a rejection, the majority in the Senate made it clear that they were in no way excusing the Attorney-General from possible impeachment and that they were not renouncing what they considered to be their legal right to punish him by imprisonment, or otherwise than by impeachment for his refusal to submit to the committee the desired information.17

This hardly seems, therefore, to be a case which could or should be cited by the executive in support of that branch’s "precedent" argument. In this situation, the Senate, in effect, said: We censure you, Mr. Gar-

15 The following colloquy, contained in 17 Cong. Rec. 2814 (1886), is pertinent:

"Mr. Hoar. I desire to raise a question of order. All the resolutions have been passed, the whole four. There is no mode of amending the series now. It is simply like dividing the vote on the passage of a bill into four parts, and when they are all passed upon you can not move to amend the bill after it has been passed.

"The President pro tempore. The Chair is of opinion that in view of the notice given by the Senator from Alabama that he would offer an amendment, and the amendment having been sent to the desk, the question being raised as to whether he could or could not offer it, the resolution should be received.

"Mr. Hoar. To what is it an amendment? An amendment implies a pending question to be amended. The question is, Shall the bill pass? The question, shall it pass with a certain amendment, must be acted on before it is passed. But when a series of resolutions which are four distinct propositions are before the Senate and there is a demand that the question be divided, according to the usual parliamentary procedure the question is put on the passage of each separately, and when each separately has passed the matter is as much beyond the reach of amendment as a bill after it has passed. Giving a notice beforehand does not change the parliamentary law. The Senator should have made his motion as an amendment to the last resolution.

"The President pro tempore. In ordinary cases clearly the Senator from Massachusetts is right; but the Senator from Alabama sent an amendment that was then in order to the Chair, and the Chair was about to put the question upon it as an amendment when the Senator from Alabama gave notice to the Senate that he would offer it as an additional resolution. The Chair thinks under the circumstances that it is clearly his right to offer the amendment."

16 The following definition of a "motion to lay on the table" is to be found in Cannon, Procedure in the House of Representatives (U. S. Govt. Printing Office, 1948) p. 415 and is equally applicable in regard to the Senate:

"The motion to lay on the table is used for final and summary disposition without debate, and to protect the House against business which it does not wish to consider, and while it is not a technical rejection, it is in effect an adverse disposition equivalent to rejection."

17 17 Cong. Rec. 2814 (1886).
land, because you have not given us the information we requested; we do not force you to give us the information, but this does not mean that we do not think we have the power to do so. Nor, by these resolutions, are we waiving such power.

These debates of 1886, consuming some seventeen days, present additional information in support of the legislative branch’s position and in rebuttal of the argument, based on precedent, advanced by the executive branch.

The novel arguments, supporting the position of the legislative branch, were mainly advanced by Senator Edmunds of Vermont, a member of the Republican Party and the Chairman of the Senate Judiciary Committee during the Forty-Ninth Congress, in the debate on the general subject of the relations between the Senate and Executive Departments. The Senator’s first argument was based on Article II, Section 3 of the Constitution of the United States. Article II, of course, deals with the powers of the Executive and Section 3 specifically provides that the Chief Executive:

... shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; ... \(^{19}\)

The Senator gave a broad definition to the term, “state of the union”, and argued that the Constitution commands the President in affirmative terms to give such information to the two houses of Congress and that when the Constitution so refers to “state of the union”, it has reference to the

... universal power of knowledge and information of the two Houses of Congress in respect to every operation of the Government of the United States and every one of its officers, foreign and domestic.\(^{20}\)

The Senator continued in the following words:

That is the “state of the Union.” The “state of the Union” is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law, either within its borders or out of it. There is no one mass, no one cue, or quantity, or subject that makes up “the state of the Union”, as every gentleman—and there are a good many here who have been members of the House of Representatives, when they go into the Committee of the Whole on the State of the Union—knows. It is the condi-

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\(^{18}\) Id. at 2211.

\(^{19}\) U. S. Const., Art. II, § 3.

\(^{20}\) 17 Cong. Rec. 2215 (1886).
tion of the Government and every part of it, not only its legislative part about which the President of the United States could communicate no information without impertinence, for the Constitution has declared that the two Houses are to regulate themselves, but he is to give to Congress, as a positive command, from time to time, information on the state of the Union; and that is because they are entitled to have it, and they are entitled to have it every time they call for it, and he violates a positive command of the Constitution when on a constitutional call and in a regular way by either House he omits to do it.  

For this reason, Edmunds continued, from our earliest Congresses, the Chief Executive has been given much leeway by the legislative branch in determining whether the public interest would be preserved or injured by forwarding certain information to the Congress or to a committee of the Congress. This was particularly true where undue and premature disclosures of confidential fact would be involved in forwarding the information to a committee, even though the committee was entitled to have such information. Following the line of reasoning above outlined, however, this Republican leader reached the conclusion that either House of Congress had a "right to know everything that is in the Executive Departments of the Government."  

From his research, the Senator stated that this was the first instance in forty years in which either House had failed "on its call to get information that it has asked for from the public Departments of the Government." In all the history of our country, up to his era, declared the Senator, there had been few instances in which there was evinced the slightest reluctance on the part of either the executive or the departments to respond to calls of either House or of their committees for papers in the possession of the former.  

Sometimes in a case of political fever, as it might be called, they have evinced, wide years apart, a reluctance and a hesitation on the part of the executive or of the heads of Departments to do this thing; and then, that storm being over, the orderly administration of constitutional government went on as before, and either House of Congress on its request or demand, as the case might be, and the committees of either House of Congress acting without a direct and positive authority to send for persons and papers, have always obtained from the Departments on their mere request everything that either House or its committees thought necessary for the proper discharge of their duties. (Emphasis supplied.)

21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid.
The Senator from Vermont continued his attack on the position of the minority of the committee, who had cited a few incidents in which the executive department refused to furnish papers or information to one of the Houses of Congress. He pointed to the numerous occasions on which Presidents actually furnished such information to congressional committees even on subjects which were, indeed, more confidential than the subject then under consideration, and some of which were as confidential as the information which Washington refused to furnish concerning Jay's treaty.25 His argument, supported by these numerous citations, is that the Presidents realize their responsibility to submit information to the Congress, whether based on the "state of the Union" requirement or otherwise; and that when Presidents refuse to furnish such information, they do so not on constitutional but on purely political grounds.

The willingness displayed by the executive branch in furnishing information to the various committees and to the respective Houses of Congress, in the period prior to Cleveland's first administration, is best observed by a perusal of some of the examples cited by Senator Edmunds in his argument on the opening day of this debate in the Senate on March 8, 1886. The wide range of subjects involved in the submissions of information through the years is also worthy of notice.26

In executive session on March 3, 1806, the President was requested to report all documents and papers relative to the interference of the American Minister at Paris in the case of the ship New Jersey. The President furnished this information although there was no question then pending in the Senate regarding either the ship New Jersey or the American Minister at Paris.27

The President was requested by the Senate on June 2, 1813, to inform the Senate, and the Senate was so informed by the Chief Executive, whether any communications had been received from one Russell, an agent of the United States, admitting or denying the declaration of the Duke of Bassano, as to the repeal of the Berlin and Milan decrees. With respect to this Senator Edmunds said:

It has been stated that an agent of the United States had got (sic) that information and had given it away in an improper manner; but the detail it is quite unnecessary now to go into; . . . in order, I repeat, to keep itself acquainted with the state of the Union and the executive affairs of this Government and the

25 Some of the occasions cited by Senator Edmunds are listed, supra note 6.
26 17 Cong. Rec. 2216 (1886).
27 Ibid.
conduct of all its agents, proceeded to call for this information, and got it as a matter of course. It was not exercising a jurisdiction to confirm or reject Russell for anything, or to ratify or reject a treaty. It was getting information in a general way for its general purposes in the exercise of its general duty. (Emphasis supplied.)

The Senate Committee on the Judiciary was instructed on March 13, 1822, to procure from the Secretary of State a letter written by a Mr. Jennings of the State of Indiana, recommending one Dewey for appointment as United States Attorney for Indiana. The Senator indicated that the resolution instructing the committee to obtain this paper implied that the power to secure the same extended to a private paper, so far as such a paper can be a private paper, and described the document in question as being a letter that the Senate had reason to believe was in the files of our Department of State. The paper was turned over to the Committee without objection.

The Secretary of War was directed by the Senate on October 30, 1828, to furnish copies of the reports of the Inspector-General of the Army of the United States, confidential as well as others, including the details of all statements and instructions. This order, the Senator informs us, was adopted in executive session and was complied with by the Secretary of War as a matter of course.

The Senator similarly cited numerous other occasions on which the executive had without argument surrendered information to Congress. But of all the cases amassed by the Senator from Vermont in this discussion, his last probably had the most telling effect. In March and April 1879 the Senate Judiciary Committee, controlled by a Democratic majority, had sought and received from the Attorney-General, the same type of information which Cleveland and his Attorney-General, Mr. Garland, were refusing to submit to the Republican-controlled Senate Judiciary Committee in 1886. The information requested in 1879 concerned nominations for certain vacancies and also dealt with the propriety of the removal of one Michael Schaeffer, Chief Justice of the Supreme Court of the Territory of Utah and the appointment of David Corbin to that office. To cap the climax, Senator Edmunds gleefully noted that in 1879 some of the most famous Democrats of the era were on that
judiciary committee, three of whom were presently members of Cleveland's Cabinet, and one of whom was the present Attorney-General, Mr. Garland. The Democratic Senatorial Committee had asked for information and the Republican Executive had acceded to the request. Edmunds concluded his recitation of this incident with the following biting peroration:

Alas, for the Democracy of those days! Think sir, of the infinite idiocy, unpatriotism, usurpation of that number of five Senators of the United States of the Democratic Party assailing a Republican Attorney-General and a Republican President with the insulting and impertinent inquiry as to papers and information touching a man, to be removed whose successor was nominated to accomplish his removal. And yet those men were in their day and in those times among the headlights of the Democratic locomotives. There was Thurman—his light is put out—the greatest Democrat in the United States (applause in the galleries) and the best one, and the noblest one, and the bravest one, for he had the courage not long ago in your State, sir, to denounce the Democratic frauds on the ballot. There was Thurman, and there was Joe McDonald, a name familiar in the West as well as in the East as the embodiment of upright Democratic pluck and constitutional law; and there was Garland, whom we all knew here, the leader on the Democratic side of the Senate, and running over with constitutional and statute and reported law, knowing his rights as a Senator and as a member of the committee and knowing his duties; and Lamar, and then all the rest of us on this side, joining in what the present President of the United States calls an impertinent invasion of his rights in asking for information from him. Sir, if I was going to be rhetorical, I should say just here:

O shame! Where is thy blush? ...\(^{32}\)

It is submitted that Mr. Edmunds presented well the answer of his era to the "precedent" argument of the executive branch. His answer is that there is no precedent for the statement that the executive branch may withhold information from the Congress and their committees of investigation, when the former branch feels that the submission of such information is for the public interest. He contends that, because of its responsibility to present to Congress information on the state of the union and otherwise, the executive branch must comply with requests for information and documents from the legislative branch and its committees. He supports this proposition by examples of the continued adherence of the executive branch to this norm and he shows that refusals are usually based solely on political and party arguments.

The Republican House majority in the Eightieth Congress carried this argument one step further. They passed a resolution requiring the

\(^{32}\) 17 Cong. Rec. 2221 (1886).
executive branch to furnish them with whatever information they requested. To understand the position of the Republican House of Representatives in the Eightieth Congress, it is necessary to examine the piece of legislation they introduced, House Joint Resolution 342 of the Eightieth Congress, Second Session.\textsuperscript{33}

The intent and purpose of this joint resolution of the House of Representatives, is best revealed by a study of its legislative history,\textsuperscript{34} brief though it be, in comparison with that of many bills considered by Congress.\textsuperscript{35} As is true with much controversial legislation, the emotional attitude of the House of Representatives, when considering this resolution, was not especially calm and tranquil.

Before proceeding any further, it should be emphasized that House Joint Resolution 342 was never enacted into law. The history of this resolution, in fact, may be stated in a very few words.

The resolution was introduced into the House of Representatives on March 5, 1948, was referred to the Committee on Expenditures in the Executive Departments on that same date, and was favorably reported out of committee, without hearings, on March 22, 1948. Though accompanied by a majority report, included also was a stinging retort by the minority, and an answer to the minority report by the majority of the committee.\textsuperscript{36} By special resolution,\textsuperscript{37} House Joint Resolution 342 was taken up quickly on the floor of the House by the Committee of the Whole on the State of the Union,\textsuperscript{38} was debated for two days, after which it was reported favorably by the Committee of the Whole to the House of Representatives and finally was passed by the House of Representatives on May 13, 1948. Referred to the Senate Committee

\textsuperscript{33} H. J. Res. 342, 80th Cong., 2d Sess. (1948).

\textsuperscript{34} Cf. the following statements concerning a "joint resolution" to be found in Cannon,\textit{Procedure in the House of Representatives} (U. S. Govt. Printing Office, 1948) p. 228:

"A joint resolution is a bill within the meaning of the rules and must be signed by the President, with the exception of proposed amendments to the Constitution.

"A joint resolution is the proper vehicle for authorization of invitations to foreign governments, correction of errors in bills which have gone to the President, \textbf{enlarge-ment of scope of inquiries provided by law, authorization of deviation from form prescribed by bills}." (Emphasis supplied.)

\textsuperscript{35} See, for example, the two bound volumes, published by the National Labor Relations Board, which comprise the \textit{Legislative History of the Labor-Management Relations Act of 1947}, popularly called the Taft-Hartley Law.


\textsuperscript{37} H. Res. 575, 80th Cong., 2d Sess. (1948).

\textsuperscript{38} For information on the Committee of the Whole on the State of the Union, see, Clarence Cannon, \textit{op. cit. supra} note 16, at 95 \textit{et seq}.\textsuperscript{39}
on Expenditures in the Executive Departments on May 14, 1948, the resolution died there. The reason for the demise of the resolution in the Senate Committee is quite apparent when one recalls that convention summer of 1948—the deliberate inactivity of a Republican Congress, endeavoring to obstruct the plans and hopes of the President, and his so-called must legislation—which the Senate refused even to consider.

As introduced, House Joint Resolution 342 was comparatively mild, its real teeth being inserted while it was in committee,—though, of course, the three section resolution, as originally introduced, was still highly unacceptable to the executive branch. It provided that all executive departments and agencies of the Federal Government, the Secretaries of the respective departments and agencies, and all persons acting under authority granted these agencies were authorized and directed to furnish the congressional committees any information, books, records and memoranda in the agency's possession that the respective committee might deem necessary for its investigation, provided that the request was made upon a majority vote of the members of the committee and provided that the request had the approval of the Speaker or the President pro tempore, depending whether it was committee of the House of Representatives or of the Senate. Under the resolution, the committee request would be accompanied by a certificate of the committee, signed by the committee clerk, attesting to the majority vote; and the approval of the Speaker or the President pro tempore was to be indicated by a letter over his signature. These provisions were found in Section 1 of House Joint Resolution 342, the real core of the Resolution as it was introduced.39

39 H. J. Res. 342, 80th Cong., 2d Sess., § 1, (1948) reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

"That all executive departments and agencies of the Federal Government created by the Congress, and the Secretaries thereof, and all individuals acting under or by virtue of authority granted said departments and agencies, are, and each of them hereby is, authorized and directed to make available and to furnish to any and all of the standing, special, or select committees of the House of Representatives and the Senate, acting under the authority of any Federal Statute, Senate or House resolution, joint or concurrent resolution, such information, books, records, and memoranda in the possession of or under the control of any of said departments, agencies, Secretaries, or individuals as may, by any of said committees, be deemed to be necessary to enable it to carry on the investigations, perform the duties, falling within its jurisdiction, when requested to do so: Provided, That said request shall be made only by a majority vote of all the members of the committee voting therefor at a formal meeting of the committee: And provided further, That if the com-
Under Section 2 of this resolution, which was added in committee, when information, books, records, or memoranda were received from a governmental department or agency or from any administrative officer of such an agency, as a result of a request previously made under the first section of the resolution, the committee would immediately meet and determine, by majority vote, what, if any, part of such information should be made public and what part should be deemed to be confidential. If any part of that portion of such records declared confidential were divulged by a member of the committee or by any employee of the committee or any other individual obtaining knowledge of such information because of the disclosure of such information to the committee, any such offender would be liable to prosecution for having committed a misdemeanor and could be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court. In addition, if the offender was an employee of the United States, he would be dismissed from office or discharged from his employment.

Committee created by the Senate, upon approval of the President or the President pro tempore of the Senate: And provided further, That if the committee making such request be a committee created by or acting under the authority of the House of Representatives, upon approval of the Speaker or Acting Speaker of the House of Representatives, such majority vote of the committee to be shown by a certificate of the chairman of the committee, countersigned by the clerk; the approval of the President or President pro tempore of the Senate or the Speaker or Acting Speaker of the House of Representatives to be shown by letter over his signature. Any officer or employee in any such executive department or agency who fails or refuses to comply with a request of any committee of the Congress made in accordance with the foregoing provisions of this section shall, upon conviction thereof, be punished by a fine not exceeding $1,000 or by imprisonment for not exceeding 1 year, or both, at the discretion of the court."

H. J. Res. 342, 80th Cong., 2d Sess., § 2, (1948) reads as follows:

"When, by virtue of section 1, any committee of the Congress shall have received information, books, records, or memoranda from any of the departments, agencies, Secretaries, or individuals in pursuance of a request made under the authority of said section, it shall forthwith, by majority vote of the membership of said committee, determine what, if any, part of such information shall be made public and what part shall be deemed to be confidential, and it shall thereafter be unlawful for any member of said committee or any employee thereof to divulge or to make known in any manner whatever not provided by law to any person any part of the information so disclosed to said committee and which has by said committee been declared to be confidential; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and, if the offender be an employee of the United States, he shall be dismissed from office or discharged from employment."
The chairman and the majority of the committee explained their position very fully and very well in the Committee Report,\textsuperscript{41} which accompanied the resolution, as reported to the Congress. The report stated that an executive branch had never denied information to Congress when the information would aid in the passage of legislation which the executive branch deemed beneficial or helpful to itself. In such instances, in fact, “the various departments of the Government, when favoring legislation proposed by the Administration in power, have been quick to assert the right to have their representatives appear and testify before congressional committees.”\textsuperscript{42} It was only when opposing some action, thought to be contemplated by the Congress, that the President or his subordinates have challenged this right of Congress.

The majority indicated, however, that the policy of the Executive of denying information to congressional committees seemed to be widening in scope continually. Committees of both Houses of Congress were finding that their efforts to ascertain how money appropriated by Congress was being spent, how the laws were being interpreted and administered, or whether certain legislation was effective or ineffective, were being hindered or delayed by the refusal of various officials and departments of the executive branch to make available information sought by congressional committees. The report then proceeded to indicate instances where the various congressional committees were denied their requests for documents and testimony by agents of the executive branch. For instance, the Department of Justice had denied information concerning the parole of four members of the underworld, reputed to be remnants of the Capone gang; Doctor John Steelman, the Assistant to the President, had, on the advice of the President, refused to testify before a subcommittee of the House Committee on Education and Labor on the manner in which the Taft-Hartley Act was being administered; the Civil Service Commission had refused to furnish a congressional committee with a so-called “key loyalty list” of governmental employees and this was followed some months later by the President’s “Loyalty Order”, by which the label of “confidential” was placed on all loyalty records; and finally—and perhaps most important of all—the Secretary of Commerce had refused to submit to the House Un-American Activities Committee the Federal Bureau of Investigation letter concerning Doctor Edward U. Condon.\textsuperscript{43}

\textsuperscript{42} Id. at 2.
\textsuperscript{43} Id. at 3-4; see also minority report at 12.
The majority of the committee presented the issue before the Congress and then proposed the remedy. They did not claim, they insisted, that the Congress had the right to challenge the actions of the executive or of the judiciary while the latter branches were acting within the scope of the authority given by the Constitution; those departments, they admitted, were created by the Constitution, and congressional power over them was limited to Congress’ power of removal from office through constitutional procedure. The majority contended, however, that, inasmuch as the Congress was charged with the authority to create, and it had created, various executive departments and agencies, and that since it was charged with the duty of appropriating funds and enacting legislation for the proper and effective activities of these agencies, it not only had the right but the duty to seek and obtain from every agency created by it and dependent upon congressional appropriations, all relevant information necessary to the enactment of proper legislation. Summing up, the majority stated the issue to be as follows:

Shall the Congress insist that departments created by it, dependent upon its will for existence, give to its committees the information necessary to enable it to act intelligently and wisely, or shall it permit its creatures to arbitrarily determine what information the Congress shall or shall not have?44

The majority concluded their report by submitting that the proper remedy seemed to be not special legislation enacted to meet a particular situation, but over-all legislation by the Congress, which, subject to court decision, would settle the question as to the authority of the Congress to demand information from the executive departments. It was expressly denied that the members of Congress were any less discreet or loyal than the heads of, or the subordinates in, the various executive departments. But the committee made it clear that they were placing the best possible safeguards around the receipt of confidential information from executive departments.

The minority report,45 which was signed by six members of the minority on the committee, including the minority leader, Mr. McCormack of Massachusetts, as was to be expected, called for the defeat of this resolution. This report presented the usual arguments of the executive branch, which this writer has chosen to label as the “precedent” and “legal” arguments, and while not specifically citing the opinion of former Attorney-General Jackson, paralleled its substance almost exactly.46 Unlike their pre-

45 Id. at 7.
decessors in the Senate during the first Cleveland Administration, however, the members of the minority did not admit, though discussing the same basic issue, that they were involved in a purely political argument, but rather, kept their discussion on the lofty level of a pressing problem of constitutional law.\footnote{Minority Leader McCormack particularly echoed this view which may be found in H. R. Rep. 1595, part I, 80th Cong., 2d Sess. (1948):

"The development of our constitutional history from the beginnings of this country, and the relative ease with which we as a Nation have found ourselves able to work and run the Government within the concept of separation of powers which is embodied in our Constitution is a tribute not only to the founding fathers who wrote our Constitution but also to the statesmanship and good sense of the Presidents of the United States and the 79 Congresses which have gone before us whose duty it has been to work under that Constitution. We should respect and follow the statesmanlike and constitutional precedents which have become part of our heritage.

"Clearly this is not the time for the two branches of our Government to become locked in internecine warfare. Our Constitution is a great and mighty document. Its strength and vitality depends upon the statesmanship and good sense of those whose duty it is to operate under it. By ill-considered action, departing from the precedents of a century and a half, we may weaken our Constitution for all time. Passage of House Joint Resolution 342 would certainly be a step in this direction. There are too many other nations at this point in the world's history whose constitutional systems have been shaken and shattered. Let us not join them by taking such ill-considered action."}

The minority of the committee denied the assertion in the majority report that the refusal of information to congressional investigating committees had hindered these committees in carrying out their function. Returning to the "precedent" argument of the executive branch, the minority proposed that "the short answer to this assertion is contained in the history . . . of repeated Executive refusal to comply with such congressional demands ever since the time of President Washington."\footnote{Id. at 11.}

In conclusion, the minority examined the instances cited in the majority report and in regard to each instance declared that the President or the particular executive department was justified in refusing to submit the information requested by the congressional committee.

Eight days after the minority report was submitted, the chairman of the House Committee on Expenditures in the Executive Departments, Mr. Clare Hoffman, submitted an "Answer to the Minority Report."\footnote{H. R. Rep. No. 1595, part II, 80th Cong., 2d Sess. (1948).}

This document pointed out some prominent loopholes in the argument of the minority. It chided the minority report for its lack of judicial authority in support of the proposition denying the right of the Congress...
to subpoena witnesses who might be employed in the executive branch of the Government and from whom Congress, through its committees, desired to elicit testimony deemed necessary for the proper exercise of Congress’ legislative function. It was pointed out by the chairman, in his answer, for no other member joined with him in signing this document, that opinions of Presidents and presidential advisers would not bear much weight, since such authorities would, as a matter of course, deny the right of the legislative branch to infringe upon what the President considered his exclusive function. Opinions of the Attorney-General merit most respectful consideration, Hoffman said, but they are not law. He denied that the President of the Senate, the Speaker of the House, a congressional committee, or a majority of a congressional committee had less discretion or patriotism than had the executive or his advisers, particularly since, in his opinion, the State Department and the Department of Commerce had “their full quota of indiscreet individuals, as well as some who seem to be unaware we have potential enemies.”

The answer denied that it was the purpose of the Resolution to lock these two branches of the Government in internecine warfare—only a distorted view of the resolution would give rise to such a statement. The present situation was deplorable if these two branches of the government could not submit a difference of opinion to the third branch of the government, the judiciary, in a constitutional manner for a constitutional decision. The argument that seventy-nine Congresses have not seen fit to attempt such enforcement, so this Congress should not dare to do so was answered by the chairman in the following manner:

The very fact—if it be a fact—that we are still or, if you prefer, again confronted by a great national crisis or emergency, upon the correct solution of which our future existence depends (and we might begin to inquire when one emergency ends, another begins, or whether emergencies are not now continuous), is a cogent reason why, before we proceed further along the unusual and uncharted and variable course mapped out by the Executive, we should obtain a final, judicial decision road-marking the proper course.

The fact that “79 Congresses which have gone before us have not seen fit to attempt such enforcement” is no reason for further delay. None of the preceding 79 Congresses ever was asked to burden the American taxpayer with the obligation of policing, educating, rehabilitating the whole world.

If the executive departments and administrative agencies have authority to withhold some information from the Congress, do they not, by the same token, have power to withhold all information from Congress? If, when they

50 Id. at 3.
cause bills to be introduced and insist they be heard in support thereof, should they not give to the Congress the information it seeks and needs? Should the departments be permitted to hide their errors and maladministration behind a cloak labeled "confidential" and thus defeat a needed remedy?51

Mr. Hoffman pointed out in detail the New Deal trend of issuing rules and regulations, in great numbers, by the executive departments. It reminded the dissenters of the minority that these agencies only possess this rule making power under some act of Congress, conferring such authority on these rule making agencies. Remembering this fact and guided by numerous decisions of the several federal courts the "answer" reiterated that Congress had the power to require the executive to submit the information it deemed necessary.52

The argument that congressional committees would abuse this power, if it were granted by the passage of this resolution, found its reply in the decision of the United States Supreme Court in the case of McGrain v. Daugherty,53 wherein the Court made the following declaration:

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses.54

It should be remembered, however, in evaluating this case, that the Court was not speaking of a direct demand by the legislative on the executive. Its authority as a precedent concerning any phase of the legislative power of inquiry over the executive is consequently weakened.

In concluding, the answer to the minority report differentiated between the executive office and the executive departments. The Congress, it was admitted, had no jurisdiction over the executive himself, when

51 Ibid.
54 Id. at 175.
he acted within the limits of his constitutional power. The executive departments, however, were in an entirely different category, for they were created by an act of Congress and depend upon the Congress for their continued existence; "It is axiomatic that that which the Congress creates, it may destroy or regulate". The conclusion of this "Answer to the Minority Report" was that judicial decisions, logic and reason upheld the right of the Congress to the authority expressed in House Joint Resolution 342.

Debate on the resolution, after the House had resolved itself into the Committee of the Whole on the State of the Union, was both diverse and interesting.

Congressman Hoffman of Michigan, who was in charge of the legislation on the floor of the House took pains to make clear to the House what the resolution did not do. He showed that the resolution in no way sought information from any individual holding an office created by the Constitution, that is from the President or from any member of the judiciary.

Congressman McCormack of Massachusetts, the minority leader, chided his colleagues of the majority stating that this was the first time in the history of Congress that this endeavor to obtain information from the executive branch had ever been reported out by a committee and considered by either House in the form of a bill or resolution. But the majority was ready for Mr. McCormack's proposition, and they replied in the following fashion through their chairman:

... the opponents of this resolution argued that, inasmuch as 79 previous Congresses had not found this legislation to be necessary, this Congress should not adopt it. Seventy-nine Congresses never found the Marshall plan to be necessary. Seventy-nine Congresses never found it necessary to give to other nations more than $50,000,000,000. The statement that 79 Congresses never found legislation of this type necessary is no argument against the present need, for 79 Congresses never found executive departments so insistent in their refusal to deny to the Congress information which it needed and requested.

Never, during the existence of 79 previous Congresses, has the Nation been confronted by a bureaucracy which was so egotistical, so arrogant, so defiant of the power of the Congress as that which challenged the authority of the Eightieth Congress.

Mr. Graham, speaking for the majority, told his colleagues that they were considering "one of the most grave, one of the most serious, and

56 Id at 7.
57 94 Cong. Rec. 5704 (1948).
58 Id. at 5708.
one of the most far-reaching steps that any Congress of the United States will ever take,\textsuperscript{59} in this problem of the relations between the Congress and the executive branch. He exhorted the members to pass this resolution, by all means since “this great sprawling bureaucracy with these tremendous grants of powers and the subordination which past executives have sought to bring about in lowering the dignity, honor, and position of the Congress, can no longer be tolerated”\textsuperscript{60} He argued that the President should be told that he had gone so far and could go no further; then, the Supreme Court could pass on the whole matter and determine what the policy of the government should be.\textsuperscript{61} Congressman Graham was undoubtedly over-flowing with zeal and fervor for the cause he was espousing, but the writer questions whether the Congressman actually meant that the Supreme Court should determine governmental policy.

Congressman MacKinnon, on the other hand, believed that too much emphasis was being placed on the question of confidential, secret or restricted information in the course of this debate. It was his feeling that too many of the governmental departments, save the Army, Navy and Atomic Energy Commission, overclassified their documents and information. He claimed that the entire objective of these executive departments in so doing was to stop producing evidence on matters involving public business primarily because it would embarrass the administration. He continued:

\ldots I have examined these claims of secrecy while I have been a Member of Congress. I ran into similar claims when I served in the legislature of my own State for a number of years. I have never yet seen the claim of secrecy made that when the information was dragged out and given to the public there was any real merit to the claim. I have never yet seen one. There may be some that exist, but I will have to be shown. I have never seen a good excuse for secrecy and I will say further that the reasons I get down here from the Federal departments I consider far inferior to those I get back home. They are equally ingenious.\textsuperscript{62}

Following these and other expressions of opinion, pro and con, as to the merits of this resolution, a group of amendments were introduced,

\textsuperscript{59} Id. at 5721.
\textsuperscript{60} Id. at 5722.
\textsuperscript{61} Ibid.
\textsuperscript{62} Id. at 5728.
in an endeavor to settle differences as to the contents thereof and in order to perfect the resolution.\(^63\)

After sundry amendments had been accepted, the chairman of the Committee of the Whole House on the State of the Union reported the joint resolution back to the House of Representatives. The resolution was then ordered by the Speaker to be engrossed and read a third time.\(^64\)

Congressman McCormack, then, made use of a procedural strategem and offered a motion to recommit the resolution to the Committee on Expenditures in the Executive Departments. The motion to recommit was rejected by a vote of two-hundred-seventeen nays to one-hundred-forty-five yeas, with sixty-nine members not voting. The next and final action in the House on the joint resolution was "on the passage of the bill". The question was taken and there were recorded two-hundred-nineteen votes in favor of the resolution, with one-hundred-forty-two against and seventy members not voting. In the end, then, the joint resolution was passed by the House by a substantial majority.\(^65\)

One could, in fact, say that the majority is overwhelming, when the list of the members "not voting" is examined. It is to be noted that, of the seventy members not voting, twenty-three were Republicans and twenty-five were Dixiecrats. In a word, then, had this resolution passed the Senate and been vetoed by the President, an action certain to take place, there would have been a distinct possibility of overriding the veto. A party line vote, adding the forty-eight votes of the Dixiecrat-Republican abstainers to the admixture of two-hundred-nineteen members voting "yea", would result in two-hundred-sixty-seven votes, which is very close to the number required to override a veto in the House of Representatives.

The resolution, as amended by the House of Representatives and as passed by that body on May 13, 1948, was referred to the Senate, read twice in that body, according to the normal procedure, and referred to the Senate Committee on Expenditures in the Executive Departments. There, with all the activities of the pre-Presidential election summer and with the special session of the Congress, which, by its inactivity, lived up to the presidential appellation of a "do-nothing" Congress, the joint resolution died. In fact, there was little probability of its being enacted, once it reached the House of Representatives as late as

\(^{63}\) These amendments are not discussed in the body of this article, since they are relatively unimportant and have little bearing to the main subject under discussion.

\(^{64}\) 94 Cong. Rec. 5820 (1948).

\(^{65}\) Ibid.
the middle of May in a presidential year. For, even though it passed the House of Representatives, there would have been a fair amount of debate in the upper body before passage, and following that, most assuredly, there would have been a presidential veto. Then, both Houses of the Congress would have been faced with the additional and time-consuming problem of marshalling forces to override the veto.

In this struggle between the executive and legislative branches of our Government, the legislative history of the proposed joint resolution is quite important. In answer to the precedent argument of the executive branch, there has been presented in this article, thus far, the two-part reply of the legislative branch, the answer of the Senate during Cleveland’s first term and the answer to the House of Representatives by this joint resolution during the second session of the Eightieth Congress. The joint resolution takes the legislative branch’s answer a step further. The Senate, during Cleveland’s first term, said that the precedent argument of the executive branch was not valid, since there was no actual precedent, the executive departments furnishing information to congressional committees willingly and without hesitation in a majority of instances. Refusal was made only where conflict existed between the two branches, more often based on political than on constitutional grounds. Going further, the argument of this Senate stated that, not only is there no precedent to prevent them from obtaining information from the executive branch, on the refusal of the latter branch, but that, in carrying out their function, they have the right to know anything and everything about the executive departments. This they considered particularly true, under the constitutional provision, requiring the President to submit information on the State of the Union.

The House of Representatives, in the second session of the Eightieth Congress, takes the further step of proposing that they have the right to pass legislation compelling submission of information and documents, as they require, under this right which allegedly has always belonged to the legislative branch.

One merely hazards a guess, under the make-up of our present Supreme Court, in submitting whether or not House Joint Resolution 342 would have been declared constitutional, if enacted into law and if brought up to our high court on a test case. When weighing the basic arguments of the executive branch, i.e., that there cannot and must not be an encroachment by one branch of the government on another branch under our doctrine of separation of powers—and of the legislative, that the Congress must know of the operations of the executive branch in
order to legislate properly and that there should be a spirit of cooperation between all branches of our government—it is well to consider the language of the United States Supreme Court in the case of O'Donoghue v. United States. 66 This case was decided by a Supreme Court, which was probably closer to the present day Truman Court than to the Roosevelt Court. The Court there stated:

If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—ind esent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution... 67 (Emphasis supplied.)

It is suggested that this language, which was quoted favorably by the court in Humphrey's Executor v. United States, 68 probably the latest decision on the removal of governmental officials by the President, is important to the argument of the legislative branch. It brings out the fact that, while it is true the governmental branches must maintain their separate entity, all branches are working for a common goal—the making of a better government and the preservation of that government. However, neither case directly involves the exercise of the power of compulsion by the legislative.

In brief, it is submitted that a study of the debates during the Cleveland administration, of the legislative history of this resolution passed by the House of Representatives during the Eightieth Congress and of cases decided by the United States Supreme Court during the last twenty years show that the precedent argument of the executive branch is not as iron-clad as one might be led to believe. While it is not the writer's function at this juncture to present the argument on the merits of the respective positions, it is submitted that a future Congress, facing a President who is a member of the opposing political party, may well make use of these two series of debates—one by a Republican Senate during Cleveland's administration and the other by a Republican Congress during Truman's first term—and may well find the means of forcing their will upon the executive branch, by the passage of legislation, similar to House Joint Resolution 342, Eightieth Congress, Second Session, 1948.

66 289 U. S. 516 (1933).
67 Id. at 530.
A CRITIQUE OF THE LEGAL ARGUMENT OF THE EXECUTIVE BRANCH

In order to ascertain just what is meant by the legal argument of the executive branch, it is necessary to examine two specific answers of executive departments to requests for information from committees of Congress.

In April of 1941, Robert H. Jackson, presently an Associate Justice of the Supreme Court, was Attorney-General of the United States, a member of the Cabinet of the late President Roosevelt. On April 23, 1941, he had been requested by the Honorable Carl Vinson, Chairman of the House Committee on Naval Affairs to furnish the committee with all Federal Bureau of Investigation reports since June, 1939, together with all future reports, memoranda, and correspondence of the Federal Bureau of Investigation, or the Department of Justice, in connection with investigations made by that Department arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts, either as prime contractors or subcontractors. Since the Attorney-General and the Justice Department in general had received several requests for similar types of information, Jackson framed his answer to the committee in the manner of a governmental statement of policy, or in other words as a formal “Opinion of the Attorney-General.”

The Attorney-General restated the position of the Department of Justice that all investigative reports are confidential documents of the executive department of the government, intended to aid the President in his duty of seeing that the laws of the land are faithfully executed, and that congressional or public access to them would not be in the public interest. He further stated that disclosure of these reports could not do otherwise than prejudice law enforcement; that disclosure of the reports at that time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which the Congress wished to protect the country; that disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation; and that disclosure of information contained in the reports might also result in the grossest kind of injustice to innocent individuals.

The lawyer of the cabinet then restated that, in refusing to submit

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70 Id. at 46.
71 Id. at 47.
the requested documents to the committee, he was following the "eminent examples" of a long line of predecessors, citing from letters of various Attorneys-General of the United States to the various Houses of Congress;\footnote{72} in addition, he cited the usual examples of presidential refusals and refusals of the executive branch.\footnote{78}

The important citation from this opinion of the Attorney-General, in which we are most interested, is the statement made that "this discretion in the executive branch has been upheld and respected by the judiciary."\footnote{74} Continuing with this line of reasoning, Jackson further states:

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\ldots \text{The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine.}\footnote{75}
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\footnote{72} Attorney-General Jackson cited the following opinions of his predecessors at 40 Op. Atty. Gen. 45, 47 (1941):

"Letter of Attorney General Knox to the Speaker of the House, dated April 27, 1904, declining to comply with a resolution of the House requesting the Attorney General to furnish the House with all papers and documents and other information concerning the investigation of the Northern Securities case.

"Letter of Attorney General Bonaparte to the Speaker of the House, dated April 13, 1908, declining to comply with a resolution of the House requesting the Attorney General to furnish to the House information concerning the investigation of certain corporations engaged in the manufacture of wood pulp or print paper.

"Letter of Attorney General Wickersham to the Speaker of the House, dated March 18, 1912, declining to comply with a resolution of the House directing the Attorney General to furnish to the House information concerning an investigation of the smelter trust.

"Letter of Attorney General McReynolds to the Secretary to the President, dated August 28, 1914, stating that it would be incompatible with the public interest to send to the Senate in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Co.

"Letter of Attorney General Gregory to the President of the Senate, dated February 23, 1915, declining to comply with a resolution of the Senate requesting the Attorney General to report to the Senate his findings and conclusions in the investigation of the smelting industry.

"Letter of Attorney General Sargent to the Chairman of the House Judiciary Committee, dated June 8, 1926, declining to comply with his request to turn over to the committee all papers in the files of the Department relating to the merger of certain oil companies."\footnote{78}

\footnote{74} \textit{Id.} at 49.

\footnote{75} \textit{Ibid.}
In support of this statement, cases decided by the United States Supreme Court, the several federal courts and certain state courts are cited. It is doubtful whether these cases are correctly cited and whether they would stand scrutiny when applied to the situation where Congress is requesting information from the executive to aid in legislation and whether the courts would so hold, if a congressional committee attempted to force the production of such information and the case reached the courts, as the result of such forceful action.

Another executive reply meriting consideration involved the Post Office Department. The answer of this Department differs in form from the letter of the Attorney-General, in that it was read to a committee of the Eightieth Congress as a statement of the Honorable Vincent C. Burke, the Acting Postmaster General. The form of this answer was, most naturally, different from Jackson's because the request for information did not come in the courteous form of a letter, as Jackson had received, but as a subpoena, commanding Burke to appear before a special subcommittee of the Senate Post Office and Civil Service Committee and to present investigative reports prepared for the Postmaster General by certain post office inspectors.

The committee took this action, based on a “tip” from a disgruntled former area inspector concerning the activities of the postmaster of the city of Detroit, Michigan. Newspaper clippings, of some eleven years previous, were brought forth. The dissatisfied retired postal inspector testified at the hearing, that there were several investigations made of this particular post office, all indicating malfeasance and nonfeasance in office and that the Post Office Department in Washington had taken no action in this matter. He hinted that the reason for the inaction on the part of the Washington officials was because the postmaster had previously been chairman of the Democratic central committee in the greater Detroit area.76

In his statement, Burke discussed the functions of post office inspectors, showing that they are the special representatives of the Postmaster General and are charged with the investigations of post offices and all matters connected with the postal service. He indicated that inspection reports received from these officials are regarded as confidential documents and that the disclosure of their contents is forbidden, except as the Postmaster General, in his discretion, should other-

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76 Hearings, Special Subcommittee of Senate Post Office and Civil Service Committee, May 20, 1948. Subcommittee composed of Senator Langer of North Dakota, Senator Buck of Delaware and Senator Chavez of New Mexico.
wise direct. He then relied almost exclusively on the opinion of Attorney-General Jackson for the remainder of his statement. In addition he pointed out that the disclosure of such information would hamper the inspection service, since it would be a breaking of faith with many people, who had made confidential statements to these inspectors, and would also cast aspersions on many innocent people, since statements received in investigations are often wrong and inspired by malicious or misinformed people. The Acting Postmaster General, then, cited the executive precedent, as appears in the Jackson opinion, and also the statement, with case citations, to which reference has been previously made.77

Numerous cases are cited in both of these answers of executive departments.78

Before discussing these cases, it is well to recall the proposition which the Attorney-General and the Acting Postmaster General support in their respective documents, i.e., that the courts have held that they will not require the executive to produce such papers when the production of the same is contrary to the public interest, and that the executive shall determine whether or not the production of the papers would be or would not be in the public interest. Since both of the documents were addressed to Congress, we must naturally presume that the words of the Attorney-General as to the production of the papers must mean the production of such papers to or for the use of congressional committees of investigation. It is submitted that an analysis of these cases fails to show that they so hold.

The two reports cite Marbury v. Madison,79 a landmark case in the field of American constitutional law. For the purposes of the present topic, it is necessary to discuss only the facts of the case plus the quo-

77 Statement of Vincent C. Burke, Acting Postmaster General, delivered before the Special Subcommittee of the Senate Post Office and Civil Service Committee on Thursday, May 20, 1948, pp. 3 ff.

78 Boske v. Comingore, 177 U. S. 459 (1900); In re Quarles & Butler, 158 U. S. 532 (1895); Vogel v. Gruaz, 110 U. S. 311 (1884); Kilbourn v. Thompson, 103 U. S. 168 (1880); Totten v. United States, 93 U. S. 105 (1875); Aaron Burr v. United States, 4 Cranch 455 (U. S. 1807); Marbury v. Madison, 1 Cranch 137 (U. S. 1803); Arnstein v. United States, 296 Fed. 946 (D. C. Cir. 1924); Elrod v. Moss, 278 Fed. 123 (4th Cir. 1921); In re Valeria Condensed Milk Co., 240 Fed. 310 (7th Cir. 1917); In re Lamberton, 124 Fed. 446 (W. D. Ark. 1903); In re Huttman, 70 Fed. 699 (D. Kan. 1895); Appeal of Hartranft, 85 Pa. 433 (1877); Worthington v. Scribner, 109 Mass. 487 (1872); Gray v. Pendland, 2 S. & R. 23 (Pa. 1815); Thompson v. German Valley R.R., 22 N. J. Eq. 111 (1871).

79 1 Cranch 137 (U. S. 1803).
tation from the holding of the court, cited in the opinion of Attorney-
General Jackson.

President Adams had appointed one William Marbury as a justice of
the peace, prior to the assumption of the presidency of Thomas Jeffer-
son. However, the commission evidencing the appointment had not been
issued to Marbury by John Marshall, the Secretary of State under
President Adams. James Madison, who succeeded Marshall as Secre-
tary of State, refused to issue the commission to Marbury. In the mean-
time, John Marshall had been appointed Chief Justice of the United
States by President Adams and was called upon to decide this issue.

The Attorney-General, Levi Lincoln, was summoned to appear before
the Court, since certain facts relating to the commission had to be
ascertained. Lincoln objected to answering the questions, since, as he
pointed out, he found himself delicately situated between his duty to
the Court and his duty to the executive department, having been Act-
ing Secretary of State at the time when the transaction in question had
taken place. It was Lincoln’s feeling that he was not bound to answer
concerning any facts which came officially to his knowledge while acting
as Secretary of State.

The Court gave Lincoln time to consider what he should answer, but
stressed that they had no doubt he ought to answer, since there was
nothing confidential to be disclosed. Anything which was confidential
or which had been communicated to him in confidence, he was not
bound to disclose. After some thought, Lincoln agreed to answer all
questions, with the exception of one, the inquiry as to what had been
done with the commissions. He had no way of knowing that they had
ever come to the possession of James Madison, nor could he shed any
light on the question of whether they were in the office of the Secre-
tary of State, when Mr. Madison took over that office.

The court agreed that Lincoln did not have to say what had become
of the commissions. The court pointed out that:

By the Constitution of the United States, the president is invested with cer-
tain important political powers, in the exercise of which he is to use his own
discretion, and is accountable only to his country in his political character, and
to his own conscience. To aid him in the performance of those duties, he is
authorized to appoint certain officers, who act by his authority, and in con-
formity with his orders. In such cases, their acts are his acts; and whatever
opinion may be entertained of the manner in which executive discretion may
be used, still there exists, and can exist, no power to control that discretion.
The subjects are political: they respect the nation, not individual rights, and
being entrusted to the executive, the decision of the executive is conclusive. . . .

80 Id. at 165.
Marshall showed that there existed an intimate political relation between the President and the heads of departments. Because of this relationship, any legal investigation of the acts of any of these officers was rendered peculiarly irksome, as well as delicate, and this aroused some hesitation about entering into such an investigation. He concluded that it was the province of his Court solely,

... to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, ... 81

could never be made in his Court.

The author would not dream of depreciating the decision of this first chief justice of our high Court. It should be noted, however, that this citation, considered so apt by Attorney-General Jackson in his opinion, referred to an action brought before the Court by an individual citizen and concerned not in the least a situation where information is desired not in the interests of a private person but for the benefit of the Congress of the United States, which, though a different branch than the executive, is still a branch of our government.

The case of *Totten, Administrator v. U. S.* 82 stands for the proposition that an action cannot be maintained against the government in the Court of Claims for secret services rendered during most of the Civil War by a Northern spy, based on a contract made between the spy and President Lincoln in 1861. Mr. Justice Field stating, as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the

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81 Id. at 170. Rufus Choate, the famous American lawyer, stated as follows concerning Marshall's opinion:

"I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the Legislature contrary to the Constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamantine demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it,—this is an achievement of statesmanship of which a thousand years may not exhaust or reveal all the good."


82 92 U. S. 105 (1875).
disclosure of matters which the law itself regards as confidential, and respecting which, it will not allow the confidence to be violated. But this case is far removed from a refusal by the executive branch to a request of a congressional committee. The \textit{Totten} case involved a civil suit for damage and the so-called "confidential" information was refused when requested by the court in this action.

The Court held in \textit{In re Quarles & Butler} that it is the right of every private citizen to inform a United States marshal or his deputy of a violation of the Internal Revenue laws, that this right is secured to a citizen by the Constitution and, accordingly, that a conspiracy to injure, oppress, threaten or intimidate the citizen in the free exercise or enjoyment of his right, or because of his having exercised it, is punishable under Section 5508 of the Revised Statutes. \textit{Vogel v. Gruaz} was a "privileged statement" case. The United States Supreme Court found that a communication made to a state's attorney in Illinois by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot, in a suit against such a person to recover damages, be testified to by the state's attorney, even though there be evidence of the speaking of the same words to other persons than the attorney. Neither of these cases bear on our present problem. Nor does \textit{Boske v. Comingore} support the broad statement made in Attorney-General Jackson's opinion, since an opinion of a court holding that certain records of a government department are privileged, has little or no bearing on the scope of congressional investigatory authority.

\textit{Huittman} and \textit{Lamberton} concern matters which Internal Revenue officials are not compelled to relate in a court of law. Information of this nature is confidential and privileged and such officials cannot be compelled to reveal it. But, these cases arose where the information was demanded of the executive department in criminal proceedings \textit{in a court of law}. These cases had nothing to do with demands made by \textit{congressional investigating committees} and the courts said nothing in support of the refusal of executive agencies to submit information to

\begin{itemize}
\item \textit{In re Quarles & Butler}\footnote{158 U. S. 532 (1895).}
\item \textit{Vogel v. Gruaz}\footnote{Rev. Stat. § 5508 (1875).}
\item \textit{Boske v. Comingore}\footnote{110 U. S. 311 (1884).}
\item \textit{Boske v. Comingore}\footnote{177 U. S. 459 (1900).}
\item \textit{Huittman}\footnote{70 Fed. 699 (D. Kan. 1895).}
\item \textit{Lamberton}\footnote{124 Fed. 446 (W. D. Ark. 1903).}
\end{itemize}
such legislative committees. These cases, then, hardly seem germane to the question.

In another cited case the United States Court of Appeals for the Fourth Circuit, found, inter alia, that a local sheriff, who testified that he communicated to the defendant prohibition officers that the plaintiff was transporting liquor, did not have to reveal the source of his information. This scarcely is on all fours with the problem at hand.

In Worthington v. Scribner, the Massachusetts high court held that, in an action for maliciously and falsely representing to the Treasury Department of the United States that the plaintiff in bringing books into the United States was intending to defraud the Revenue Bureau, the defendants could not be compelled to answer interrogatories filed by the plaintiff. This was another privileged communication case and the court held that the communications in question could not be disclosed, since the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by interrogatories or by a bill in equity.

Neither the Worthington case, supra, nor the Valecia, Arnstein, Gray, and Thompson cases support the proposition asserted by the Attorney General in his opinion. They stand for the proposition that certain matters, which are classified as privileged communications of one sort or another, need not be disclosed in a court of law. While these cases place limitations on the judiciary, since the requests or demands on the executive were made as a result of civil or criminal litigation—they have no bearing on the question under discussion.

In the Appeal of Hartranft a grand jury had requested the court to hold the Governor of Pennsylvania in contempt because he refused to appear, though under subpoena, to testify concerning deaths in a Pennsylvania railroad strike. The court held that the Governor was the absolute judge of what official communications, to himself, or his department, might or might not be revealed, and he was the sole judge not only of what his official duties were, but also of the time when they should be performed. The nature of the request is similar to requests ordinarily made by the legislative upon the executive. But it must be

89 Elrod v. Moss, 278 Fed. 123 (4th Cir. 1921).
90 109 Mass. 487 (1872).
91 240 Fed. 310 (7th Cir. 1917).
92 296 Fed. 946 (D. C. Cir. 1927).
93 2 S. & R. 23 (Pa. 1815).
94 22 N. J. Eq. 111 (1871).
95 85 Pa. 433 (1877).
noted that the request originally came from the grand jury on the theory that it would be an aid to a criminal prosecution. This is the proposition to which the decision of the court was necessarily addressed. The court's broad statement, as to the Governor's right to refuse disclosure of information, must be read in that context.

The Attorney-General also cites the Aaron Burr treason trial as supporting authority. Burr had applied, as will be recalled, for the issuance of a \textit{subpoena duces tecum} upon President Jefferson. Marshall, the presiding judge, allowed the subpoena to issue. It directed the President to produce a letter which one General Wilkinson had sent to him. Burr filed an affidavit with the Court, in which he alleged that this letter contained information, which would prove helpful to his defense. Marshall, in his opinion, stated that, under the Constitution and laws of the United States, the President was not exempt from the process of the Court in a criminal trial, nevertheless, he also ruled that the President was free to keep from view those portions of the letter which the President deemed confidential in the public interest. To this end, the President alone was the judge of what was confidential. This is perhaps the nearest thing to authority contained in the citations of the Attorney-General. Its weaknesses are too apparent to merit discussion.

The Court, through Marshall, seems to state that it would not force official records and papers into public view by subpoena. What probably led the Court to its decision was the fact that the letter in question was not in the files of the War Department, or in any other department of the Government. The court appears to have been largely influenced by Colonel Burr's argument that the President, who had publicly accused Burr of traitorous conduct, in a special message to the Congress, and had been primarily responsible for bringing him to trial, and for bringing the weight of the government behind the prosecution, ought not, in fairness to an accused person on trial for his life, keep from him a private communication which the accused thought would help prove his innocence.

A brief reading of these cases shows clearly that they do not stand for the proposition stated in the opinion of the Attorney-General. Some of the cases give a general statement as to the theory of separation

\begin{itemize}
  \item[96] 2 Robertson, \textit{Reports of the Trials of Colonel Aaron Burr} (Hopkins and Earle, 1808) pp. 533-536.
  \item[97] 1 Robertson, \textit{Reports of the Trials of Colonel Aaron Burr} (Hopkins and Earle, 1808) pp. 177, 180, 187-188.
\end{itemize}
of powers, but the leading case\textsuperscript{99} which does so has been overruled by a group of more recent cases beginning over twenty years ago.\textsuperscript{100}

The bulk of the cases cited by the Attorney-General not only do not support his broad assertion, but instead are based on the point that the papers or testimony sought were privileged communications within the meaning of the law and hence inadmissible as evidence. In addition, the requests or demands on the executive were a result of civil or criminal litigation. Whatever limits may be imposed on the judiciary in the conduct of civil and criminal litigation can have little bearing on the scope of congressional investigatory authority.

The fact that the opinion of the court in \textit{Kilbourn v. Thompson},\textsuperscript{101} is outmoded is perceivable from the opinion of the Court of Appeals for the District of Columbia in \textit{Townsend v. United States},\textsuperscript{102} where, concerning the scope of a congressional investigation, the court pointed out that a legislative purpose may be presumed and that the “power to conduct a hearing for legislative purposes is not to be measured by recommendations for legislation or their absence”.\textsuperscript{108} Again, in \textit{United States v. Bryan},\textsuperscript{104} the District Court of the United States for the District of Columbia indicated that the collection of facts by a congressional investigating committee may cover a wide field and need not be limited to “securing information precisely and directly bearing on some proposed measure, the enactment of which is contemplated or considered”.\textsuperscript{106} The court found that the Congress could very well find it necessary and desirable, in order to act in an enlightened manner, to become acquainted not only with the precise topic “involved in prospective legislation, but also with all matters that may have an indirect bearing on the subject”.\textsuperscript{106}

In a decision rendered in 1946, the United States Supreme Court gave indication that it recognized that the limitations imposed upon the legislative power of inquiry by \textit{Kilbourn v. Thompson}\textsuperscript{107} were not realistic. In that case, \textit{Oklahoma Press Publishing Co. v. Walling},\textsuperscript{108} the Ad-

\begin{itemize}
\item \textsuperscript{99} Kilbourn v. Thompson, 103 U. S. 168 (1880).
\item \textsuperscript{100} McGrain v. Daugherty, 273 U. S. 135 (1927).
\item \textsuperscript{101} \textit{Suþra} note 99.
\item \textsuperscript{102} 95 F. 2d 352 (D. C. Cir. 1938).
\item \textsuperscript{103} \textit{Id.} at 355.
\item \textsuperscript{104} 72 F. Supp. 58 (D. D. C. 1947).
\item \textsuperscript{105} \textit{Id.} at 61.
\item \textsuperscript{106} \textit{Ibid.}
\item \textsuperscript{107} \textit{Suþra} note 99.
\item \textsuperscript{108} 327 U. S. 186 (1946).
\end{itemize}
ministrator of the Wage and Hour Division of the Department of Labor had issued and served on the Oklahoma company a subpoena directing the production by the company of certain of its records, including records which would indicate whether or not the company had a sufficient relationship to interstate commerce to bring it within the jurisdiction and coverage of the Fair Labor Standards Act. The company, in opposing the subpoena, contended *inter alia*, that at least "probable cause" for jurisdiction over it must be shown before it could be lawfully required by subpoena to produce its records. The court rejected this contention of the appellant company, holding that "probable cause" for jurisdiction did not have to be shown in order to validate the subpoena—that the Administrator had jurisdiction to compel the production of documents in order that he might determine whether the facts showed that a case existed within the jurisdiction of the Fair Labor Standards Act.

The court, then, proceeded to liken the powers of the Administrator, which were granted to him by the Congress, to the inquisitorial power of a grand jury or the discovery powers of a court of equity. In a footnote to its opinion the court stated that the investigating power of Congress, itself, was of the same character. It seems reasonable to conclude that if Congress can vest in the Administrator of the Wage and Hour Division such a power of investigations limited only by the broad grant of authority in Section 11 (a) of the Fair Labor Standards Act—Congress itself may do the same in conducting its own investigations in aid of its own powers. From this, it seems reasonable to conclude further that the inquisitorial power of Congress extends to adducing facts which it can use as a basis for determining whether or not it has any power to legislate.

From the above, it can be seen that the Supreme Court is cognizant of the unrealistic qualities of the decision in the *Kilbourn* case and that this is not an appropriate case to cite in support of any point in the general subject matter of congressional investigations.

The distinction should be drawn, therefore, between information which an individual is demanding for his benefit in a civil or criminal trial and information which an investigating committee of the Congress should have in order to carry out the legislative intent of a statute or in order to aid it in its function of enacting appropriate and necessary legislation. There should, of course, be a spirit of cooperation between

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106 Id. at 216.
the executive and legislative branches when the information is to be given for a purpose good for the country as a whole. Furthermore, it seems reasonable to suppose that the framers of the Constitution wished to make that same spirit of cooperation a constitutional obligation incumbent upon the executive branch.

It is the feeling of the writer that should a case, perhaps through a contempt proceeding involving the head of an executive department or agency, reach the courts, credence would be given to the requirements of the legislative branch and that the cases cited in the opinion of Attorney-General Jackson would not be deemed binding. Stated in another way, it is submitted that the aforementioned statement of the Attorney-General falls and with it falls the second or legal argument of the executive branch.

**Conclusion**

In summary, the foregoing discussion holds that the "precedent" argument of the executive can be countered by precedents favorable to the legislative, about as numerous and strong as those of the executive branch. Even if the reader feels that the argument from precedent does not favor the legislative as much as it favors the executive branch, the claim of Congress that it has the constitutional power to create a precedent in its favor by enactment of appropriate legislation, has not been successfully countered by the executive. It is further submitted that the second or legal argument of the executive branch, generally accepted as true by the public and the press, is not supported by the authorities cited.
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599
NOTES

THE ERIE CASE AND THE FEDERAL RULES—A PREDICTION

The year 1938 occupies a very special place in the history of federal jurisprudence. It was in that year that two of the most important and far-reaching events in our federal judicial history occurred. On April 25, 1938, the Supreme Court announced its decision in the case of Erie R. R. v. Tompkins.¹ On September 16, 1938, the Federal Rules of Civil Procedure became effective.

In the relatively short period since that time, both the Erie doctrine and the Rules have become basic elements of federal law. They are probably as firmly entrenched in our legal system as it is possible for any concept or set of rules to be.² Yet what is particularly interesting about these two legal phenomena, each taking effect the same year, each a product of the Supreme Court, and each so warmly embraced by both bench and bar, is that to a large degree they are inconsistent with each other. Whereas Erie established the principle that federal courts, sitting in diversity of citizenship cases and adjudicating state created rights, must apply substantive state law, the Rules require that the same courts abandon the prior practice of conformity to state procedure,³ and apply a uniform federal procedure. While before 1938 a federal court under the doctrine of Swift v. Tyson⁴ was free to decide diversity cases according to the general federal substantive common law, its decisions since Erie must be based on the substantive law of the state in which it sits; yet in procedural matters the same court, required to conform to state rules before 1938, was by the Federal Rules of Civil Procedure freed from state procedural law and

¹ 304 U. S. 64 (1938).
² Without belaboring an undisputed fact, the effect of the Erie case upon federal law is illustrated by the fact that, according to Shepard's Citator, it has been cited in subsequent cases a total of 1,318 times. In an article by Judge Clark, Judge Learned Hand is quoted as having remarked, "I don't suppose a civil appeal can be argued to us without counsel sooner or later quoting large portions of Erie Railroad v. Tompkins." Clark, State Law in the Federal Courts: the Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 267, 269 (1946).
³ This was required by the Conformity Act, 17 Stat. 197 (1872). This Act was inferentially repealed by the Enabling Act, 48 Stat. 1064 (1934), 28 U. S. C. § 2072 (Supp. II 1948), which provides that all laws in conflict with the Rules should be of no further force and effect.
⁴ 16 Pet. 1 (U. S. 1842).
made subject to a uniform federal procedure. In matters of substantive common law the rule of federal uniformity was by *Erie* changed to the rule of conformity to state law; in matters of procedure the previous policy of conformity was by the Rules made one of federal uniformity.

This inconsistency presents no problem so long as matters of procedure and substance remain sharply divided. But it becomes readily apparent that where a procedural rule also governs substantive rights, the federal policies of procedural uniformity and substantive conformity come into direct conflict with each other. An unlimited application of *Erie* to all matters of substance must of necessity invalidate a rule of federal procedure which interferes with substantive rights conferred on litigants by state law.

This problem has, since the inception of the Rules, plagued our federal courts. The early suggestions that the Federal Rules dealt only with procedure, or at least that the courts should give them the benefit of a presumption of procedure, have received some judicial support. In fact, the first three times the Supreme Court considered the validity of particular Federal Rules as substance or procedure, it appeared to be anxious to find in each case that the rule was indeed only one of procedure and did not abridge any state created substantive rights.

On the other hand, Supreme Court opinions in cases not involving the Federal Rules, made it plain that the *Erie* doctrine would be applied to all state law which in any way affected a litigant’s substantive rights, regardless of what label that law had previously held under the substantive-procedure dichotomy applied in the conflict of laws field.

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5 It was early suggested by a leading authority on federal procedure that the *Erie* doctrine and the Federal Rules can both be consistently supported, since the *Erie* case applies only to substantive law, and the Federal Rules only to procedure. Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins*, 24 J. Am. Jud. Soc. 57 (1940). Since the Enabling Act, supra note 3, which authorizes the Rules, provides that they "...shall neither abridge, enlarge, nor modify the substantive rights of any litigant" and since the Rules were drawn up by the Supreme Court as rules of procedure, this suggestion appears quite reasonable.

6 Holtzoff, supra note 5.


When in the now famous case of *Guaranty Trust v. York* the Court adopted the outcome test previously suggested by Professors Tunks and Morgan and Judge Magruder to determine whether state law was substantive or procedural, it became apparent that certain of the Federal Rules could not logically be sustained, when challenged in federal diversity cases by litigants relying on conflicting state law. In the words of Mr. Justice Frankfurter, the basis of that test is described as follows:

And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether . . . such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

. . . In essence, the intent [of the *Erie* decision] was to insure that in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. (Emphasis supplied.)

The next occasion on which the Court considered the validity of any of the Federal Rules after the *Guaranty Trust v. York* case came in three decisions announced the same day in 1949. By that time, as a result of its consistent extension of the *Erie* doctrine, the Court had ruled that conflicts of laws rules; the question of sufficiency of facts to send a case to the jury; burden of proof; statutes of limitations; and state limitations on the exercise of jurisdiction; are all matters of substantive law on which a federal court in a diversity case must defer to state law.

In *Ragan v. Merchants Transfer Co.*, Federal Rule 3, which pro-

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13 Sampson v. Channell, 110 F. 2d 754, 756-758 (1st Cir. 1940).
20 337 U. S. 530 (1949).
vides that an action in a federal court is commenced by filing a complaint with the court, was attacked on the ground that it conflicted with state law, and thereby affected litigants' substantive rights. The state law as to when an action commenced (on service of process on defendant) had been held to be an integral part of the state statute of limitations. The action in this case was commenced in a federal court by filing of the complaint, before the statute of limitations had run. But the defendant was not served and therefore the action would not have commenced under state law until after the statute had run. Thus the action could not have been brought in the state court. Obviously the outcome of the case would be affected by an application of federal procedure instead of state law. In addition, the state law involved was in effect a statute of limitations, previously considered substantive by the York case. It was obvious that both the outcome test and the specific holding of the York case required that state law be applied. The Supreme Court in so holding, consistently followed its policy of extending the Erie doctrine. It also held for the first time that where Erie and the Rules conflict, the Rules must give way, without even mentioning any such thing as a presumption that the Rules are procedural.

But it must also be remembered that a decision upholding the Federal Rule in the Ragan case would have required not only an abandoning of the York case, but of the substance-procedure test so painstakingly developed in prior cases, and finally adopted in that case.

The same day that Rule 3 bowed to state law in the Ragan case, one of the provisions of Federal Rule 17 (b) was made subservient in federal courts to conflicting state law, without the honor of even receiving consideration in the Court's opinion, in the case of Woods v. Interstate Realty Co. In that case a Mississippi statute provided that a corporation which had not qualified to do business in Mississippi could not sue in any courts of that state. Federal Rule 17 (b) provides that the capacity of a corporation to sue shall be determined by the law under which it was organized. The plaintiff corporation, organized under Tennessee law, had not qualified to do business in Mississippi under the above mentioned state statute. Therefore it would have been refused the right to sue in the state courts. Accordingly, it brought suit on the grounds of diversity of citizenship in the United States District Court for Mississippi.

The Supreme Court, without bothering to mention Rule 17 (b), held that if plaintiff is denied a remedy under state law, it is under the Erie

doctrine denied a remedy in a federal court sitting in that state. Once again a Federal Rule gave way to *Erie*. But again it must be pointed out that the *Woods* decision follows with almost mathematical certainty from the Court’s recent decision in *Angel v. Bullington*.\(^{22}\) To have upheld Rule 17 (b) in the *Woods* case would have required either a reversal or a “re-interpretation” of the *Bullington* case, in short a general retreat from the entire trend which the Court had established during the previous ten years.

In *Cohen v. Beneficial Loan Corp.*,\(^{23}\) also announced the same day, the Court again considered the problem of tailoring federal procedure to the requirements of state law. A New Jersey statute provided that in a shareholder’s derivative suit the plaintiff, if unsuccessful, would be liable to the defendants for reasonable expenses including attorney fees incurred in defending against the action, and that the corporation could require security for the payment of such costs. Federal Rule 23 (b) governs procedure for such derivative actions in federal courts. It imposes no liability on an unsuccessful plaintiff for costs above the usual court costs levied upon a losing party.

Plaintiff brought a derivative action on diversity grounds in the United States District Court for New Jersey. The defendant corporation moved to require security from plaintiff for cost of defense in the amount of $125,000. Admitting that once the action was commenced, the New Jersey statute would not have any effect on the final determination of liability, the majority of the Supreme Court was of the opinion that it created a new substantive liability where none had existed before. The rule of the *Erie* case was therefore applied, and the Court held the New Jersey statute applicable in the federal court. The language of Mr. Justice Jackson shows plainly that the area of procedure is not *necessarily* outside the *Erie* doctrine. If it affects any substantial rights of litigants, whether or not related directly to the cause of action, the state law must be applied by a federal court “... in all except details related to its own conduct of business.”\(^{24}\)

Although it is dangerous to attempt to formulate general rules from particular cases, a logical interpretation of the above mentioned cases would seem to be that if a Federal Rule conflicts with state law, the rule will not be followed by a federal court sitting in that state in a diversity case, if (1) it interferes with any substantial rights afforded

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\(^{22}\) 330 U. S. 183 (1947).

\(^{23}\) 337 U. S. 541 (1949).

\(^{24}\) *Id.* at 555.
a litigant under state law, or (2) it will materially vary the outcome of the case from what the outcome would have been under state law.

Even a cursory examination of the Federal Rules reveals that many can be challenged on this basis. In addition to Rules 3 and 17 (b) discussed above, others which are threatened under the *Erie* doctrine include Rule 13 (a) which requires compulsory pleading of counterclaims arising out of the transaction on which plaintiff sues; Rule 14 which in providing for third party practice in federal courts permits a defendant to bring in a joint tortfeasor as third party defendant; 25 Rule 15 (c) which provides that an amendment of the complaint relates back to the time the complaint was first filed if the claim asserted in the amendment arose out of the transaction originally alleged; 26 Rules 18 through 21 concerning joinder of claims and parties; Rule 23 (b) which requires in a shareholder’s derivative action that the complaint shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains, and that it set forth the efforts of the plaintiff to secure from the corporation management and the other shareholders such action as he desires; 27 and Rule 41 (a), providing that a second dismissal at the plaintiff’s instance will be a dismissal on the merits. In addition, Rule 50 is apparently subject to state law regarding the quantum of proof necessary to take a case to a jury. 28 Rule 50 may well be subject to state law in regard to other matters concerning motions for directed verdicts. Serious questions arise with respect to other rules which time and space do not permit consideration of here.

It is not surprising that the net effect of the Supreme Court opinions from *York* to *Cohen* has been interpreted as spelling doom for the Federal Rules. There are certainly ample grounds for such a conclusion. The present status of the *Erie* doctrine could well be described in the words of a far-sighted commentator who in 1943 foresaw “uniformity

25 In Hills v. Price, 79 F. Supp. 494 (E. D. S. C. 1948), this rule was held to be subject to conflicting state law.
26 Two cases have applied state law in overriding this rule. Nola Electric Inc. v. Reilly, Civil Action No. 44-396, D. C. S. D. N. Y., September 30, 1949; L. E. Whitham Construction Co. v. Remer, 105 F. 2d 371 (10th Cir. 1939).
27 To date all cases which have considered the requirement that plaintiff allege ownership of stock at the time of the transaction of which he complains, have held that the rule prevails over conflicting state law. E.g. Perrott v. United States Banking Corp., 53 F. Supp. 953 (D. Del. 1944). A recent case has held, however, that this rule applies only to pleading, and that state law must govern the extent to which an effort to obtain stockholder action is required. Steinberg v. Hardy, 90 F. Supp. 167 (D. Conn. 1950).
run riot”. Recent comment has ranged from the suggestion in an article entitled “Weary Erie” that the Erie case be overruled and the rule of Swift v. Tyson be re-vitalized, to the counter-suggestion that the Federal Rules be repealed with respect to diversity cases, and the prior practice of conformity to state law be re-adopted.

That either such drastic step will be taken appears highly unlikely. Nevertheless, sufficient doubt has been cast upon the status of the Rules to render necessary some clarification of their efficacy in diversity cases. One of the great improvements resulting in federal procedure from the institution of the Rules was the fact that they created a uniform procedure to apply to all federal district courts. Another was that they simplified many previously complicated procedures. The present application of the Erie doctrine tends to negative these improvements. It also injects great uncertainty into each step of procedure in a diversity case. There can be little question that the Court’s extension of Erie has diminished, and threatens to further diminish the value of the Rules to our federal judicial system.

If they are going to continue to co-exist with the Erie doctrine, it would seem necessary that the Court modify to some extent the policy trend it has previously adhered to regarding Erie. It is true that this seems unlikely at the present time, after a review of the foregoing decisions. Nevertheless it is the writer’s opinion that such a change will be made, and that it is presaged by the language in the last Supreme Court opinion on this subject, namely the Cohen case.

The anomaly of such suggestion following a discussion which has been devoted to the thesis that the Court has consistently and repeatedly extended the doctrine ever since its inception, is admitted. But the very fact of the consistency of the Court’s extensions of the Erie case suggests that the momentum of the doctrine is due to run out. As pointed out by Mr. Justice Holmes, experience, not logic, is the life of the law. And experience inevitably will require that the unlimited extension of Erie eventually must come to a halt.

Furthermore, it must be remembered that the Erie doctrine was born at approximately the same time that the “New” Court replaced the

conservative "Old Guard". The opinion in the *Erie* case was written by one of the most esteemed jurists of the last fifty years (Mr. Justice Brandeis), and the doctrine had been previously advocated by another (Mr. Justice Holmes). The new Court undoubtedly was anxious to protect and nurture this important new principle during the first decade after its origin. And the new doctrine was generally welcomed by the legal profession. Impressive support for the use of the outcome test adopted in the *York* case could be found in the articles of Professors Tunks and Morgan, both of which have been referred to by the Court in its *Erie* doctrine cases.

The attitude of the Court on the *Erie* principle is exemplified by the following language of Mr. Justice Frankfurter in the *York* case:

*Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties. (Emphasis supplied.)

But there is no longer need to "protect" *Erie*. In fact, protection of the federal courts from *Erie* now seems more fitting in many respects. Furthermore, legal commentators in law review articles, some of which have bitterly criticized the Court's application of *Erie*, have in recent years almost unanimously favored a policy of restricting *Erie* in order to preserve the Rules. Very high authority among the judiciary lends great weight to this view. Two comments of Judge Goodrich typify

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33 Justice Holmes' dissents from the *Swift v. Tyson* rule had much to do with its eventual undoing. See Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U. S. 518, 532 (1928).
the trend from early approval of *Erie* to the more recent desire to preserve the Rules. In commenting on the *Erie* case in 1938 he said:

The final result is proper and desirable; . . . one more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished.39

Eleven years later, however, in discussing the effect of the outcome test his view was that:

If the rules are to be upheld in the interests of a uniform system of federal procedure the above test is inadequate. In view of the admitted federal power over procedure in the federal courts, it is submitted that when the Congress has exercised that power it has in a sense "occupied" the field and the test should be whether the rule has any relation as to how a federal court shall conduct its business. If it does, the rule should be upheld.40

No one doubts that the Supreme Court is aware of and sensitive to this problem, and to the opinions of authorities regarding it. Law review articles played an important part in creating the *Erie* principle.41 There is no reason to suppose that they will be ignored by the Court in its future application.

As mentioned above, language used in the *Cohen* case suggests that the Court is anxious to support the validity of the Rules in future cases. Although the Court divided on the actual holding (that a cost bond for attorneys fees must be required in a federal diversity case if required by state law), the Justices were unanimous in expressing through dictum their opinions on the status of Federal Rule 23 (b).

The provisions of that Rule, that the plaintiff in a derivative action must allege that he was a shareholder at the time of the transaction complained of, effectively bars recovery by a plaintiff who cannot or does not so allege. The possible conflict of this rule, as a rule of substantive law, with the *Erie* doctrine was recognized as soon as the Rules became effective.42 Even before the recent extensions of *Erie*, it was argued with excellent logic that the rule was substantive, and must defer to state law in a diversity action in states which permitted recovery by

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42 Note, 38 Col. L. Rev. 1472, 1480 (1938).
a shareholder regardless of when he purchased his stock. The problem has been raised frequently in the lower federal courts. The provision to date has been upheld, sometimes on the basis that it is procedural, sometimes on the ground that the Federal Rules are binding on the District Courts.

The basis on which the rule has been upheld as procedure is that it does not destroy the cause of action on behalf of the corporation, but merely designates the proper party to bring the action, much as a rule does which stipulates who may sue on behalf of a minor. Such an argument, it is submitted, is not based on either logic or reality. Without becoming involved in the intricacies of corporation law, it can be pointed out that a shareholder who sues on behalf of his corporation is suing to protect his own interest. He can bring suit only after a request that the corporation itself take action has failed or would be useless. Almost invariably the plaintiff is a single minority shareholder, or represents a minority group which is powerless in the corporation except through the expedient of court action. Some states permit recovery by him regardless of when he became a shareholder. Rule 23 (b) prohibits recovery by such shareholder on behalf of the corporation if he was not a shareholder at the time of the transaction for which he seeks to recover. Despite the fact that the cause of action remains in the corporation, the ineligible shareholder cannot recover in the federal court, although he could have in the state court. He cannot protect his interests in the corporation although he has a right to do so under state law. It is also quite probable that he will be unable to find any other shareholder who is willing and eligible to sue. If so, his state-created right to protect his own interest and that of the corporation, has been effectively precluded by Federal Rule 23 (b).

Different reasons have been advanced for the adoption of this rule. One is the federal policy that a person will not be permitted to buy into a cause of action. Another is simply that the plaintiff, not having been a shareholder when the alleged wrong was done the corporation, has

46 Perrott v. United States Banking Corp., supra note 44.
no right to sue on its behalf—he has no interest in recovering for that wrong.48

But whatever the reason, it is plain that the rule requires a different outcome in a federal court from that which would obtain in the court of a state not imposing such restriction. The rights of the parties appear to be as substantial as those involved in state laws on sufficiency of evidence to get a case to a jury, or a requirement of cost bond, or burden of proof, or others previously held to control in federal diversity suits.

It seems clear, therefore, that such a rule would be held to be one of substance if the Supreme Court continues the policy adopted in other recent cases. However, the members of the Court went out of their way to expressly consider Rule 23 (b) in the Cohen case, in each of three separate opinions. And in each opinion it was stated that the rule is only one of procedure, which will therefore control in a federal court, regardless of state law. In the words of Mr. Justice Jackson, writing for the majority,

These provisions [of Rule 23 (b)] neither create nor exempt from liabilities . . . . None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court.49

Mr. Justice Douglas, in a dissent concurred in by Justices Frankfurter and Rutledge, said:

The measure of the cause of action is the claim which the corporation has against the alleged wrongdoers. . . . [State statutes] do not fall under the principle of Erie R. Co. v. Tompkins, . . . unless they define, qualify or delimit the cause of action or otherwise relate to it.

This New Jersey statute, like statutes governing security for costs, regulates only the procedure for instituting a particular cause of action and hence need not be applied in this diversity suit in the federal court. Rule 23 of the Federal Rules of Civil Procedure defines that procedure for the federal courts.50

The late Justice Rutledge, in a separate concurring opinion, said flatly that he had no doubt of the validity of Rule 23, and that in his view it governed in the Cohen case.51

These expressions of opinion on a matter not at issue were unneces-
sary to the holding of the Court, and were equally unnecessary to the arguments of the dissenting opinions. The statements of Rule 23 were apparently purely gratuitous (a rather rare phenomenon in the present Court). If so, they must have been made by the Justices only after careful consideration of the problem, and are certainly entitled to great weight, despite their status as dictum. It is a safe assumption that the Justices would not have made such a point of expressing their opinions on the rule if there were any doubt in their minds as to its status. As a matter of fact, out of all three cases decided that day, the Court was unable to agree unanimously on any other point than the one not then before it, that Rule 23 is a rule of procedure.52

It is submitted that, without a psychoanalysis of the Court, the only logical inference to be drawn from such an unusual expression of opinion not necessary to the decision is that the Court has become convinced that, despite its substantive aspects, Rule 23 (b) must be upheld as a rule of procedure. As pointed out before, if the Rule is judged according to the standards of the outcome test—will it significantly affect the result of the litigation?—or according to the suggested standard of the Cohen case—will it alter the substantial rights of the litigants created by state law?—it is almost impossible to construe its status as pure procedure.

Considering Rule 23 (b) as a valid rule of procedure, it is not difficult to justify the validity of the rest of the Rules. Of all of them, it smacked most strongly of substance, and appeared likely to be an early victim of the onrushing Erie doctrine. If this line of reasoning—or, more properly speculation—is correct, and the Court has placed Rule 23 (b) in a position of security, it is not too unreasonable to suggest that it will be equally solicitous in upholding other Federal Rules.

As pointed out before, such a policy would quiet a very audible and growing clamor that the Rules be protected from further encroachments by Erie. It would also save the Court from the problem of having to re-write large portions of the Rules, or abandon them altogether in diversity cases. And there is no reason why the principle of the Erie case should not, after its period of prodigious growth, be restricted at least to the extent of protecting efficiency and simplicity in federal procedure.

To accomplish such a result would not require a great shift in the

Court's policy. The holdings of the Ragan and Woods cases were necessary to avoid discrediting prior recent cases. The holding of the Cohen case did not directly involve the validity of a Federal Rule. By following the suggestion of Judge Goodrich, the Court could recognize that Congress has exercised its power over procedure, and uphold the rule so long as it is related to how the federal court shall conduct its business—in other words, so long as it deals with federal procedure. This would not require any change in the Erie policy, except when the validity of the Rules is in issue, and since the Supreme Court itself promulgates the Rules, it would be an ever present check to insure that they were restricted to procedural matters.

If this test suggested by Judge Goodrich were adopted, it seems probable that none of the Rules would be invalidated by Erie. The weight of Congressional approval of the Rules would be given recognition, and the aims of simplicity and uniformity of federal procedure would be protected. If it is felt that such a test would too arbitrarily foreclose any state law, no matter how important, if it conflicted with a Rule of Federal Procedure, power to revise the Rules periodically could easily be given the Supreme Court, and the Court would thereby have discretion to resolve any important conflicts between the Rules and state law. It is submitted that such a policy would be much more desirable than the present one of testing the validity of the rule by ad hoc decision, which leads to confusion and uncertainty in federal procedure; diversity of result among circuits and possibly even among different districts of the same circuit; and undue delay in final decision which must await the Supreme Court's grant of certiorari (it took eleven years before Rules 3 and 17 (b) were invalidated in the Ragan and Woods cases; after thirteen years of argument and litigation other rules are still in doubt).54

In summary, it has been the aim of this note to show that despite the threat posed to the Federal Rules by the rapid growth and repeated extensions of the Erie doctrine, there are indications that the Supreme Court will retreat from its present Erie policy, at least to the extent of upholding the Rules. These indications are: (1) the practical necessity of arriving at a workable policy which will permit the co-existence of Erie and the Rules; (2) the fact that the period of unchecked Erie

54 A contrary recommendation was made in 1946 by the Advisory Committee on Revision of the Rules, to the effect that the validity of Rule 23 (b) be left to await a litigated decision.
extension must end eventually; (3) the growing desire in the legal profession, as evidenced by law review articles and statements by eminent members of the judiciary, for an *Erie* policy which will also permit preservation of the Rules; (4) the unanimously supported dictum by the Supreme Court that it intends to uphold Rule 23 (b), despite that rule's very dubious status as one of procedure; and (5) the inference that if the Court in fact intends to protect Rule 23 (b), it very probably intends to extend similar protection to the rest of the Rules.

It is submitted that the adoption of such a policy would be of considerable benefit to our federal judicial system. It would recognize and clarify Congress' power over federal procedure. And it would relieve the Rules of the doubt cast on their validity by *Erie*. It would, in short, permit the federal courts to function normally without at the same time encroaching upon the power of each state to create and enforce its own substantive law.

RICHARD L. BRAUN

SOME ASPECTS OF SEAMEN'S RIGHTS AND SOVEREIGN IMMUNITY

As a result of the rapid industrial changes in this country which took place shortly after the beginning of this century the government found itself functioning in fields which had hitherto been the exclusive domain of private business. It ran railroads, owned merchant fleets, established its own corporations, and started developing great hydroelectric power facilities. At the same time, the country as a whole became increasingly aware of the need for social legislation to protect the individual and the public alike from the hazards of our modern economy. This trend was evidenced by workmen's compensation and anti-trust legislation. In tune with this social awareness, the government passed legislation which provided compensation for its own employees¹ and waived its sovereign immunity in certain fields, thereby making itself subject to suit on its contracts² and for the torts of its agents.³ The purpose of this note is to show the effect of such legislation on a seaman's right to obtain redress from the government as his employer.

Seamen are the wards of admiralty. Historically, their rights and remedies have been treated in a field of law which is separate and distinct from the common law, that is, admiralty law, the ancient law of the sea. The Constitution recognized this distinction, and Congress implemented it in the Judiciary Act of 1789. These ancient rights were summarized in the Osceola case wherein the Supreme Court recognized the right of a seaman to recover maintenance and cure and wages as an implied term of the employment contract. It further laid down the proposition that a seaman could recover indemnity for injuries received as a consequence of the unseaworthiness of the ship or defective appliances appurtenant thereto. Any other right to indemnity, however, was subject to the defenses of the fellow servant doctrine, assumption of risk, and contributory negligence.

The first legislative attempt to modify these rights was the Seamen’s Act of 1915 which proved ineffectual. It was subsequently amended by the Merchant Marine Act of 1920, which incorporated applicable provisions of the Employers’ Liability Act of 1908 as amended, thereby making these provisions a part of the maritime law of the United States. The effect of this amendment, known as the Jones Act, was to give the seamen an election to proceed in rem against the ship under previously existing maritime law as set out in the Osceola case, or to proceed against the employer under the Jones Act, in which case the fellow servant rule was no longer a defense, the doctrine of assumption.

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6 U. S. Const., Art. III, § 2 provides, “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdictions . . .”
7 1 Stat. 73 (1789).
8 The Osceola, 189 U. S. 158 (1903).
9 Id. at 171.
10 Id. at 175.
13 38 Stat. 1164 (1915).
14 41 Stat. 988 (1920).
of risk was strictly limited,\(^{18}\) and apportionment of damages in case of contributory negligence was liberalized.\(^{19}\)

Prior to the first World War, the Government’s operation of vessels was generally limited to Army transports, naval warships, and accompanying cargo and transport vessels, which by the nature of their employment are classed as “public vessels” as opposed to merchant vessels of the United States. Naval personnel, along with military personnel of the Army, were provided for by special legislation\(^ {20}\) which compensated them for injuries and disabilities incurred while in Government service. By the Shipping Act of 1916,\(^ {21}\) the United States Fleet Corporation was formed, thereby making the Government the owner and operator of a large fleet of merchant vessels. At the time of this Act, it was clear that the Government would become a party to the numerous claims arising from the contracts and torts of its agents incident to the normal operation of such a fleet. However, as the only available redress to such claims at the time was by special private remedial legislation for each claim,\(^ {22}\) Congress, in establishing the Fleet Corporation, recognized the duty of the Government to be answerable for its acts when operating in a non-governmental capacity and incorporated in the Act provisions which in substance removed the sovereign’s immunity when acting as a merchant shipper. It immediately became clear that this language was too broad, and that revision was necessary, for the Supreme Court, in construing the Act in the case of The Lake Monroe,\(^ {23}\) held that in spite of their ownership by the United States, Government merchant vessels were subject to the same arrest as any vessel privately owned.

The arrest and seizure of Government owned merchant vessels was regarded as detrimental to the public interest and the immunity from arrest which had been taken away from the Government in the Act of 1916 was restored in 1920 by the Suits in Admiralty Act.\(^ {24}\) This act declared that a suit \textit{in personam} might be brought against the United

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\(^{19}\) Panama R. R. v. Johnson, 264 U. S. 375 (1924).

\(^{20}\) See Title 38 of the U. S. Code which gives a complete coverage of pensions, bonuses, and veterans’ relief for service personnel since 1861.


\(^{22}\) With the exception of claims not sounding in tort and not in excess of $10,000 as provided in the Tucker Act, 24 Stat. 505 (1887).

\(^{23}\) 250 U. S. 246 (1919).

States under all circumstances where a proceeding in admiralty could have been maintained had the vessel been privately owned or operated.\textsuperscript{25} Thus, the suits in Admiralty Act created no new liabilities. It was in effect a procedural act, giving courts jurisdiction to entertain substantive causes of action only in instances where such causes of action could have been maintained against a private owner or shipper. The choice of the word "maintained" in the Act is significant since it implies that there must be a cause of action existing independently of the Act.\textsuperscript{26} With the Government in the role of an owner and operator of a sizable merchant fleet, and with all of its immunity waived except as to the arrest of its vessels, the impact of its business and trading activities was not long in reaching the courts. The Government found itself a litigant in suits involving damage to the property of individuals.\textsuperscript{27} Liability was determined to exist where personal injury was inflicted by the vessel.\textsuperscript{28} Moreover, as seamen had a right to bring an action \textit{in personam} against a private maritime employer, the same right was found to exist against the Government under the Act.\textsuperscript{29}

Thus the Act did not limit any of the rights of merchant seamen under the maritime law, but merely waived the sovereign immunity of the Government in order to permit the application of that maritime law to suits against the Government by way of libels \textit{in personam}.\textsuperscript{30}

The rights of Government employed seamen under the Act are complicated by the fact that these merchant seamen, as employees of the Government, have been considered as coming under the benefits of the Federal Employees' Compensation Act.\textsuperscript{31} This statute when originally enacted, unlike most workmen's compensation statutes, made no provision regarding the exclusiveness of the relief provided thereunder. The remedy given an employee of the United States under this Act was held in \textit{Dahn v. Davis}\textsuperscript{32} not to be exclusive where the Government had also provided the right to sue for personal injuries under another

\textsuperscript{25} The Isonomia, 285 Fed. 516 (2d Cir. 1922).
\textsuperscript{27} The Moosabee, 7 F. 2d 501 (E. D. Va. 1923).
\textsuperscript{29} McNmis v. United States, 152 F. 2d 387 (9th Cir. 1945), maintenance and cure; Stewart v. United States, 25 F. 2d 869 (E. D. La. 1928), injury due to unseaworthiness.
\textsuperscript{32} 258 U. S. 421 (1922).
Having received compensation, was precluded from suit under the other act. During World War II, the constant change of merchant seamen employed through the War Shipping Administration from one type vessel to another not only created difficult administrative problems, but also left in doubt their right to sue the Government under certain circumstances. Some of these vessels operated by the War Shipping Administration were classed as merchant vessels, while others were treated as "public vessels". These latter vessels did not come under the provisions of the Suits in Admiralty Act. At that time, any right of seamen on "public vessels" to sue the Government as a result of its waiver of sovereign immunity under the Public Vessels Act was in doubt.

Generally, personnel aboard "public vessels" are full-time Government employees, either civil service personnel or members of the armed forces of the United States. However, when War Shipping Administration merchant vessels were employed by other Government agencies, they thereby changed their status to that of "public vessels", with the result that the merchant seaman found himself a government employee on a "public vessel". Solely by virtue of the vessel's change of status, the merchant seaman's rights, which were otherwise clear under the Suits in Admiralty Act had become uncertain. Congress recognized the inequities of this haphazard status and remedied the situation with the

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33 Federal Control Act, 40 Stat. 451 (1918). This was a case of a federal postal employee injured on a railroad operated by the Director General of Railroads. Under the above Act he would have been permitted to maintain an action against the Director General for negligence causing the injury, but for his previous election to accept and receive compensation.

34 The Act permits suit "... provided that such vessel is employed as a merchant vessel or is a tugboat..." 41 Stat. 525 (1920), 46 U. S. C. § 742 (1946).


36 "Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel. As a consequence the aforementioned rights [rights under the Jones Act and the general maritime law] of such seamen are frequently in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by a bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury or illness also constantly
Clarification Act of 1943, which provided that a merchant seaman employed on any War Shipping Administration vessel would be allowed to pursue his claim under the Suits in Admiralty Act even though the vessel, for purposes of that Act, might have been treated as a “public vessel” and, therefore, not within the scope of the Act. These seamen were also specifically excluded from the provisions of the Federal Employees’ Compensation Act. The result of this Act was to class merchant seamen on War Shipping Administration vessels in the same category as seamen on privately owned ships, with the same remedies as if the Government were a private employer with the sole limitation that a libel in rem was not permitted against the vessel itself.

As has been previously indicated, the Government operates certain vessels which do not come within the classification of merchant vessels for purposes of suit under the Suits in Admiralty Act. These vessels include naval warships, Military Sea Transport Service vessels, into which category were merged the Army Transport Service vessels in 1949, Coast Guard vessels, and other similar vessels operated by the Government in pursuit of purely governmental functions. The inclusion of merchant vessels within this group depends upon the manner of operation and purpose for which they are employed, and will vary with the fact situation in each case. When the Suits in Admiralty Act was before Congress, the inclusion of “public vessels” within that act was considered, but to expedite its passage, the provisions were confined to merchant vessels. Following the enactment of the Suits in Admiralty Act, Congress was presented with several proposed bills which would extend the provisions of that act to include public vessels. These efforts change depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill is designed to remove this confusion and these inequities.” H. R. Rep. No. 2572, 77th Cong., 2d Sess. 9 (1942).

39 For example, a merchant vessel bound for a port in the United States with coal belonging to the Army where she was to complete cargo by loading munitions of war was a “public vessel” within the meaning of the Public Vessels Act. Bradey v. United States, 151 F. 2d 742 (2d Cir. 1945), certiorari denied, 326 U. S. 795 (1946).
40 Hearings before House Committee on Judiciary on H. R. 7124 and S. 3076, 66th Cong., 1st Sess. 7 (1919).
culminated in the enactment of the Public Vessels Act\(^{42}\) which provides:

... A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States. ...\(^{43}\)

It is significant that the apparent coverage of this statute is not as broad as that of the Suits in Admiralty Act which permits a libel *in personam* against the Government when one of its vessels is employed as a merchant ship or tugboat, provided that a proceeding in admiralty could have been maintained if such vessel were privately owned or operated. As a result of this difference in language, it was first thought that this Act applied almost exclusively to cases of collision damage caused by the vessel itself.\(^{44}\) Subsequent interpretations have resulted in extensive modification of this theory. Jurisdiction has been upheld in a case involving property damage caused by the negligence of the crew of a public vessel. In this case, *Canadian Aviator, Ltd., v. United States*,\(^{45}\) the Supreme Court said that "... the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner. ... ."\(^{46}\) A further application of the Public Vessels Act was revealed by the Supreme Court in the *Porello* case,\(^{47}\) wherein, the Supreme Court held that the United States was liable for injury to a stevedore through acts of the employees of a "public vessel". The Court further accepted the statement of the Attorney General as to the intended coverage of this Act:

The proposed bill intends to give the same relief against the Government for damages caused ... by its public vessels ... as is now given against the United States in the operation of its merchant vessels, as provided by the suits in admiralty act of March 9, 1920.\(^{48}\)

\(^{42}\) Id. at § 781.

\(^{43}\) Id. at § 781.

\(^{44}\) Id. at § 781.

\(^{45}\) Id. at § 781.

\(^{46}\) Id. at § 781.

\(^{47}\) Id. at § 781.

\(^{48}\) Id. at § 781.
It will be noted that these cases all discuss damages sounding in tort, either property damage or damage resulting from personal injury. It has also been held that “damages” within the Act included damages for breach of contract, and recovery has been allowed under the Public Vessels Act for wages, and maintenance and cure, since these have traditionally been implied terms of every seaman’s contract of employment.

Despite the liberalizing of the apparent meaning of the Public Vessels Act by the process of judicial interpretation outlined above, one more problem has remained in doubt, that is, the right of a seaman to indemnity for personal injuries incurred in the service of the ship. Shortly after the Act became law, this very question was decided adversely to the seaman in the O’Neal case. In this decision the Act was strictly construed on two bases: first, that “damages” referred only to damages done by the ship, and second, that the employee already had his exclusive remedy in the compensation provided by the Government, namely, that provided by the Compensation Act. In 1946, however, the same Circuit Court, the Second Circuit, which had decided the O’Neal case, certified to the Supreme Court the question as to whether “... a suit for damages for death by wrongful act will lie under the Public Vessels Act. ...” This question was taken by the Supreme Court in combination with the Porello case, also a Second Circuit case, which posed the issue as to whether the Public Vessels Act made the United States liable for damages on account of personal injuries. The Court answered both questions in the affirmative. Despite the general terms of the questions answered, both of the cases involved injuries to steve-

49 Thomason v. United States, 184 F. 2d 105 (9th Cir. 1950); Jentry v. United States, 73 F. Supp. 899 (S. D. Cal. 1947). In these cases recovery for contract damages under the Tucker Act, 28 U. S. C. §§ 1346, 2401, was denied on the basis that the Public Vessels Act must necessarily be an exclusive remedy since the Suits in Admiralty Act has consistently been held to be exclusive. If the Tucker Act were available to “public vessel” seamen, they would enjoy a six-year statute of limitations, whereas merchant vessel seamen would be restricted to a two-year statute of limitations.

50 Note 49 supra, and cases cited.

51 United States v. Loyola, 161 F. 2d 126 (9th Cir. 1947).

52 O’Neal v. United States, 11 F. 2d 869 (E. D. N. Y. 1925), affirmed, 11 F. 2d 871 (2d Cir. 1926).

53 American Stevedores v. Porello, 330 U. S. 446, 458 (1947). The question certified by the 2d Circuit involved the right of a stevedore’s widow to recover under the Public Vessels Act for the wrongful death of her husband while working on a public vessel. Lauro v. United States, 157 F. 2d 416 (2d Cir. 1946). The Supreme Court considered only the question quoted above.
dores, not seamen. Consequently, while the Porello case is highly persuasive, it does not provide a square holding on the question of whether a seaman crew member under the Public Vessels Act has a right to sue the Government for personal injuries incurred in the service of the ship.

While the dicta in the O'Neal case interpreting the Public Vessel Act as limited in application to property damage by a Government vessel, has been rejected both by the Second Circuit in the Dobson and Porello cases and by the Supreme Court in the Porello case, its other holding, that Government compensation for "public vessel" seamen was intended to be exclusive, has been under attack. In United States v. Marine, the doctrine of election of remedies was applied to the end that a "shoreside" federal employee was allowed to recover from the Government under the Suits in Admiralty Act for injuries incurred when he was leaving a merchant vessel owned and operated by the United States. This was extended in Mandel v. United States to allow an election of remedies to a crew member of a vessel owned and operated by the Government who was also eligible under the Federal Employees' Compensation Act. In this case, the question arose as to whether the vessel was a merchant vessel under the Suits in Admiralty Act or a public vessel under the Public Vessels Act. The court said it was unnecessary to decide the status of the vessel as the two statutes must be read in pari materia, and recovery would be allowed in either event. The court went on to say:

Although, for reasons peculiar to their status, members of the armed forces should be excluded from the waiver of sovereign immunity, a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government.

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54 155 F. 2d 456 (4th Cir. 1946).
55 74 F. Supp. 754 (E. D. Pa. 1947). This case went to trial on its merits and was again reported in 93 F. Supp. 692 (E. D. Pa. 1950) when the court ruled that the reports of the Army Board of Investigation were not privileged and that the Government was required to produce these reports. This requirement is one of the bases on which the Government is objecting to a seaman's right to sue under the Public Vessel Act. It is understandable that disclosure of classified information involving military operations in such suits may be detrimental to the best interests of the Government, but the Public Vessel Act is not concerned with that aspect of governmental immunity, and, as an equitable argument, it is not pertinent to the legal issues involved. This case has been appealed by the Government and is presently in the Third Circuit.
56 Id. at 755. The court in this case denied the Government's motion to dismiss but reserved its decision on the issue of the effect of a release signed by libellant until further evidence was produced.
At this time it should be noted that only the rights of civilian seamen are involved in this discussion. As regards uniformed personnel of the Government, the law is clear. The courts have consistently held that naval personnel (and the rationale would apply to all uniformed personnel) injured in public vessels may not recover compensation under the Public Vessels Act. The reasoning of these cases is the same as that of the cases wherein military and naval personnel have been denied recovery under the Federal Tort Claims Act. The basis of denial is that Congress has already made adequate provisions to compensate service personnel for dangers incident to their profession and that when they enter upon such service, they are aware of and accept such provisions as their exclusive right to compensation.

While the courts have uniformly held that the compensation and pension rights provided military service personnel constitutes their exclusive right to recover from the Government for personal injury claims arising from such service, they have refused to apply this concept to the right of compensation of civil service employees eligible under the Federal Employees' Compensation Act. As previously indicated, the Supreme Court in Dahn v. Davis held that a federal employee entitled to compensation under the Federal Employees' Compensation Act who was also provided with another remedy against the Government had the right to elect his remedy.

In 1949, Congress amended the Federal Employees' Compensation Act so as to make compensation exclusive, and in place of, all other liability of the Government with respect to the injury or death of an employee. However, the amendment specifically stated that this provision "... shall not apply to a master or a member of the crew of any vessel." Further, there were exempted from the operation of the amendment, those seamen covered by the Clarification Act of 1943, and, in order that there be no uncertainty as to the congressional intent of these provisions the amendment stated that:

57 Braden v. United States, 151 F. 2d 742 (2d Cir. 1945), certiorari denied, 326 U. S. 795 (1946); Dobson v. United States, 27 F. 2d 807 (2d Cir. 1928), certiorari denied, 278 U. S. 653 (1929); Mandel v. United States, supra note 55.
59 Dobson v. United States, 27 F. 2d 807, 809 (2d Cir. 1928).
60 258 U. S. 421 (1922).
(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.\textsuperscript{63}

That the literal meaning of these words was intended is apparent from the fact that these exemptions were introduced from the floor of the Senate immediately prior to the passage of the bill. The reasons stated for the amendment were that its effect upon seamen had not been considered and rather than delay passage of the bill, it was more desirable to exempt them therefrom.\textsuperscript{64}

From this it is clear that any rights which seamen had to an election of remedies under \textit{Dahn v. Davis} were unaffected by the 1949 Amendment to the Federal Employees' Compensation Act. The \textit{O'Neal} case, without reference to \textit{Dahn v. Davis}, held that no right to an election existed for "public vessel" seamen. The \textit{Mandel} case indicated otherwise. The conflict may be resolved in the near future in view of the fact that the Government has been granted an extension of the time within which certiorari must be requested in the case of \textit{Johnson v. United States}.\textsuperscript{65} In that case, the plaintiff, a civilian deck hand employed on a public vessel of the United States, was severely burned under circumstances which tended to show negligence on the part of a superior officer. The plaintiff, an infant of 19 years, accepted compensation and subsequently brought suit under the Public Vessels Act. Two questions are raised by the case. The first concerns his right to an election of remedies; the second concerns the effect of his infancy on the election already made.

The Fourth Circuit held that the right to an election which it had previously found to exist under the Suits in Admiralty Act was available to the libellant today under the Public Vessels Act; and further,

\textsuperscript{63} \textit{Id.} at §§ 791-4.

\textsuperscript{64} 95 Cong. Rec. 13609 (1949). Here, Senator Douglas said that the only change in the status quo of the seamen was to increase the compensation rights of the seamen covered by the Act. The Senator further indicated that these amendments left open for later consideration the justice of permitting these federal employees to have an election of remedies denied to the others.

\textsuperscript{65} 186 F. 2d 120 (4th Cir. 1950). This case presents clearly the issue of the right of a civilian "public vessel" seaman eligible for compensation to sue the Government. Should the decision in the \textit{Mandel} case, presently on appeal to the Third Circuit (Note 55 \textit{supra}), be decided adversely to the Government, it is probable that certiorari would be requested for the \textit{Mandel} case instead of the \textit{Johnson} case, since the Government is concerned with the unfortunate consequences of the requirement to produce classified information and the undesirable implications of civilian seamen being able to question the judgment of commanding officers in military or naval operations.
that his right to an election remained unaffected by the 1949 Amend-
ment to the Federal Employees’ Compensation Act. In arriving at this
interpretation of the Public Vessels Act, the court relied on the liberal
interpretation previously given this Act by the Supreme Court. It is
submitted that this interpretation placed upon the Acts by the Court
is sound. The decision in this case is the culmination of an historic
struggle of seamen to protect and preserve the rights incident to their
calling. If the effect of this decision is to give them rights which seem
unwarranted, a logical analysis of the law will permit no other conclu-
sion; and if modification appears necessary or desirable, legislative
amendment is the proper remedy.

JAMES F. SCHREMP
WILLIAM W. KELLY

THE GEORGIA CASE

INTRODUCTION

FOR years the South, including Georgia, has watched a moribund
Interstate Commerce Commission struggle fitfully to rid that region
of its discriminatory basic freight-rate structure in accordance with a
provision of the Transportation Act of 1940 forbidding unjust discrimi-
nation in rates against regions, districts, or territories of the United
States.1 Another section of the 1940 Act required that the Interstate
Commerce Commission conduct an investigation and enter appropriate
orders to remove discrimination found to exist.2

In 1944, the Governor of Georgia, Ellis G. Arnall, sought to obtain
quicker relief from discriminatory freight rates than afforded by the
leaden-footed pace of the Commission. Noting that many of the de-
cisions on freight rates were being made by private rate-making orga-
nizations of the railroads, rather than by the ICC, Governor Arnall, on
behalf of the State of Georgia, sought to invoke the original jurisdiction
of the Supreme Court of the United States in a complaint attacking
the rate associations of the large northern and southern railroads and
challenging the legality of the differences between the higher rate struc-
ture in the South as compared with the North. Relief sought was a
decree by the Court equalizing all freight rates between Georgia and the
North on the same basis for similar commodities, distance considered,

as those prevailing within the North. The complaint charged the ICC with condoning the fixing of rates by the alleged conspiracy.

The Governor sought and obtained the support of the late President Roosevelt and received assistance from the Department of Justice in obtaining evidence on the operations of the rate organizations of the railroads. Shortly thereafter more appropriate pleadings were formulated, and Georgia, in September 1944, sought to file an amended bill of complaint in the Supreme Court as an original bill under Article III, Section 2 of the Constitution, charging twelve eastern and eight southern railroads with a conspiracy to use coercion in violation of Sections 1 and 2 of the Sherman Act in the fixing of freight rates and to discriminate against Georgia in the rates so fixed, thereby causing irreparable damage to the economy of Georgia.

Georgia sued in the capacity, among others, of parens patriae to redress injury to the economic health of the State and asked for an injunction against certain practices of railroad freight-rate organizations. In March 1945, the Supreme Court allowed filing of the amended complaint. In December 1945, the Court designated Lloyd K. Garrison as Special Master to hear the parties and report to the Court findings of facts, conclusions of law, and to submit a proposed decree. After hearing and argument the Special Master made his report in June 1950, recommending dismissal of the amended complaint.

Herman Talmadge, son of the late Eugene Talmadge, former Governor of Georgia, had become Governor of the State. By its order of November 27, 1950, the Supreme Court of the United States, in a memorandum opinion, dismissed the amended bill of complaint in the proceeding. Thus ended the attempt of Georgia to obtain injunctive relief against an alleged conspiracy among the defendant railroads to

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3 Obviously Georgia before filing its original complaint had not exhausted its administrative remedy to obtain rate equalization at the ICC, which is exclusive of any which may be afforded by the courts at least until the Commission has acted upon the validity of the freight rates and classifications involved. See, e.g., Midland Valley R. R. v. Barkle, 276 U. S. 482 (1928); Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907). The amended complaint omitted the prayer for court action equalizing freight rates.


6 Georgia v. Pennsylvania R. R., 340 U. S. 889 (1950), Report of the Special Master; the report is in three volumes of over 900 pages. This report and the documents filed by the parties are the principal sources of material for this review.

use coercion in the fixing of freight rates and to discriminate against Georgia in the rates so fixed, in violation of anti-trust laws.

GEORGIA'S CHARGES AND REPLY OF THE RAILROADS

Georgia's action in bringing this suit was inspired by a discriminatory railroad freight-rate structure against which the South and West have long struggled, and which even today has not been eradicated. The freight-rate structure works to the disadvantage of the South and West, and to the advantage of the East, in this way. The ICC prescribed a basic freight-rate structure, known as the class rates, to apply within (intraterritorial) and between (interterritorial) each of the several freight-rate territories of the United States. These class rates are graduated according to mileage and apply to the movement of all articles of commerce unless so-called lower commodity rates are available for a given shipment of freight. The class rates are so fashioned that a southern or western shipper pays substantially higher rates, either for movement within the South or West, or from these territories to the East, than are paid by an eastern shipper for a haul of equivalent length entirely within the East.

To obtain lower commodity rates, shippers must, as a practical matter, deal with freight rate associations established by the railroads in each rate territory.

Briefly stated, Georgia charged that southern shippers in attempting to reach the great consuming markets of the East seek commodity rates lower than the class rates, but the eastern and southern railroads are in a conspiracy, through the freight-rate associations, to freeze the discriminatory class rate structure. Further, it was alleged that this conspiracy was initiated in 1934 by powerful eastern financial interests through the organization of the Association of American Railroads, a coercive mechanism fashioned to maintain the status quo. As a part of the conspiracy, the already-existing eastern and southern rate organizations (formerly loosely-organized trade associations) were integrated into the AAR and made subject to its control, thereby becoming coercive mecha-

8 "The South" as used here refers to the Southern Rate Territory lying approximately south of the Ohio and Potomac Rivers and east of the Mississippi River; "the East" indicates Eastern (or Official) Rate Territory, located north of the Ohio and Potomac and east of the Mississippi. "The West", which includes rate territories west of the Mississippi, need not be defined more precisely for this Note.

9 Hereinafter referred to as AAR.
anisms like the AAR for perpetuating the existing class-rate discriminations.

Georgia further charged that most of the East is not reached by the rails of southern railroads, therefore southern shippers, to reach the great eastern markets, must depend on through rates made jointly by southern and northern railroads. These rates, it was contended, discriminate against the South. Georgia maintained that this situation constantly causes southern shippers to seek reductions in rates, but that the defendant railroads, both southern and eastern, have conspired not to file proposed rate changes for consideration by the ICC, as the law requires, until the proposals are acted upon by vote of the members of the territorial rate organizations, the defendants agreeing to abide by decisions thus made.

Georgia admitted that each railroad, in theory, has the right of "independent action", that is, the right to file (regardless of the vote of the majority) the proposed rate change with the ICC. This, Georgia maintained, is an illusory right because of the coercive measures available to enforce the decisions of the rate organizations. A railroad favoring a rate change may take an appeal from an adverse decision through the several steps of the organizational hierarchy, but after this process is exhausted, the proponent must conform or take the consequences. These include all-out opposition before the ICC to rates filed independently; and the withholding of business from the nonconformist railroad by routing freight over other rail lines. The eastern railroads are able to force the hand of southern railroads by withholding freight revenues which accrue in favor of the southern lines, thus deterring the latter from appealing to the ICC when the eastern roads refuse to lower northbound interterritorial rates to the same level, distance considered, that prevail on similar traffic moving interterritorially within the East. Further, Georgia claimed, the eastern railroads control the Association of American Railroads, the orders of which the southern rail lines have agreed to accept. All defendant railroads, Georgia further averred, have a strong interest in maintaining the authority of the rate organizations to prevent rate erosion and resulting losses in revenue.

The rate organizations set-up is successful, it was argued, in its designs to keep the South, including Georgia, in the relation of a colony to the East. Georgia maintained, however, that it is not necessary to offer proof of injury to Georgia's economy because the acquisition of the

coercive power to fix freight rates and to discriminate against Georgia violates the Sherman Act and gives Georgia the right to injunctive relief.\textsuperscript{11} The State deliberately refrained from offering proof of injury, maintaining that injury could be presumed to flow from the existence of the conspiracy.

Georgia did, however, offer examples by means of documents obtained from defendants' files as illustrative of "coercive and discriminatory" price-fixing but emphasized that these were not an essential element of proof.

The relief sought by the State was an injunction to prevent the defendants from agreeing among themselves or with other railroads upon freight rates and related matters to be filed with ICC, and to reduce the multi-layered territorial rate organizations with their secrecy to single-action public conferences—one to each rate territory. Proposals for rate changes would be subject to a single public discussion. The proponent might submit the proposal if he wishes. In addition, agreements relative to rates would be allowed only between railroads actually participating in joint, through rates.

Defendant railroads denied Georgia's charges and argued that their rate association does not possess coercive power. Further, they introduced evidence to show that during the time of the alleged conspiracy industry had developed more rapidly in Georgia and the South than in the East. Witnesses for defendants testified they had no knowledge of industries kept away from Georgia or the South because of differences in freight rates. Defendants maintained that the rate bureau operations are necessary for compliance with the Interstate Commerce Act. They sought to bring their actions into the area of consultation and other concerted action regarding prices held to be lawful by the Supreme Court.\textsuperscript{12}

Georgia did not attempt to controvert this evidence, arguing that it was irrelevant and that by acquiring power to fix freight rates and to discriminate against Georgia in rates so fixed, defendants had irreparably injured the economy of Georgia. The State maintained that had it not been for the illegal acts of defendants, greater economic progress might have been made.


\textsuperscript{12} See, e.g., Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933); Maple Flooring Association v. United States, 268 U. S. 563 (1925).
The charges of Georgia did not prevail, as may be seen from the findings of fact by the Special Master. These findings, very generally stated, were that no conspiracy such as Georgia charged was established by the plaintiff. No intent to discriminate against any area of the Nation was present in setting up the Association of American Railroads, an organization born of the depression with the help of large railroad investors but not under their domination. Rather, the AAR’s purpose was to find ways of reducing costs, avoid wastes due to competition, and fight government ownership. Furthermore, the Master found that AAR had handled rate questions on an intermittent basis, and was content mainly with establishing policies calculated to deter reductions in rates or to effect increases. The routine business of rate adjustment was found to take place in the defendants’ regional rate organization, not in the AAR. The establishment of AAR did not bring about significant changes in the organization or procedures of these rate associations. The AAR was found to be merely an influence for conserving railroad revenues by avoiding reductions in rates. This influence is neither coercive nor discriminatory but only assists the regional rate associations to lessen reductions in rates.

Likewise, the activities of the territorial rate organizations were held to be non-discriminatory and non-coercive. There was found to be no perceptible difference between the handling of rate proposals on traffic originating in the South destined to the East and those on freight moving southbound from the East.

The Master did point out, however, that in the 1930’s the eastern rail lines through their rate organizations had followed a policy of opposing the same level of rates on southern products destined for the East as prevailed within the latter territory. ICC decisions in the late 1930’s had the effect, according to the Master, of nullifying this policy of the eastern roads. Further, he noted that territorial organizations are necessary forums for discussing rate proposals in order to conform to the provisions of the Interstate Commerce Act, which charges the railroads with responsibility to initiate rates that are reasonable and non-discriminatory—a necessity conceded by Georgia. However, he found that the defendant railroads have used these associations for more

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13 This is true only to a limited extent because ICC actions in this period dealt with relatively few items of traffic originating in the South and seeking equality on the eastern rate level.
than mere discussion by agreeing to procedures to lessen the magnitude and frequency of reductions in rates: by secret ballots, by bringing to bear the influence of the majority votes, by authorizing rate association officials to retard and hold up favorable action on rate reductions, and by use of appeal to a higher level in rate organizations when rate reductions were deemed to be against the best interests of the rail lines as a group.

Additionally, the Master held, it is commonly understood that although each railroad theoretically retains the right at any time to avail itself of independent action, the right is rarely exercised when adverse decisions are rendered against a proponent of a rate reduction or when an appeal is taken. If appeals and majority decisions are ignored frequently, the effectiveness of rate organizations would be so impaired as substantially to lessen the revenues of all. The Master found that these agreements only lessen, but do not destroy, the right of independent action. The question thus raised, the Master asserted, is whether such a deterrent to independent action, applicable both in eastern and southern rate bureaus, operates to freeze a rate structure discriminatory in nature, as charged by the State of Georgia.

Incidental to answering this question, the Master reviewed the action of the Interstate Commerce Commission in the Class Rate Investigation, 1939.14 In this proceeding the Commission examined the railroad class-rate structure east of the Rocky Mountains and found that a single system of class rates should supplant the regionalized class-rate structure described earlier in this paper. As an interim measure, the ICC ordered lessening, but not complete removal, of the differences between class rates applicable in the East and those in the South. The Supreme Court sustained the Commission's action when attacked by eastern states and western railroads.15

The Master then found that so far as class rates are involved, the pertinency of the effect of the rate organizations on removing rate discriminations through rate negotiations, railroad by railroad, is not involved. Such discriminations can be removed only by the Interstate Commerce Commission. He found that Georgia's accusation that the rate organizations operate to freeze a freight rate structure discriminatory to Georgia and the South has validity only in so far as commodity rates are concerned.

14 262 I. C. C. 447 (1945).
Commodity rates, the Master found, do not make up a rate structure but are individual, negotiated rates of limited application. Consequently, the commodity rates applicable on traffic northbound from the South are a heterogeneous mixture, some lower, some equal to, and some higher than, those prevailing in the East on similar goods. Even if these rates are higher than the eastern rates, which is not a certainty, the difference in the aggregate is only slight. From this the Master concluded that the northbound interterritorial commodity rates cannot be regarded in and of themselves as injurious to Georgia and the South, for there is no evidence to demonstrate, and no reasonable basis for presuming, that these rates influenced the choice of industrial locations as between the South and the East. He further made the important finding that the possibility of commodity rate differences causing a loss of profits to shippers in the South is only speculative and does not warrant a finding of injury to such shippers.

Only a relatively few rate proposals on traffic from Georgia to the East are disapproved by the railroads' rate organizations each year, the Master found. The effect of these on Georgia shippers is unknown. There is a chance that a few of these might have been approved had it not been for the dampening action of the railroad rate organizations.

On the basis of the findings of fact recounted above, the Master concluded that Georgia had not proved the injury set forth in her complaint—proof of which was necessary to entitle the state to seek the aid of the Supreme Court.

Conclusions of Law by the Special Master

The conclusions of law made by the Master were consistent with his findings of fact. Recounting that Georgia sued as pares patriae on behalf of all the citizens of the State, claiming irreparable damage to the economy of Georgia, the Master concluded that the Court had allowed the complaint to be filed expecting such damage would be proved. The evidence presented, he found, had fallen short of such proof and had shown only that a few of Georgia’s shippers each year were denied rate reductions on northbound traffic because of the rate bureaus. Under the applicable decisions of the Court, such a showing was insufficient to give Georgia the right to sue in her sovereign capacity; rather, the injuries were those of individuals, and the claims of damage should be asserted by them, not the State.16

The Master pointed out that a plaintiff, other than the United States, is not authorized, under Section 16 of the Clayton Act, to seek injunctive relief under the anti-trust laws and the applicable decisions unless the plaintiff shows either: (1) that injury to the plaintiff is threatened by acts in violation of the anti-trust laws aimed at the plaintiff, or at a particular group in which the plaintiff is included; or (2) that the threatened injury is a direct one different from that suffered by the general public. The Special Master concluded that the State had not met either test because (1) the evidence failed to show that rate bureau and AAR activity was directed specifically at either Georgia or the South, and (2) the evidence showed merely a generally unsuccessful nationwide attempt by the railroad rate organizations, including AAR, to discourage reductions in rates, the economic effects of which were diffused so that no single State was able to show that its citizens suffered in a way different from the general public.

In view of these conclusions the Master recommended a decree by the Court dismissing Georgia's complaint. However, he said that the conclusions were given with some hesitation because the precedents for them were neither recent nor numerous. He likewise considered the possibility that in view of portions of the opinion of the Supreme Court allowing Georgia to bring the action, a conclusive presumption of damage to the economy of Georgia sufficient to sustain her contentions might be deduced from the findings of fact—although in his opinion the evidence was insufficient to warrant such a presumption.

The Master asserted that if the Court should decide, notwithstanding his conclusions, that Georgia had established her standing to sue as parens patriae and had proved damage as required by the anti-trust laws, it would be necessary to consider in what manner the defendants had violated the Sherman Act, if it had been violated. Upon this question, the Master concluded that railroads are not exempted from the scope of the Sherman Act, but agreements concerning rates necessary to allow the rail lines to meet the obligations imposed for instituting reasonable and non-discriminatory rates by the Interstate Commerce Act must be regarded as made legal by that Act. Rate organization activities for such discussions are lawful. However, portions of the rate bureau agreements in question go beyond discussion and are established to lessen rate reductions. The voting and appeal machinery described previously fall into this category and are unnecessary for compliance.

with the Interstate Commerce Act. Consequently, they are price-fixing agreements forbidden by the Sherman Act. During the course of the litigation, the Master noted, enactment of the Reed-Bulwinkle Bill had added Section 5a to the Interstate Commerce Act.18 Under this provision of the law, agreements made by carriers relating to rate organizations may be submitted to the ICC for approval. Under such approval the parties to the agreements are relieved from the application of the anti-trust laws. He stated that because agreements relating to the rate bureaus involved in the case were pending before the ICC19 it would be inappropriate to frame a decree pertaining to them.

Because the defendants had not, under Section 5a of the Interstate Commerce Act, asked for approval of the agreement under which the AAR operates, Georgia could press for relief so far as the defendants' participation in AAR contravenes the anti-trust laws. The Master designated the following practices of the AAR to be violations of the anti-trust laws and not necessary for compliance with the Interstate Commerce Act: (1) resolutions aimed at preventing specific rate reductions; (2) resolutions not originating as a result of ICC action in pending proceedings before that regulatory body and calculated to result in agreement relating to increases in rates on a certain commodity; (3) action by the Traffic Department of AAR to persuade member roads to agree to forego reductions in rates or agree to rate increases; and (4) actions related to changes in procedure in the rate bureaus to retard reductions in rates.

The Master pointed out that obstacles stood in the way of injunctive relief in behalf of Georgia against the defendants taking part in AAR. First, Georgia had not established injury to the State in the establishment of AAR. As a plaintiff, other than the United States, Georgia could not seek an injunction against AAR unless its activities could be associated with those of the regional rate organizations—assuming the Supreme Court should hold that the regional organizations damaged Georgia. It is true that the evidence disclosed that AAR did assist the regional associations in discouraging reductions in rates, but the agreements under which this was done are before the ICC for approval. If these agreements were approved, Georgia's ground for injunctive relief against the Association would no longer exist. The Master found, therefore, that the case against AAR could not be disposed of until the Court had decided the case and held against the regional rate associations.

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19 Subsequently, the ICC approved the agreements.
Second, it was pointed out that the AAR was not a defendant and that the defendant railroads represented only a few of the member rail lines associated in the AAR. Consequently, a decree against the defendants would have caused either a reduction in the size of the Association or a re-vamping of its organization. The result of either alternative would be to harm the majority of the railroads making up AAR’s membership without these having had an opportunity to be heard. The question may be solved in the suit of the United States against the AAR pending in the United States District Court at Lincoln, Nebraska.\(^\text{20}\)

Third, it was indicated that the questions relating to the legality under the anti-trust laws of certain of AAR’s rate activities that were not entirely clear from the evidence in the *Georgia* case would probably be cleared up in the suit at Lincoln. In view of this situation, the Master advised the Court, that if it were to find that Georgia had made a case against the defendant railroads’ participation in the Association, action against AAR should not be taken until Georgia’s case against the territorial association was disposed of, and until the Lincoln case had been adjudicated.

**Conclusion**

One with some familiarity with both the operation of the railroad rate bureaus and with the anti-trust laws will find it difficult not to reach the conclusion that the Master rejected the idea of a large conspiratorial forest in favor of the idea that this forest is not a forest at all but instead is merely a number of individual trees. The conspiracy charged may be compared to a dangerous weapon, that is, when the parts are joined into a whole and operating, it is capable of great destruction, but when the parts are separated and examined (as the parts of the conspiracy were separated and examined by the Master) one finds only a heterogeneous collection of harmless objects.

As Mr. Justice Holmes stated in *United States v. Swift*:

\[\ldots\text{Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.}\]

\[\ldots\text{The scheme as a whole seems to us to be within reach of the law. The}\]

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constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. . . .

The approach of examining the parts separately as opposed to viewing the conspiracy as a single, integrated machine capable of destruction may very well be laid to the conflict that exists between those with an administrative law viewpoint as opposed to those with the anti-trust point of view.

Another aspect of the Special Master's report is his apparent conception of what constitutes coercion. To him coercion seems to be nothing less than physical force; he seems to reject completely the idea of economic coercion, a subtle but much more effective form of coercion than can ever be attained by use of physical force.

The case seems to pivot, however, on proof of irreparable damage to Georgia. One accepting, in accordance with generally accepted anti-trust principles, the doctrine of the Trenton Potteries\textsuperscript{23} and Socony-Vacuum\textsuperscript{24} cases that acquisition of the power to fix prices is a violation \textit{per se} of the Sherman Act, would doubtless have also accepted Georgia's illustrative examples of overt acts as sufficient proof of the irreparable damage claimed to the economy of Georgia by the conspiracy. Mr. Justice Douglas seemed to accept such a theory when in the majority opinion establishing jurisdiction over the case, he stated, "Damage must be presumed to flow from a conspiracy to manipulate rates within that zone."\textsuperscript{25} The zone referred to is the "zone of reasonableness" between minima and maxima within which the Supreme Court has held a carrier is ordinarily free to adjust its charges for itself.\textsuperscript{26}

The Special Master, however, seems to adopt the idea that proof of irreparable damage consists of showing dollars-and-cents damage to the economy of Georgia flowing from the operations of the rate bureaus. It may be pointed out that such a knowledge of damage would require a legal remedy. The very nature of the term "irreparable damage" de-

\textsuperscript{21} 196 U. S. 375, 395-396 (1905).
\textsuperscript{22} United States v. Butler, 297 U. S. 1 (1936).
\textsuperscript{23} 273 U. S. 392 (1927).
\textsuperscript{24} 310 U. S. 150 (1940).
\textsuperscript{25} Georgia v. Pennsylvania R. R., 324 U. S. 439, 461 (1945).
notes that it cannot be defined with precision and therefore an inadequate remedy exists at law. The action was properly brought in equity and should be so viewed.

Thus, the most serious error that the Special Master would appear to have made was his holding that Georgia must prove damage in a concrete manner by demonstrating specific injury to the economy of Georgia. Although he concedes that there was proven a conspiracy to control rates, he maintains there is no basis for a "presumption" of damage. This appears contrary to the Court's holding that from a conspiracy to manipulate rates "damage must be presumed to flow" as well as contrary to the ruling in New York v. United States27 in which Mr. Justice Douglas said:

We assume that a case of unlawful discrimination against shippers by reason of their geographic location would be an unlawful discrimination against the regions where the shipments originate. But an unlawful discrimination against regions or territories is not dependent on such a showing. As we stated in Georgia v. Pennsylvania R. Co., 324 U. S. 439, 450, "Discriminatory rates are but one form of trade barriers." Their effect is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a State or region, to make it difficult for an agricultural economy to evolve into an industrial one. Non-discriminatory class rates remove that barrier by offering that equality which the law was designed to afford. They insure prospective shippers not only that the rates are just and reasonable per se but that they are properly related to those of their competitors. Shippers are then not dependent on their ability to get exception rates or commodity rates after their industries are established and their shipments are ready to move. They have a basis for planning ahead by relying on a coherent rate structure reflecting competitive factors.

If a showing of discrimination against a territory or region were dependent on a showing of actual discrimination against shippers located in these sections, the case could never be made out where discriminatory rates had proved to be such effective trade barriers as to prevent the establishment of industries in those outlying regions. . . .28

The Special Master, in requiring that Georgia demonstrate that the railroads specifically intended to single out Georgia for particularly discriminatory treatment, has violated the repeatedly-affirmed rule that specific intent is never essential to an anti-trust case and that conspirators are always charged with intending the results which their acts bring to pass. As Judge Learned Hand stated in United States v. Aluminum Co. of America:29

27 331 U. S. 284 (1947).
28 Id. at 308.
29 148 F. 2d 416 (2d Cir. 1945).
In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within § 2, it must be reversed.30

An intangible in the field of administrative law affecting the findings of facts and conclusions of law by the Special Master may be found in the attitude of the grandfather of all administrative law bodies, the Interstate Commerce Commission. Although the Commission did not present evidence in the case, it is common knowledge that the Commission heartily disapproved of this anti-trust suit and so expressed itself in a number of ways. Another such intangible was the passage, during the litigation, of the Reed-Bulwinkle Bill, allowing the ICC to exempt from the anti-trust laws the rate bureaus and their procedures in question. It was a foregone conclusion that if the legislation was enacted, the ICC would give the rate bureaus relief from the anti-trust law. Subsequently such relief was given.

Particularly does the Special Master's report seem inappropriate to the realities of the situation when it is known that the eastern railroads have openly declared a policy of refusing to concur in the same basis of freight rates on freight from the South to the East as prevails within the latter territory.31 Further, the ICC has found that the eastern railroads do, in fact, control the rates on freight destined to the East;32 and a spokesman for the southern railroads has stated that the rate policies of the eastern lines have, in effect, erected a rate wall which prevents or greatly curtails the movement of southern products into the East.33

Despite its unhappy ending, Georgia's anti-trust suit to obtain relief from discriminatory rates has borne fruit. The Supreme Court allowed Georgia to file its amended complaint in March 1945; the Interstate Commerce Commission in May of the same year, found in the Class Rate Investigation, 1939,34 that the class-rate structure was discrimina-

30 Id. at 432. The Section 2 referred to here is that section of the Sherman Act.
34 262 I. C. C. 447 (1945).
tory to the South. Consequently, class rates in the South and the East were ordered placed on the same basis after years of ICC dawdling with the proceeding that began in 1939. After alleviating, but not removing, the class-rate discrimination against the South, the Commission lapsed into its customary lethargy; its order issued in 1945 has not been further implemented.

Another practical result of the suit is the reported discontinuance of Association of American Railroads participation in rate matters. The removal of the clammy hand of the AAR from important rate adjustments on southern products will be a distinct benefit to the economy of the South. Above all, the Georgia suit has aided in dispelling the idea that all railroad rates are established, free of discrimination, by the Interstate Commerce Commission. On the other hand, it has brought out clearly that the railroads have a great measure of discretion in establishing freight rates, a privilege they sometimes exercise in substantial disregard of the public interest.

FRANK L. BARTON
RECENT DECISIONS

ADMINISTRATIVE LAW—PROFESSIONAL BONDSMAN APPLYING TO COURT FOR RENEWAL OF AUTHORIZATION TO WRITE BAIL BONDS HAS A CONSTITUTIONAL RIGHT TO FULL HEARING BEFORE COURT CAN DENY SUCH AUTHORIZATION.

At the expiration of a two-year period of authorization to write bail bonds in the United States District Court for the District of Columbia, one Carter applied to that court for a renewal of his authorization under the statute regulating professional bondsmen in the District of Columbia, and Rules of the District Court promulgated under the statute. His application was denied without hearing on the grounds that he lacked the qualifications for a bondsman. Carter perfected an appeal to the United States Court of Appeals for the District of Columbia, resting his argument primarily on the thesis that the original grant of an authorization for a two-year period vested in him a right in the nature of a property right, which right could not be taken away by denial of his application for a renewal without a hearing containing the elements of due process of law. Held, the denial of renewal of a limited-term license to appear as surety on bail bonds is a judicial act, which destroys an established business, and the applicant is entitled to a full hearing. In re Carter, 19 U. S. L. Week 2342 (D. C. Cir., Jan. 18, 1951). Petition for re-hearing by the Solicitor General as amicus curiae granted March 30, 1951.

The instant case involves the application of principles of administrative law developed in the field of occupational licensing. The cases have generally recognized two categories of occupations subject to the licensing power of the state: a category in which a license is regarded as conferring a species of "property right", of which the licensee may not be deprived without notice and an opportunity for hearing (e.g., Riley & Co. v. Wright, 151 Ga. 609, 107 S. E. 857 [1921], in which a license to solicit insurance was held a "property right"); and a category in which the license is held to confer a bare privilege, terminable at the will of the licensing authority (e.g., Floeck v. Bureau of Revenue, 44 N. M. 194, 100 P. 2d 225 [1940] in which a liquor license was held to amount to no more than a bare privilege). The assignment of a given occupation to a category is generally based on a determination by the court that it is either "socially desirable" or "inherently harmful".

The bulk of the cases which have come before the courts in this field have involved an attempted mid-term revocation of a license, as opposed to the instant case, which concerns refusal to renew a limited-term license. The court was therefore presented with the question of whether the considerations applicable to an attempted mid-term revocation, or those referable to an original application, are properly applied to a refusal to renew. The majority held that an authorization to write bail bonds conferred a "property right", and gave weight to the fact that a refusal to renew Carter's license would have

639
the same effect as a mid-term revocation, i.e., it would destroy an established business. A vigorous dissent takes issue with both of these findings.

The licensing statute involved placed upon the criminal courts of the District of Columbia the duty to provide, under reasonable regulations, the qualifications for persons applying to engage in the bonding business before the courts, and prohibited the conduct of such business except under authorization from the courts. The statute provided that both financial and moral qualifications should be considered, and stipulated that no persons should be so authorized who had ever been convicted of an offense involving moral turpitude, or who were not known to be of good moral character. It was also provided that the courts must require periodic renewal of the authorization. Pursuant to the latter provision a rule of court fixing two years as the period of authorization was promulgated. No provision was made for hearing or for judicial review. 47 Stat. 1482 (1933), D. C. Code 1940, § 23-601.

For an understanding of the instant case it is necessary to refer to a previous appeal by the same Carter from an order of the District Court which barred him from engaging in the bail bond business. In re Carter, 177 F. 2d 75, certiorari denied, 338 U. S. 900 (1949). In his original application Carter had stated that he had never been "charged and/or convicted" of a crime. This was a misrepresentation of fact. He had been three times charged with gambling and once with receiving stolen property. Each of the four charges had been dismissed before trial. The judge who had initially granted Carter a two-year license learned these facts, "withdrew" the original grant, "reinstated" the application, and ordered an investigation of Carter's character and criminal associations, if any. The results of an F. B. I. investigation were made available to the court, but were never revealed to Carter, nor placed in the record. Carter produced twenty-six letters attesting his good character. On June 8, 1948, without further hearing, the District Court disapproved the reinstated application on the grounds that, in the opinion of the court, Carter lacked the qualifications for a bondsman. The Court of Appeals held in that case that the action of the District Court constituted a mid-term revocation of Carter's license, and that he was, therefore, entitled to be confronted by the evidence against him, to cross-examine, and to present contrary evidence. In the instant case the appellate court held that the same considerations were applicable to an application for renewal.

The dissent in the instant case was written by the judge who wrote the court opinion in the first Carter case, supra. The dissent maintains that a full hearing is of right only in the case of a mid-term revocation, and that the granting or refusal of original or renewal applications for authority to write bail bonds rested, under the statute, in the administrative discretion of the court, unqualified by any constitutional right to a full hearing. The question of the character of the interest conferred by a limited-term license is a field of remarkably few but sharply-conflicting decisions. A series of Iowa cases is to the effect that the original grant vests in the licensee an interest in the
nature of a property interest, and that as the same consequences flow from refusal to renew as from revocation, i.e., the destruction of an established business, the licensee is entitled to a due-process hearing on denial of his application for renewal. State v. Otterholt (chiropractor), 234 Iowa 1286, 15 N. W. 2d 529 (1944); Gilchrist v. Bierring (cosmetologist), 234 Iowa 899, 14 N. W. 2d 724 (1944); Craven v. Bierring (dentist), 222 Iowa 613, 269 N. W. 801 (1936). Representative of the contrary view is Fochi v. Splain (auto driver's school), 36 N. Y. S. 2d 774 (Sup. Ct. 1942). State v. Conragan (beauty culture school), 58 R. I. 313, 320-21, 192 Atl. 752, 756 (1937) contains a forceful statement of the conclusion reached in these cases. “Although the privilege conferred by the certificate may be valuable, it is neither a contract nor a property right, within the constitutional meaning of these words.” In the instant case the decision implicitly embraces the “property right” theory although it avoids citation of the Iowa cases, which were urged upon the court by the appellant. In the earlier Carter case, supra, however, the same court appeared to accept the “privilege” concept, stating at p. 76 “. . . authorization is for a term, at the expiration of which the same considerations govern renewal as govern original approval; . . . .” It must be stated here that the majority opinion in the instant case is so phrased as to indicate that a full hearing might be required even on the application for an original authorization. This position is reached by assimilating the calling of bondsman to that of the lawyer, and citing the case of In re Summers, 325 U. S. 561 (1945), for the proposition that denial of an original application for admission to the bar is a judicial act. The dissent questions the Summers case as authority for this proposition.

The dissent examines at some length the nature of the bail bond business, and concludes that it is characterized by two features: it is a part of the operation, and under the supervision, of the criminal courts; and it is a contract with the Government. In this dual character, it is not an independent vocation, as to which the police power is sharply limited. The dissent argues that it follows that only in the case of deprivation, i.e., revocation, is the licensee entitled to a full hearing. As stated above, the majority opinion holds that the business of bondsman is analogous to the profession of the lawyer in all respects which are pertinent to the question of whether denial of a license is a judicial act which can only be performed after a full hearing.

In the light of this brief examination, it is suggested that the decision of the court to rehear the instant case en banc is to be applauded. The further examination and clarification of the two points raised will be a needed addition to the law on these subjects.

MARTIN P. DETELS, JR.
ATTORNEYS—AGREEMENT TO DELIVER PART OF CONTINGENT FEE TO LABOR UNION THAT PROCURED CLAIMS FROM ITS MEMBERS IS CENSURABLE CONDUCT.

A railroad labor union established a department for its members and their families to procure lawyers to prosecute personal injury claims against the railroad companies on a 20% contingent fee basis. The attorney agreed to turn over one-fourth of that fee to the union for the maintenance of the department whose activities included advertising the services of the department and the employment of investigators who made reports on accidents and urged or strongly recommended the employment of cooperating counsel. Petitioners, who are attorneys who prosecuted claims under the union plan, seek review of the disciplinary action taken by the Board of Governors of the State Bar as a result of their violation of Rule 2a (prohibiting “solicitation”) and Rule 3 (prohibiting the employment of others to “solicit”) of the Rules of Professional Conduct of the State Bar of California, 26 Cal. 2d 32 (1944). Held, participation in the labor union service was a violation of both rules. Hildebrand v. State Bar of California, 225 P. 2d 508 (Cal. 1950).

These rules are similar in their provisions to Canon 27 of the Canons of Professional Ethics of the American Bar Association. This Canon prohibits the solicitation of professional employment directly or indirectly, by advertisements, touters, or personal communications not warranted by personal relations. The Standing Committee on Professional Ethics and Grievances of the American Bar Association has written a number of opinions (over 80) concerning this Canon. An analysis of these opinions reveals the fact that certain quarters of the bar have realized some difficulty in conforming with the requisites of this Canon and have originated and experimented with novel and often ingenious methods of testing the exactness which the Canon prescribes. The legislative history of the Canon (adopted as one of the first 32 Canons in 1908, and amended in 1937, 1940, 1942 and 1943) and the connotations of the opinions of which it is wholly or partially the subject, suggest a prevailing view, the dominant feature of which is a strict adherence to the literal meaning of the words of the Canon. In an apparent effort to conform with these restrictive limitations and other ethical requisites of state and national bar associations, and, at the same time, to provide certain legal services for its members, the Brotherhood of Railroad Trainmen (which is the labor union concerned in the instant case) devised and revised several basic plans. The first plan provided for a 20% contingent fee of which the attorney was to return one-fourth to the union. In an attempt to eliminate fee-splitting accusations after a preliminary hearing in In re O'Neill, 5 F. Supp. 465 (E. D. N. Y. 1933), this plan was revised to the effect that clients would be required to execute two separate contracts: one to secure the attorney's contingent fee (15%) and the other to employ the legal service of the union (5%). The court, in In re O'Neill, supra, held that both contracts were one
transaction constituting a fee-splitting device contravening Canon 28 (stirring up litigation), and Canon 35 (use of intermediaries) of the Canons of Ethics of the New York State Bar Association and the Canons of Professional Ethics of the American Bar Association.

Both of these plans were in effect during the period in which the petitioners were actively cooperating with the union in the instant case. However, by the time of the trial, a third revision had resulted in an arrangement whereby the client made only one contract and that with the attorney for a 25% contingent fee (the percentage having been increased). The attorney then paid the union's investigators on a quantum meruit basis. The court in the instant case, differing from other courts [See In re Thibodeau, 295 Mass. 374, 376, 3 N. E. 2d 749, 750 (1936)], determined these proceedings according only to those practices which existed during the period that the petitioners were charged with misconduct. Thus, the status of the final revision of the union's plan remains undetermined.

The place, in the law, of the canons of professional ethics of state and the national bar associations is sui generis. The significance attached to them varies from the force and effect of law (the instant case) to their application as mere guiding principles. The court commented in In re Mitgang, 385 Ill. 311, 324, 52 N. E. 2d 807, 813 (1944):

We have held such canons are not of binding obligation and are not enforced by the courts as such, although they constitute a safe guide to professional conduct to which they apply, and we may discipline an attorney for not observing them.

That there may be disbarment for certain offenses without a direct violation of any statute and based only on applicable canons or an interpretation thereof is evident. "Apart from any statute, an attorney may be suspended or disbarred for unprofessional conduct even though not criminal in its character." Louisville Bar Ass'n v. Mazin, 282 Ky. 743, 745, 139 S. W. 2d 771, 772, rehearing denied (1940). However, in other factual situations, it has been held that there may be violations of the canons with impunity. An attorney may, for example, personally solicit professional employment without being subject to disciplinary action, though the court may not condone such and would regard this as unethical. See Louisville Bar Ass'n v. Hubbard, 282 Ky. 734, 739, 139 S. W. 2d 773, 775, rehearing denied (1940); Herrscher v. State Bar, 4 Cal. 2d 399, 402, 49 P. 2d 832, 833 (1935). Further, as is esoterically known, "... engaging in the practice of law is a privilege and not an absolute right. ..." In re Donaghy, 402 Ill. 120, 123, 83 N. E. 2d 560, 562 (1948), rehearing denied (1949). Attorneys are officers of the court and the power over them is thus judicial and not legislative. Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929), 15 St. Louis L. Rev. 294 (1930). In addition, it has been said:

It is held by the great weight of authority that it is within the inherent power of courts of general jurisdiction to define and regulate the practice of law and
that this power includes the control of practice not only in the court, but also outside.


[A proceeding for disbarment] is quasi criminal in its nature, and while it is not essential that the proof of guilt be established beyond a reasonable doubt, yet the charges must be sustained by convincing proof to a reasonable certainty and any reasonable doubts should be resolved in favor of the accused.

The wrongful acts complained of need not be indictable. Dickens' Case, 67 Pa. 169 (1870). Few formalities are necessary to constitute due process. See In re Mundy, 202 La. 41, 58, 11 So. 2d 398, 403 (1942). The requisites of a sufficient basis for the proceeding are stated in In re Donaghy, 402 Ill. 120, 135, 83 N. E. 2d 560, 567 (1948), rehearing denied (1949):

... the case made must be free from doubt, not only as to the act charged but as to the motive with which it was done. ... The evidence of guilt ... must be clear, and it is not sufficient that the evidence shows a state of facts not entirely creditable to the respondent. ...

Considering the extensive power of the courts over lawyers in regard to their professional status and the weight of ethical standards, disbarment proceedings are such as fall within an area for the exercise of considerable discretion by the courts. In the instant case, then, the court could have condoned the activities of the petitioners even though confronted with an apparent violation of the Rules of Professional Conduct of the State Bar of California, supra. The question remains: Should such practices be fostered or closely limited and discouraged?

Answered both from the viewpoint of solicitation and fee-splitting, the action of the petitioners in the instant case appears improper. The practice would appear to go beyond the purpose of the union in devising the plan and, as an incident thereto, creating the investigatory department within the union. The members of the Brotherhood of Railroad Trainmen are largely engaged in hazardous occupations where accidents are common. To provide for the inadequacies of common law methods, the Brotherhood was instrumental in achieving Congressional enactment of the Federal Employers' Liability Act. 35 Stat. 65 (1908), 45 U. S. C. §§ 51-59 (1946). Subsequent investigation revealed that members were not deriving full benefits because of their ignorance of their rights and also as a result of interviews with claims adjusters. To remedy this condition, the Brotherhood provided what, all would probably agree, is a commendable service in advising its members of their substantive rights, so long as this was done in a general way and did not border on the
unauthorized practice of law. This activity on the part of the Brotherhood would accomplish the desirable purpose of having its members derive full benefits under the Federal Employers' Liability Act, supra. However, the Brotherhood did not limit its activities here, but went beyond this, and unnecessarily so in view of its purpose, to urge or strongly recommend the employment of certain named counsel. It went further. It arranged an apparent fee-splitting with the cooperating counsel.

There was no guaranty that the lawyers who were strongly recommended by the Brotherhood to its members would be efficient or competent. Furthermore, from the professional point of view, the plan had certain unethical incidents, since the lawyer who cooperated in its exercise was engaged both in fee-splitting and in fostering the use of intermediaries for the indirect solicitation of professional employment. However, since the instant case was the first of its kind, in the absence of intentionally unethical conduct, public censure, which was the procedure taken by the court, would appear to be adequate action.

THOMAS J. O'CONNOR, JR.

ATTORNEY-CLIENT—THE FIDUCIARY RELATIONSHIP EXISTING BETWEEN ATTORNEY AND CLIENT WARRANTS AN EXCEPTION TO THE DOCTRINE OF RES JUDICATA AS APPLICABLE TO SUCCESSIVE SUITS ON A SERIES OF NOTES ARISING OUT OF THE SAME FEE CONTRACT.

The plaintiff, an attorney, brought this action to recover on the remaining five of seven promissory notes given him by the defendant, his client in a divorce proceeding, in payment of the fee agreed upon by the parties. As a defense the defendant contended that she executed the notes only after the plaintiff had misrepresented to her that, if she refused, her best interests would not be served in the matter of the divorce. She was thus denying the validity of her fee contract with the plaintiff for lack of mutual assent to its execution. After a jury trial in the Municipal Court for the District of Columbia judgment was entered for the defendant. This decision was reversed by the Municipal Court of Appeals for the District of Columbia which held that the particular defense offered by the defendant was not available to her since it raised substantially the same issues as were raised by her defense to a prior suit, brought by the same plaintiff, on a note which was one of the same series as the notes here in question. The defendant appealed to the United States Court of Appeals for the District of Columbia Circuit. Held, in view of the attorney-client relationship and the policy of the law towards fee contracts made between parties to such a relationship, the requirements of justice are better served by permitting reexamination of the merits of the case rather than by considering the prior suit as foreclosing the matter. Hankin v. Spilker, No. 10576, D. C. Cir., Feb. 23, 1951.
The Court of Appeals rejected the doctrine of res judicata primarily for reasons of policy. In substantiating this reasoning the court enumerates certain other occasions when the doctrine has been rejected for policy reasons. It mentions the instance of litigation controlled by bankruptcy legislation where previous judicial acts concerning the person or property of a debtor are subject to attack collaterally, *Kalb v. Feuerstein*, 308 U. S. 433, 438 (1940); the instances where Congress has by legislation created a structure coordinating the adjudication of certain matters before the courts and administrative boards, where it is presumed from the inconsistency arising from the application of res judicata and the method devised by Congress that an exception was intended, *Denver Building and Construction Trades Council v. N. L. R. B.*, 186 F. 2d 326 (D. C. Cir. 1950); the instances where American courts have refused to recognize the judgments of foreign tribunals as conclusive, the basis of their refusal being found in a principle firmly embedded in international jurisprudence viz. reciprocity. *Hilton v. Guyot*, 159 U. S. 113 (1895).

In each of the above instances the exception to the doctrine has its foundation in a policy argument which can be justified as either one included in a congressional mandate or one whose uniqueness alone defies precedent and warrants an exception. The latter is the case in questions involving international law, which is designed to deal with nations rather than with individuals.

The precise issue in the present case is whether the relationship existing between attorney and client is such as to warrant the courts in adopting a policy affording this relationship immunity from the dictates of public policy as embodied in the doctrine of res judicata. The problem is not entirely unique nor is anything so affirmative as a congressional mandate involved.

Public policy requires that there be an end to litigation. When an issue has once been finally adjudicated by a court of competent jurisdiction, it cannot again be litigated. *Chicot County Drainage District v. Public Utilities Comm.*, 308 U. S. 371 (1940); *Stoll v. Gottlieb*, 305 U. S. 165 (1938); *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522 (1931). The necessity for this requirement is obvious.

It is also obvious that contracts arising from a relationship requiring a high degree of trust and fidelity should be subject to close scrutiny. When this relationship is disrupted by a disagreement concerning compensation for services which necessitates court action to resolve, some courts recognize the need for close scrutiny by placing the burden on the attorney to show the contract was fairly made. *Whiting v. Davidge*, 23 U. S. App. D. C. 156 (1904); *Willoughby v. Mackall*, 1 U. S. App. D. C. 411 (1893). Other courts approach the problem with a skepticism intended to favor the client. In both instances the courts base their attitude on a rule of public policy designed to give protection to the client against the influence that the confidential relationship can wield. See *Thomas v. Turner's Adm'rs*, 87 Va. 1, 12 S. E. 149, 153 (1890).

We have, therefore, what seems to be a conflict between two useful rules both of which are grounded in public policy. The conflict, however, is, I believe,
only an apparent one. The scrutinizing policy of the law can be applied to fee contracts arising from the attorney-client relationship consistently with the application of the doctrine of res judicata by recognizing the proper sphere within which each doctrine is intended to operate.

The defendant's defense in the first suit raised the issue as to mutual assent. The decision for the plaintiff in that action indicates that this defense was without merit. It was in this first suit that the scrutinizing policy of the law as to attorney-client contracts was satisfied. There the fee contract, as to the defense of mutual assent, was purged of doubt. It must be assumed that the plaintiff sustained his burden there and that the defendant included all matters upon which her defense was based. What is necessarily implied in a former decision is, for purposes of estoppel, deemed to have been actually decided. Crompton & Knowles Loom Works v. Brown, 59 N. Y. Supp. 556 (Sup. Ct. 1899); Pray v. Hegeman, 98 N. Y. 351 (1885). The defense in the first suit applied to all the notes in question as they all arose out of the same transaction and represented one contract. Thus all matters under this defense were available to the defendant at the time of the first suit and all issues that she can now raise in the present suit, under an identical defense, were raised by her defense at that time. Gill v. Gill, 147 F. 2d 154 (D. C. Cir. 1945); Great Atlantic & Pacific Tea Co. v. West, 10 F. 2d 898 (D. C. Cir. 1926).

Should the defendant now be permitted to raise the same defense in the instant suit? The problem is now one of res judicata, not the attorney-client relationship. Once a defense is interposed to a note or an installment and determined to be insufficient, it is conclusive as to any subsequent action on any other notes or installments of the same series. Crompton & Knowles Loom Works v. Brown, supra; Cf. Lacy v. Eiler, 35 N. E. 847, 848 (Ind. App. 1893); Restatement, Judgments § 68 (1942). To permit the defendant to raise the identical defense now would amount to impeaching the correctness of the former decision.

In its opinion the Court of Appeals itself says that if this was merely a suit upon the original judgment it would consider res judicata to be applicable. But the estoppel of res judicata is not confined to judgments alone, but extends to all the facts included in a claim or defense and to all the necessary steps upon which such is founded. See Burlen v. Shannon, 99 Mass. 200, 203 (1868). Does the fiduciary quality of the attorney-client relationship enlarge the distinction between a former judgment and a former defense to the extent of warranting a denial of the benefits of a doctrine whose utility is as applicable to lawyers as to other classes of fiduciaries? The law does not deny the benefits of the doctrine to individuals whose relationship is trustee and cestui que trust, or principal and agent. Transactions between these latter relationships are affected by the same intenments and implications that obtain between attorneys and their clients.

The dearth of authority concerning the exception to the doctrine of res
CIVIL PROCEDURE—THE FEDERAL VENUE PRIVILEGE REQUIRING SUIT TO BE BROUGHT ONLY IN THE RESIDENCE OF THE PLAINTIFF OR THE DEFENDANT IS WAIVED BY A NON-RESIDENT'S VOLUNTARY ACT IN DRIVING UPON THE HIGHWAYS OF A STATE HAVING A NON-RESIDENT MOTORIST STATUTE.

The plaintiffs, residents of Minnesota, instituted an action in the federal court for the District of Nebraska to recover damages for personal injuries allegedly resulting from an automobile accident occurring within the State of Nebraska. The plaintiffs claim to have been passengers in a pick up truck owned by the defendant in question, a resident of California. The defendant was served pursuant to the provisions of the Nebraska non-resident motorist statute. Neb. Rev. Stat. § 25-530 (1943). The defendant then made a special appearance and requested the court to dismiss the action on the ground of non-waiver of the federal venue privilege granted to him by federal statute. Held, the defendant California resident by the voluntary act of driving on the roads of Nebraska, and through the provisions of that State's non-resident motorist statute, impliedly designated the Secretary of State of Nebraska as his agent for the receipt of personal service of process and such designation was a waiver of the federal venue statute. Kostamo v. Brorby, 19 U. S. L. Week 2409 (D. C. Neb. 1951).

Until June 28, 1950, federal courts were unanimous in agreeing that the implied agency relation set up by a non-resident motorist statute was sufficient to evidence a waiver of the federal venue privilege. Kreuger v. Hider, 48 F. Supp. 708 (E. D. S. C. 1943), Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945), Blunda v. Craig, 74 F. Supp. 9 (E. D. Mo. 1947). Mindful of the fact that the venue privilege conferred by 28 U. S. C. § 1391 (a) (Supp. III, 1950), may be waived or lost, 28 U. S. C. 1406 (b) (Supp. III, 1950), it was the opinion of these district courts that the rule of “consent exemplifying waiver” as laid out in Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165 (1939), was sufficiently broad to cover the implied agency which results from the typical non-resident motorist statute. In the Neirbo case, the Supreme Court, speaking through Mr. Justice Frankfurter, stated that the venue privilege may be lost in any one of three ways, viz., failure to assert it seasonably, formal submission to a cause, or submission through conduct. The “conduct” in that case was the express appointment of an agent for receipt of personal service by a non-resident corporation in compliance with a state statute. The above line of cases make no distinction between the express agency of the Neirbo case and the implied agency of the non-resident motorist situation.
Before *Knott Corp. v. Furman*, 163 F. 2d 199 (4th Cir. 1947), certiorari denied 332 U. S. 809 (1947), it might have been claimed that this view was an overextension of the *Neirbo* doctrine. However, it was therein decided that the "purposes of justice" demand that venue be waived even where the agency is implied. Hence, this objection has been weakened.

Last year, the First Circuit suddenly broke from the "old school" and stated that venue was not waived by a non-resident's acts in driving on the highways of Massachusetts. *Martin v. Fischbach Trucking Co.*, 183 F. 2d 53 (1st Cir. 1950). The *Neirbo* case was distinguished in part on the ground that therein the agency was express while in the case of a non-resident motorist the agency is non-volitional and wholly imposed by law. Some federal courts have seen fit to extend the doctrine of the *Neirbo* case to cover the situation where a non-resident corporation fails to comply with a statute requiring designation of an agent and have held that the implied agency imposed by law flowing from the voluntary act of doing business within the state is sufficient to waive the venue statute, *Knott Corp. v. Furman*, supra. According to this view, such a distinction would seem to be invalid. However the First Circuit departs from precedent on a much more fundamental distinction. The court maintains that jurisdiction of a state court over the person of a non-resident motorist is not based upon any consent to suit but rather stems from the police power of that state. Hence there can be no waiver of venue under the "consent" theory.

A recent district court decision supports and enlarges upon the *Fischbach* point of view. In *Waters v. Plyborn*, 93 F. Supp. 651 (E. D. Tenn. 1950), the "natural rights" doctrine was expressed, i.e., the defendant corporation in the *Neirbo* case, supra, had no right to move from state to state and hence gave up no right inherent in citizenship when it appointed a resident agent or established a place of business within the state. Rather the corporation took on a burden in exchange for a privilege. It was said that a natural person however has a right of free passage which right may be curtailed by a valid exercise of police power. In questioning the existence of a true analogy between the *Neirbo* case, supra, and the instant fact situation, the court in the *Waters case*, supra, distinguished the former by stating at 652:

... there is an element of compulsion in the non-resident motorist statute, whereas in the appointment of a resident agent by a non-resident corporation there is no compulsion. In legal contemplation, waiver and compulsion are inharmonious terms, hostile, and mutually exclusive.

The instant case in criticizing the *Fischbach* point of view points out the fact that the *Neirbo* rule was somewhat extended and made statutory as far as it applies to corporations in the 1948 revision of Title 28, 28 U. S. C. § 1391 (c). (Supp. III, 1950). It is maintained that since nothing in the revision evidences an intent of the legislature to alter the application of the *Neirbo* rule as to non-resident motorists, the codifiers intended no change in the substantive law. Accord, *Urso v. Scales*, 90 F. Supp. 653 (E. D. Pa. 1950),
Morris v. Sun Oil, 88 F. Supp. 529 (D. Md. 1950). But might it not also be argued that since the legislature has seen fit to re-affirm and extend the Neirbo rule only as it applies to corporate defendants such action is an implied exclusion of the effect of that rule on non-resident individuals?

If a waiver is found there is no further problem, but if the Fischbach rule is to be followed, there is one additional consideration by which the defendant might be deprived of his venue privilege. It is possible that the rule of Erie R. R. v. Tompkins, 304 U. S. 64 (1938), could force the district court to deny the defendant the opportunity of objecting to the venue since he would not have had that opportunity in the state court.

The conflict in federal authority stands at present with five district courts supporting waiver of venue as opposed to one circuit court of appeal and one district court denying waiver. This conflict should be resolved.

WILLIAM J. MCDONALD, JR.

CONSTITUTIONAL LAW—THE RIGHT TO STRIKE IS A FEDERALLY PROTECTED LABOR RIGHT WHICH THE STATES MAY NOT COMPLETELY ABROGATE AND FOR WHICH COMPULSORY ARBITRATION IS NO SUBSTITUTE.

The Wisconsin Employment Relations Board, respondent, sued petitioners, labor unions, for an injunction against a strike. The Wisconsin Supreme Court, under authority of the Wisconsin Public Utility Anti-Strike Law, affirmed judgments of the lower state courts, granting injunctions against strikes by the unions involved. Petitioners brought certiorari. Held, the Wisconsin Public Utility Anti-Strike Law is unconstitutional, for it infringes on a field of legislation fully occupied by federal law. Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees of America, Div. 998 v. Wisconsin Employment Relations Board, 71 Sup. Ct. 359 (1951).

The injunctions were issued in each case upon the complaint of the Wisconsin Employment Relations Board acting under authority of the Wisconsin Public Utility Anti-Strike Law. Wis. Stats., §§ 111.50 et seq. (1947). The statute makes it unlawful for any group of employees of a public utility to call a strike or to go out on strike. Wis. Stats., § 111.61 (1947). In place of the right to strike, the statute provides for a system of conciliation, arbitration, and judicial review, Wis. Stats., §§ 111.54-111.60 (1947).

The right of labor to conduct peaceful strikes for higher wages has been a subject of federal legislation in recent years. The Labor Management Relations Act of 1947, for example, protects the rights of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 61 Stat. 140, § 7 (1947), 29 U. S. C. § 157 (Supp. III, 1950). The protection afforded extends to labor in all industries affecting commerce and within its scope includes a privately owned public utility whose business and activities are carried on wholly within a single state. Consolidated

The Wisconsin Act declares that the interruption of public utility service results in damage and injury to the general public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare. Wis. Stats., § 111.50 (1947). In the promotion of the public welfare, such businesses have traditionally been subject to police power regulation. At an earlier time, given the facts presented in the principal case, perhaps the Supreme Court would have reached a different conclusion. Cf. Dorchy v. Kansas, 272 U. S. 306 (1926). The Court could have found conceivably that there was no repugnance or conflict between the federal and state legislation involved so direct or positive that the two acts could not be reconciled or consistently stand together. Cf. Kelly v. Washington, 302 U. S. 1 (1937). Moreover, the majority would not have been precluded, by the rules of statutory construction, from holding that the emergency provisions of the federal statute pertained solely to national emergencies. From this it could be argued with much force that the implication was that the states retained the power to protect the public interests in emergencies economically and practically confined within the state in industries so peculiarly subject to police power regulation as are public utilities. A study of the arguments invoked on both sides, however, shows that in this field of legislation, at least, the presumption is against the constitutionality of state laws. The view of the majority of the Court is sufficiently clear. The right to strike is a federally protected labor right. Any state legislation which seeks to completely abrogate this right is unconstitutional, notwithstanding its emergency character, notwithstanding its subject is local public utility business.

Subsequent to the Industrial Revolution the population of urban areas steadily increased. With the further development of industry and the concomitant expansion in the division of labor, these populations have become more interdependent than ever before. The metropolitan dweller looks to the services of many others to supply him with the necessities of life. When in this great chain of supply one link breaks, it does cause repercussions wholly apart from the effect upon the parties immediately concerned. This presents a crucial problem in the regulation of strikes in industries essential to city life. Predominantly local problems, however, are not necessarily best left altogether to local governmental authority for solution. Complete abolition of the right to strike, as here, may lead to more labor unrest and disruption of service than is now experienced under a system of free collective bargain-
ing accompanied by the right to strike. Furthermore, if a strike in such essential industry does cause an emergency sufficiently grave, the state might make provision for the seizure of the industry or possibly declare martial law. These are alternatives. The state is not necessarily left without remedy.

In view of the possible alternative means available to states in times of crisis and of the great importance of determining and administering a wise and workable national labor policy, it is submitted, the problem is one best left to federal solution.

JOHN B. LETTERMAN

CONSTITUTIONAL LAW—Witness Held Not Required to Give Answers Revealing an Intimate Knowledge of Communist Party Due to Protection of the Fifth Amendment.

In response to a subpoena, the petitioner, Patricia Blau, appeared before the United States District Court Grand Jury at Denver, Colorado. There she was asked several questions concerning the Communist Party of Colorado and her employment by it. She refused to answer these questions on the ground that the answers might tend to incriminate her. She was then taken before the district judge where the questions were again propounded and where she again claimed her constitutional privilege against self-incrimination and refused to testify. The district judge found the petitioner guilty of contempt of court and sentenced her to imprisonment for one year. The Court of Appeals for the Tenth Circuit affirmed, and the Supreme Court granted certiorari. Held, a witness may refuse, under the Fifth Amendment, to answer questions which, if answered, would reveal an intimate knowledge of the organization and operations of the Communist Party. Blau v. United States, 71 Sup. Ct. 223 (1950).

In order to understand the opinion of the Supreme Court in this case, it is necessary to consider the circumstances which existed immediately prior to, and during its decision. After the decision in this case in the Tenth Circuit, but before certiorari was granted, two cases, one in the Fifth and one in the Ninth Circuit, were decided, both of which were in direct conflict with this case. Estes v. Potter, 183 F. 2d 865 (5th Cir. 1950); Alexander v. United States, 181 F. 2d 480 (9th Cir. 1950). At the time that the petitioner was summoned to testify in 1949, the Smith Act, 18 U. S. C. § 2385 (Supp. II, 1949), was on the statute books making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government, or to be or become a member of such a group with knowledge of its purposes. Further, the twelve national leaders of the Communist Party were under indictment by the Department of Justice in the Southern District of New York for the violation of
this Act. These leaders were subsequently convicted and the conviction affirmed. *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950).

In refusing to testify, Blau made her position clear, by pointing out the following facts. She said that she would not answer the questions because, by so doing she might incriminate herself under the Smith Act, *supra*, and that since the indictment of the twelve national leaders of the Communist Party specifically charged that they wilfully and knowingly did conspire with each other and with "... divers other persons to the Grand Jury unknown ..." to organize the Communist Party of the United States, an organization which advocates and teaches wilfully and knowingly, both the desirability and duty of overthrowing the Government of the United States by force and violence, she might easily associate herself with them in this conspiracy by indicating that she had an intimate knowledge of the organization of which they were the leaders, and thus become one of the "... divers other persons ..." mentioned in the indictment. The indictment of the national leaders is set out in *United States v. Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948). Blau further contended that the declaration of Attorney-General Clark, 5 C. F. R. § 210 App. A (1949 ed.), under President Truman's loyalty order, Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947), that the Communist Party is a subversive organization gave added weight to her fear of prosecution, should she indicate an intimate knowledge of the structure of the party.

The Tenth Circuit in affirming the contempt citation admitted that the status of the Communist Party was somewhat shrouded with uncertainty and confusion and that many high officials of the Government have voiced opinions to the effect that the Communist Party is dedicated to the forceful overthrow of the Government and is therefore an unlawful organization. However, the court held that in its opinion all the decisions of the courts presently are to the effect that mere membership in the Communist Party is not an offense *per se*. If this be true, then there could be no claim that Blau would incriminate herself were she to answer questions which might imply membership in, and intimate knowledge of, the Communist Party, and therefore she was guilty of contempt in not answering the questions. The court cited *Schneiderman v. United States*, 320 U. S. 118 (1943), and *Dunne v. United States*, 138 F. 2d 137 (8th Cir. 1943).

The *Schneiderman* case, although it appears to support the opinion of the Tenth Circuit, may be distinguished and should not be controlling here. It dealt with a denaturalization and deportation proceeding which involved the alleged illegal procurement of naturalization by the defendant in 1927. The case at most can be cited to support the proposition that mere membership in the Communist Party in 1927 and for five years preceding that year is not sufficient grounds for declaring a citizen naturalized in 1927 to have illegally procured a certificate of naturalization under 34 Stat. 598 (1906), 8 U. S. C. § 382 (1934). This case certainly cannot be interpreted to say that membership in the Communist Party in 1948 or 1949 is not a crime or good evidence...
of a crime, especially in view of the Smith Act, supra. The Alexander case, supra at 483, places, in effect, this interpretation on the Schneiderman case.

The Dunne case, supra, does not seem to support the contention of the Tenth Circuit. First, all the defendants were held to be guilty under the provisions of 18 U. S. C. §§ 9, 10, 11 (1940) which are substantially the same as 18 U. S. C. § 2385 (Supp. II, 1949), under which Blau fears prosecution and, secondly, the court in the Dunne case held that active membership in the Communist (or Socialist Workers') Party by each of the defendants was sufficient evidence to convict them under the above statute. This case also distinguishes the Schneiderman case and expressly determines that it does not apply to such a prosecution. 138 F. 2d 137, 152 (8th Cir. 1943).

In Estes v. Potter, supra, the respondent was held in contempt for failure in a deportation proceeding to answer questions similar to those asked of Blau. The Government advanced the same argument, i.e., membership in the Communist Party is not a crime per se and thus is not a valid basis for invoking the privilege against self-incrimination. The court in taking a logical and common sense point of view held that it would be palpably inconsistent, in one breath, to urge that being a communist is a ground for deportation for belonging to a group which advocates the forceful overthrow of the Government, and in the next breath, to argue that it may not incriminate one to be compelled to testify that he is a communist, knows communists, or has attended communist meetings. The position may be summed up thus: if he denies he is a communist, he can be prosecuted for perjury; if he admits it, he can be deported, and, if he refuses to answer he can be held in contempt.

Even conceding that it is no crime per se to be a member of the Communist Party, nevertheless, the petitioner had real and reasonable fear of being prosecuted since others, the national leaders, who had intimate knowledge of the Communist Party had been prosecuted. This is one test laid down to determine the right to invoke the privilege. Mason v. United States, 244 U. S. 362 (1917). Even if it is not a crime per se to be a member of the Communist Party, it certainly can not be denied that it would be powerful evidence in establishing a violation of the Smith Act. It was recognized in a very early and much quoted decision by the famous Chief Justice Marshall in United States v. Burr, 25 Fed. Cas. 38, No. 14,692e at 40 (C. C. D. Va. 1807), that many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If any such answer may disclose a fact which forms a "necessary and essential link" in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction.

Although this decision allows one who would destroy both our form of government and our Constitution to hide behind them as a shield, it is nevertheless the only logical conclusion in view of past decisions in this country and
in view of the common law. 8 Wigmore, *Evidence* § 2250 (3d ed. 1940). It is the only effective way to prevent “Star Chamber” and other inquisitional procedures in this country. It does seem contradictory for one who has been thus protected to advocate removal of such a system. There is apparently some rather general dislike among the public and members of the bar toward this case, because it creates great practical difficulties in successfully prosecuting communists for violation of the Smith Act and other statutes. While it is true convictions still may be obtained, this decision deprives the Government of the benefit of testimony from an unwilling witness who is probably best able to provide important and valuable evidence. A balance must be established between the right of the Government to protect itself and the right of the individual not to incriminate himself. The balance struck by this case, although perhaps distasteful in certain aspects, is on the whole salutary.

CHARLES JAY PILZER

DOMESTIC RELATIONS—Absolute Divorce Granted by Nevada Court, Where Both Husband and Wife Were Before That Court, Vitiates Prior New York Separation Decree Notwithstanding Express Refusal by Nevada Court to Determine the Question of Alimony.

Plaintiff and defendant, married in New York State in 1926, were separated by decree of that State in 1942. The judgment, calling for stated weekly payments, was granted in favor of the plaintiff wife. In 1943 the husband filed suit for absolute divorce in Nevada. The plaintiff wife appeared personally in that action to defend on the merits. The prior New York separation decree was never raised in that action and the Nevada court in granting the husband a decree of divorce expressly denied husband’s request for a finding that the wife had waived all claim for alimony, although no stipulation for support was contained in the decree. Subsequent to the absolute divorce the husband continued the New York payments but when confronted with a request for an increase claimed that the Nevada absolute divorce absolved him from all liability under the prior New York judgment. *Held*, the New York separate maintenance decree did not survive the absolute divorce in Nevada since both parties had personally appeared before that court. *Lynn v. Lynn*, 19 U. S. L. Week 2420 (N. Y. Ct. of Appeals, March 8, 1951).

With this decision, the highest court of New York has limited the applicability of the well known “divisible divorce” doctrine to those factual situations which involve an *ex parte* out of state divorce [See, *Estin v. Estin*, 334 U. S. 541, 549 (1947); *Krieger v. Krieger*, 334 U. S. 555 (1947)]. The New York court distinguishes the instant case by pointing out the fact that the Nevada court had personal jurisdiction over the defendant wife. A brief consideration of the *Estin* case, *supra*, itself will perhaps serve to clarify this
distinction. In the Estin case the out of state divorce was *ex parte* since the wife was served by publication only. The Supreme Court held that although the marriage bond was dissolved by the Nevada divorce yet the prior New York separation decree continued in force. The effect of this ruling was to make the divorce “divisible”, *i.e.*, the Nevada divorce was sufficient to dissolve the marriage *bond* in New York State but was not sufficient to absolve the husband of his duty of support. Since the judgment of a sister state was involved in the Estin controversy the Court was governed by the Full Faith and Credit Clause of the Constitution, Art. IV § 1, and its statutory implementaton, Rev. Stat. § 905, as amended, 28 U. S. C. § 687 (1946). The Estin decision may be resolved on either of two grounds, *i.e.*, (1) the due process theory or (2) the literal full faith and credit theory.

The first, or “due process” theory, may be found in the majority opinion, expressed by Mr. Justice Douglas, which points out the fact that since the marital state is a “res”, jurisdiction “in rem” is sufficient to dissolve the marriage bond. However, since the right to support granted a wife as an incident of that bond is a personal right, jurisdiction “in personam” is necessary to dissolve such personal obligation. It follows that since the rendering state was without personal jurisdiction over the person of the absent wife, this portion of the out of state judgment was a nullity, being without due process. It has long been recognized that the requirements of procedural due process prohibit the granting of a personal judgment when the court is without jurisdiction “in personam”. *Pennoyer v. Neff*, 95 U. S. 714 (1877). Since the Full Faith and Credit Clause has never required recognition of void judgments, the court would simply refrain from giving full faith to this portion of the judgment. The anomalous result of this theory is to give *Full Faith* to only one-half of the judgment. On the other hand, an examination of the dissenting opinion of Mr. Justice Frankfurter brings to light an alternate theory behind the decision more consonant with the Full Faith and Credit Clause. Rejecting the “due process” theory he agrees that if New York had stated that New York *ex parte* divorces were not sufficient to vitiate prior New York separation decrees, the Full Faith and Credit Clause would have been literally complied with, but maintains that the Court is mistaken in the belief that such policy had been stated. Hence it is his belief that the Court literally applied the Full Faith and Credit Clause, without proper basis.

Consider then the instant case in the light of both theories. Certainly since both parties appeared before the rendering court the “due process” objection is foreclosed. But one further consideration is necessary before leaving this theory. If the Nevada court had granted alimony, the question would have been res judicata as between the parties. But will the result be the same where the rendering court ignored alimony provisions? The split of authority on this point shows six states, including New York, applying res judicata even though alimony was not specifically raised, while Ohio dissents. *Cf.* 1 ALR 2d 1437 and 2 Freeman on *Judgments* §§ 674-675 (5th ed. 1925). It might
be noted that the New York courts have held an *ex parte* out of state divorce obtained by a wife to be sufficient to deprive her of her rights under a prior New York separation decree. *Gibson v. Gibson*, 81 Misc. 508, 143 N. Y. Supp. 37 (Sup. Ct. 1913). This may be regarded as consistent with the instant case under an estoppel or waiver theory but it would seem that the "due process theory" of the *Estin* case, *supra*, would lead to a different result, for how may personal rights be determined when the court has no personal jurisdiction over the husband?

Under theory II of the *Estin* case the result would depend upon the policy of the state which had granted the separation decree; *i.e.*, if an absolute divorce with no mention of alimony, obtained in that state, would destroy a prior separation decree then so will a similar foreign divorce decree under the compulsion of the Full Faith and Credit Clause.

The Constitutional guaranty of full faith and credit has been subjected to a somewhat elastic application in the field of domestic relations in the past few years. See *Williams v. North Carolina*, 317 U. S. 287 (1942); 325 U. S. 226 (1945). There are indications that perhaps the deep public interest of a state in its domiciliaries may cause further inroads in the future. As early as 1933 Mr. Justice Stone in a dissenting opinion expressed the view that where the domestic concern of a state in a marriage relation is involved, the Full Faith and Credit Clause should give way to the public policy of the state. See *Yarborough v. Yarborough*, 290 U. S. 202, 213 (1933). In concurring opinion which foreshadowed the *Estin* case, Mr. Justice Douglas pointed out the "deep concern" of a state in its domiciliaries and the fact that, "The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States." *Esenwein v. Commonwealth*, 325 U. S. 279, 282 (1944). Finally, Mr. Justice Frankfurter's concurring opinion in *People of State of New York v. Halvey*, 330 U. S. 610 (1947), contains the thought that the scope of the Full Faith and Credit Clause is bounded by its underlying policy rather than by procedural considerations unrelated to it. Thus in judgments affecting domestic relations technical questions of "finality" as to alimony and custody are irrelevant in deciding the respect to be accorded by a state to a valid prior judgment touching custody and alimony rendered by another state.

So, while the courts do not presently deem the public interest of a state in the marital relations of its domiciliaries to be sufficient reason to except state divorce decrees from the usual application of the Full Faith and Credit Clause, there is some indication that such an exception may be countenanced in the future.

WILLIAM J. MCDONALD, JR.
DOMESTIC RELATIONS—Divorce Decree Granted Against Husband
After His Appearance and Contest on the Merits, Which is not
Subject to Impeachment by a Stranger in Rendering State, is not
Subject to Impeachment by a Stranger in Any Other State.

Respondent was the daughter of decedent by his first wife. After the death of
wife number one, decedent remarried. Subsequently, the second wife ob-
tained a Florida divorce without having fulfilled the jurisdictional residence re-
quirement of ninety days. In that proceeding, decedent entered an appearance
by his attorneys and contested the allegations of misconduct. However, he did
not specifically dispute the allegation of jurisdiction. After the granting of the
decree, decedent married petitioner, wife number three. By his will, decedent
made respondent, his daughter, his sole legatee. After probate, petitioner filed
notice of her election to take the statutory one-third share of the estate as pro-
vided for by New York law. Respondent contested the election on the ground
that the divorce obtained by wife number two was invalid and hence the mar-
rriage with wife number three was void, and she had no standing as regards
decedent's estate. The New York Surrogate's Court, holding that the divorce
decree was valid and final in the state of Florida and thus not open to col-
lateral attack in the courts of New York, decreed that petitioner's notice of
election was valid. On appeal this decree was affirmed by the Appellate Divi-
sion of the New York Supreme Court. The New York Court of Appeals, hold-
ing that the jurisdictional requirement had not been complied with and that
the decree was open to collateral attack, reversed and remanded. The Supreme
Court granted certiorari. Held, a divorce decree on the merits, which is not
open to collateral attack by a stranger in the rendering state, is not open to

The decision rendered in the instant case is a logical development from the
recent holdings of the Supreme Court as to the extra-territorial effect of divorce
decrees. Essentially two situations are presented, the first being where both
spouses are parties to the proceeding and the second where only one of the re-
spective spouses is a party. The latter situation was dealt with by the Court
in the disposition of the two Williams cases. Williams v. North Carolina, 317
the Court set forth the basic rule that domicile of the party-plaintiff to the
suit creates sufficient jurisdiction for the operation of a state's power in the
field of divorce. When this requirement has been complied with the Full
Faith and Credit Clause of the Federal Constitution operates on the decree
with only one limitation, namely that the existence of domicile may be deter-
mined in an independent proceeding by the state in which recognition of the
decree is sought. In the first mentioned situation, i.e., where both spouses are
parties by valid service or entry of appearance, there is an opportunity to
contest the question of jurisdiction, and the doctrine of res judicata applies
to both parties whether or not the opportunity to contest the jurisdiction
is exercised. *Coe v. Coe*, 334 U. S. 378 (1948); *Sherrer v. Sherrer*, 334 U. S. 343 (1948); *Davis v. Davis*, 305 U. S. 32 (1938). The parties are precluded from contesting the efficacy of the decree not only in the rendering state, but also in any other state. *Coe v. Coe*, *supra*; *Sherrer v. Sherrer*, *supra*; *Davis v. Davis*, *supra*.

In the present case it is evident, arguably, that initially the rendering state did not have the requisite jurisdiction, due to the failure of wife number two to meet the ninety-day residence requirement. However, the decedent by making an appearance and contesting on the merits brought himself within the above-mentioned doctrine of res judicata. Thus the question was presented whether the fact that the parent-decedent was precluded from attacking the decree extended to bar his child by a previous marriage from making such an attack. In answering this query, the Court based its decision on the fact that according to recent Florida decisions, a stranger to the proceedings cannot impeach a divorce decree except where it affects rights acquired prior to its rendition, and cited *Gaylord v. Gaylord*, 45 So. 2d 507 (Fla. 1950) and *De Marigny v. De Marigny*, 43 So. 2d 442 (Fla. 1949) to that effect. The theory that the daughter might be in privity with her father's estate was mentioned, and if such status existed the result was stated:

If the laws of Florida should be that a surviving child is in privity with its parent as to the parent's estate, surely the Florida doctrine of res judicata would apply to the child's collateral attack as it would to the father's.

*Johnson v. Muelberger*, *supra* at 478. Attack on the basis of privity thus presents no problem in the instant case due to the appearance and contest by the decedent which provides the basis for the application of res judicata.

But what of the other situation previously mentioned, namely, where there has been domicile of one party only and the other party makes no appearance and contests nothing? By the decided cases that party is not precluded from impeaching the decree on the grounds of lack of domicile. *Rice v. Rice*, 336 U. S. 674 (1949). Thus there would seem to be no basis for the application of the doctrine of res judicata to bar the attack of one in privity with the non-appearing party.

The decision in the instant case, while barring impeachment by a stranger to the proceedings, where the parties have had an opportunity to contest jurisdiction, seems to leave the door open for such an attack by one who is in privity with one of the parties, if said party is not bound by res judicata.

JOSEPH B. CAIN
INTERNATIONAL LAW—Refusal by the Executive to Recognize the De Facto Government of a Foreign Country Precludes the Courts from Recognizing the Decrees of That Government.

Plaintiff brought this action under Section 9 (a) of the Trading with the Enemy Act, as amended, to recover the proceeds of insurance and earnings of three vessels, sunk by enemy action in 1942, from the Attorney General, successor to the Alien Property Custodian, under whose vesting orders the funds had been acquired. Plaintiff is a public corporation organized under the laws of the U. S. R., whose purported title to the funds was derived through decrees of the Latvian Soviet Socialist Republic, successor to the Republic of Latvia by virtue of the occupation of Latvia in 1940 by the armies of the U. S. R. The executive branch of the United States Government has consistently refused to recognize the incorporation of Latvia into the Soviet Union and the nationalization decrees of the Latvian Soviet Socialist Republic and still recognizes the Government of the Republic of Latvia. The district court granted the defendant's motion for summary judgment upon presentation of the above facts and the defendant appealed. Held, a positive policy of non-recognition of a foreign government and of its decrees prevents the courts from giving effect to such decrees. Latvian State Cargo and Passenger Steamship Line v. McGrath, 19 U. S. L. Week 2389 (D. C. Cir. Feb. 23, 1951).


Mere failure to recognize the de jure existence of a foreign government does not make it mandatory that the courts ignore the effects of the acts and decrees of that government. M. Salimoff & Co. v. Standard Oil Co., 262 N. Y. 220, 186 N. E. 679 (1933). And particularly is this so when the rights of American nationals depend upon recognition of the effects of such decrees. Fred S. James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 146 N. E. 369 (1925). See Banque de France v. Equitable Trust Co., 33 F. 2d 202, 206 (S. D. N. Y. 1929), where it was said,

Justice requires that effect should be given by our courts, even though we do not recognize the Russian Government, to those acts in Russia upon which the rights of our citizens depend, provided that in so doing our judicial department does not encroach upon or interfere with the political branch of our government.

Some of the courts have indicated an even stronger spirit of independence.
Cf. *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149, 158, 147 N. E. 703, 705 (1925), in which it was said,

The State Department determines whether it will recognize its [a new foreign government's] existence as lawful, and until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question.

But in none of these cases was the policy so positive and firm against recognition either of the foreign government or of its decrees as in the instant case. See Connick, *The Effect of Soviet Decrees in American Courts*, 34 Yale L. J. 499 (1925). The decision in the instant case is squarely in line with the decision in *The Maret*, 145 F. 2d 431 (3d Cir. 1944), in which it was stated at p. 438,

The Secretary of State of the United States has certified that . . . "the legality of the so-called 'nationalization' laws and decrees, or of any of the acts of the regime now functioning in Estonia, is not recognized by the Government of the United States."

Where a positive policy of non-recognition, rather than a mere failure to recognize, is demonstrated, the courts may not recognize the validity of the acts and decrees of the unrecognized foreign government. *The Maret*, supra. The decision in *The Denny*, 127 F. 2d 404 (3d Cir. 1942), is apparently to the contrary though decided by the same court as *The Maret*, and only two years earlier, but the *Denny* case involved the rights of a corporation of a foreign state dissolved as a result of nationalization decrees of the unrecognized government of that state, while the *Maret* case involved the rights of natural persons. The *Denny* case was distinguished in the opinion in the *Maret* case, but it is believed that the weight of the authority of the holding of the *Denny* case is negligible in view of the later decision in the *Maret* case.


Though the legal writings criticize the approach taken in *The Maret*, 93 U. Pa. L. Rev. 323 (1945), 58 Harv. L. Rev. 612 (1945), and followed in
the instant case, the distinguishing factor of the Executive's positive policy against recognition either of the government or decrees of the foreign state is believed to justify the approach.

EDWARD F. MCKIE, JR.

MONOPOLY—DOMINANT NEWSPAPER'S ATTEMPT TO FORECLOSE COMPETITION BY DESTROYING ADVERTISING REVENUE OF LOCAL RADIO STATION IS AN ATTEMPT TO MONOPOLIZE WITHIN THE MEANING OF SECTION 2 OF THE SHERMAN ACT.

Proceedings in equity were instituted by the Government under Section 4 of the Sherman Act, to enjoin the Lorain Journal Company and its officers from conspiring to restrain trade and from attempting to create a monopoly in violation of Sections 1 and 2 of the Sherman Act. The Company and each of its principal officers were named as defendants.

The Lorain Journal was the only newspaper of general daily circulation published in Lorain, Ohio. It reached 99 per cent of the families of that city. The only competing daily newspaper had been acquired by purchase in 1932 by the Journal Company, Samuel A. Horvitz (its vice-president), and another corporation, not named as defendant. The sole remaining competition in the dissemination of news and advertising was provided by the facilities of the Elyria-Lorain Broadcasting Company, stations WEOL and WEOL-FM. Since the establishment of these stations it had been the policy of the Journal Company not to accept advertising from those local merchants who advertised, or who were believed about to advertise over these broadcasting stations. Many of these advertisers desired to use both media to promote the sale of their goods, but for some of them it was necessary to advertise in the Journal. Substantially all of the income of the Broadcasting Company was derived from the broadcasting of paid advertisements.

The defendants contended that a corporation and its officers acting in its behalf cannot alone form an unlawful conspiracy or combination within the meaning of Section 1 of the Sherman Act, and that even if such a conspiracy can thus be formed, it is not unlawful where the restraint is to be exercised through the medium of a "single trader"; that a "single trader" has the right to deal or refuse to deal with whomsoever it pleases so long as it does not combine with others to achieve its ends. Held, that this right of a "single trader" exists only in the absence of any purpose to create or maintain a monopoly, and the defendants are guilty of an attempt to monopolize trade and commerce within the meaning of Section 2 of the Sherman Act. United States v. Lorain Journal Co., 92 F. Supp. 794 (N. D. Ohio 1950).

This case marks another application of the Sherman Act to small local business transactions which affect interstate commerce to a relatively small degree. The importance of the interstate commerce affected in relation to the
entire amount of that type of commerce in the United States is irrelevant, and the Sherman Act is designed to sweep away all appreciable obstructions in channels of interstate trade. United States v. Yellow Cab Co., 332 U. S. 218 (1947); Montague and Company v. Lowry, 193 U. S. 38 (1904). The fact that a monopoly functions in a single city, or in a particular part of a city and affects only a part of the industry involved does not prevent it from being an illegal monopoly. William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (3rd Cir. 1945). See Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 256 (1946).

Although the monopoly which the defendants attempted to create was strictly a local one, aimed primarily at intrastate commerce in the product of the defendants' publishing business, it is not outside of the scope of the Sherman Act. Mandeville Island Farms, Inc. v. American Crystal Sugar Company, 334 U. S. 219 (1948); Stevens Co. v. Foster and Kleiser, 311 U. S. 255 (1940). See Montrose Lumber Company v. United States, 124 F. 2d 573, 578 (10th Cir. 1941). The dissemination of news and the dissemination of advertising involve interstate commerce. Associated Press v. United States, 326 U. S. 1 (1945); Stevens Co. v. Foster and Kleiser, supra. See Associated Press v. National Labor Relations Board, 301 U. S. 103, 128 (1937); Ramsay v. Bill Posters Association, 260 U. S. 501, 511 (1923). The attempted monopoly also affected to a great degree the business of the broadcasting station against which the secondary boycott was enforced. It is settled law that interstate broadcasting is interstate commerce. National Broadcasting Co., Inc. v. United States, 319 U. S. 190 (1943); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936).

It is interesting to note that although the court found and adjudged the defendants guilty of a violation of Section 2 of the Sherman Act by attempting to create and maintain a monopoly in trade and commerce, yet no finding was made as to the existence of a conspiracy to restrain trade in violation of Section 1 of the Act. The existence of such a conspiracy was vigorously advanced by the Government in its brief. The point was contested on the ability or inability of a corporation to combine with its officers to form a conspiracy or combination within the meaning of Section 1 of the Act. Such a combination or conspiracy is necessary for a violation of this section, since it is a combination in restraint of trade which is there declared to be illegal.

It is well settled that membership in a conspiracy to commit an ordinary crime can consist merely of a corporation and its officers acting for it. E.g., Mininsohn v. United States, 101 F. 2d 477 (3rd Cir. 1939); Egan v. United States, 137 F. 2d 369 (8th Cir. 1943), cert. denied 320 U. S. 788. Such conspiracies have also been established under state anti-trust laws. E.g., Standard Oil Company v. State, 117 Tenn. 618, 100 S. W. 705 (1907); State v. Standard Oil Company, 120 Tenn. 86, 110 S. W. 565 (1908), affirmed sub nom. Standard Oil Company v. State, 217 U. S. 413 (1910).

The defendant contended that the conspiracy rendered illegal by Section 1 of
the Sherman Act is something different from conspiracies to commit a crime, since it is the conspiracy or combination itself which is forbidden, and not the restraints, which is the object of the conspiracy. If this be so, then the cases holding that a corporation and its officers can compose a conspiracy to commit a crime are not in point, and the state court cases are not controlling. This question has never been analyzed under the Sherman Act by any federal court, and the court in the instant case failed to determine it, resting its judgment on the defendants' violation of Section 2 of the Act. Several federal courts have upheld, but without analysis, Sherman Act suits directed against a conspiracy solely by a corporation and its officers. *Whitebear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600 (8th Cir. 1942); *United States v. Keystone Watch Case Company*, 218 Fed. 502 (E. D. Pa. 1915). See *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1944) in which the Supreme Court stated (page 723): "... Soft Lite and its officers conspired and combined *among themselves* and with at least some of the wholesalers to restrain commerce. ..." (Emphasis supplied.) Also see *Patterson v. United States*, 222 Fed. 599, 618 (6th Cir. 1915), cert. denied 238 U. S. 635, wherein it was stated that Section 1 of the Sherman Act includes conspiracies between the officers and agents of a company directed against a competitor.

The reported case is representative of the active prosecution by the Government of impediments to the free flow of interstate commerce even when they affect only a relatively small segment of a business and within only a restricted area. Nothing new is decided by it, but it is important in that it points out, by omission, the important question yet to be authoritatively decided by the federal courts: Can a single corporation and its officers acting in its behalf constitute a conspiracy in restraint of trade within the meaning of Section 1 of the Sherman Act?

JOSEPH S. BRENNAN

PARENT AND CHILD—ACTION BY CHILD AGAINST PARENT'S ESTATE ALLOWED FOR PERSONAL INJURIES INFlicted BY PARENT.

This is an action against deceased defendant's estate for personal injuries, brought by deceased's illegitimate daughter. Injury is alleged to have resulted from the child's witnessing her mother's murder, being cloistered with the dead body for about a week and finally, the decedent's suicide in her presence. The trial court sustained defendant's demurrer to the declaration. *Held*, that an infant may sue its parent for a personal tort when the tort committed is such as to manifest a complete abandonment of the parental relation. *Mahnke v. Moore*, 77 A. 2d 923 (Md. Jan. 12, 1951).

In considering this case, the court observed that there was a possible distinction between the suit of a legitimate infant and that of an illegitimate child, but treated the father as if he were the legitimate parent. The view of
the court seems to be that where the act complained of was wanton or malicious, there was no family relationship, and consequently the distinction need not be made.

Curiously enough, prior to 1891, this question had never been before a court of either England or the United States. In that year the Supreme Court of Mississippi held that a parent is not civilly liable to his unemancipated minor child for a tort committed to the person of the child under any circumstances. *Howlett v. George*, 68 Miss. 703, 9 So. 885 (1891). This is the so-called "Mississippi Rule" which is predicated on public policy and has been followed in practically all the states, no distinction being made as to the substance of the tort. *E.g.*, *Smith v. Smith*, 81 Ind. App. 566, 142 N. E. 128 (1924), malicious injury; *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 (1925), negligent injury; *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903), cruel treatment; *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905), rape; *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927), negligent injury.

The principle has been applied in reverse to prevent a recovery by a parent against the unemancipated child for negligent injury. *Shaker v. Shaker*, 129 Conn. 518, 29 A. 2d 765 (1942); *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Cafaro v. Cafaro*, 118 N. J. L. 123, 191 Atl. 472 (1937). On the other hand, a fully emancipated minor may sue his parent for a tort to his person. *Taubert v. Taubert*, 103 Minn. 237, 114 N. W. 763 (1908). But, an emancipated child may not sue for an intentional tort inflicted prior to his emancipation. *Smith v. Smith*, *supra*. Nor can the action be sustained against a deceased parent's estate. *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33 (1940). In *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901); *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903); and *Steber v. Norris*, 118 Wis. 366, 206 N. W. 173 (1925), it was held that where the defendant stands merely in loco parentis, he is liable for any tort to the child which can not be justified as reasonable punishment, reasonableness being a jury question.

Until the present case, there have been no contrary rulings; and in all, there were but three dissents. *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923), Clark C. J. dissenting; *Sorrentino v. Sorrentino*, 228 N. Y. 626, 162 N. E. 551 (1928), Cardozo, C. J., Crane, J. and Andrews, J. dissenting; *Wick v. Wick*, *supra*, Crownhart, J. dissenting. However, eminent writers have taken the position of this court and urged a relaxation of the rule. McCurdy, *Torts Between Persons In Domestic Relations*, 43 Harv. L. Rev. 1030 (1930).

There is a split of authority in automobile negligence cases where, due to negligent driving by an insured parent, the child has been injured. A majority of the courts hold that in determining the public policy applicable to suits by a child against its parent, the fact of insurance is not to be considered and that therefore, the parent's immunity to suit remains undisturbed. *Owens v. Auto Mut. Indemnity Co.*, 235 Ala. 9, 177 So. 133 (1937); *Mesite v. Kirche-stein*, 109 Conn. 77, 145 Atl. 753 (1929). Several cases have announced a con-
trary rule. Thus, in *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930), the leading case on this point, and two later cases, the courts have held that the "Mississippi Rule" is inapplicable where the ultimate liability has been transferred to a third party.

Clearly, the present decision is against the overwhelming weight of authority. No insurance company was involved so as to apply the rule in the *Dunlap* case, *supra*, nor was there a statute authorizing such an action as there was in *Minkin v. Minkin*, 336 Pa. 49, 7 A. 2d 461 (1939), where an infant recovered from its mother for her negligence in causing the death of the father under the Pennsylvania wrongful death statute. In the instant case, the court conceded that parental authority should be maintained and that "the child should forego any recovery of damages if such recovery would unduly impair discipline and destroy the harmony of the family" as in the case of a failure to perform a parental duty, or for excessive punishment not maliciously inflicted. The court further said (p. 926):

... But when ... the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied. . . .

In order to evaluate this decision, the reasons underlying the general rule should be examined to see if they warrant a dogmatic adherence resulting, on occasion, in manifest injustice. Courts adhering to the general rule give one or more of the following reasons, holding that the question is one of public policy in the last analysis. (1) The courts say either that it was the rule at common law, or, in the alternative, that since the common law is silent on the subject, it was most probably the rule. (2) It is based on the analogy to the common law unity of husband and wife. This seems wholly inapplicable since the relationship of parent and child is fundamentally different. (3) The rule tends to preserve family harmony and sustain parental authority. If it may legitimately be said that the relationship no longer exists, why should the parent still be immune? In this connection, Professor McCurdy ventured the opinion that "... filial respect and subjection would prove a greater deterrent to the bringing of actions than ... civil immunity to abuse of parental discretion." McCurdy, *Torts Between Persons In Domestic Relations, supra* at 1077. (4) The protection given the child by the criminal law is sufficient. This appears ridiculous on its face, as far as redressing the wrong done the child is concerned. Other reasons are advanced, e.g., the open road to collusion in insurance cases and the difficulty of determining the reasonableness of punishment. As to the first, insurance companies adequately protect themselves against fraud by means of extensive investigative facilities; and the difficulty in administering a rule such as that announced in the instant case has not been experienced in the criminal courts.

From this analysis, we conclude that at least in some instances the rule
of immunity might well be relaxed. The death of both parents in this case may have unconsciously influenced the court in its conclusion as to the fact of an abandonment of the parental relation. Perhaps the rule in this case is too broad and should be restricted slightly, or, at least, a more definite test should be worked out as to when the parental relationship has been abandoned. But, when the scope of parental authority of years gone by is compared with that of today; and when the reasons advanced in support of the old rule are analyzed, we cannot say that the court was wrong.

GEORGE B. MICKUM

TORTS—PARTICIPANT IN "SHARE-A-RIDE" PLAN IS NOT A GUEST BUT A PASSENGER FOR HIRE.

The plaintiff and the defendant were employed by the Sante Fe Railway Company out of Emporia, Kansas, and worked together on the same crew. They entered an agreement whereby each agreed to transport the other to and from their common place of work on alternate days. While a passenger in the defendant's automobile, the plaintiff was injured in a collision with another vehicle, caused by the defendant's negligence. The plaintiff brought suit to recover damages for the injuries sustained. In his petition he alleged ordinary negligence, and also, that the motivating purpose of the "share-a-ride" agreement was to save the expenses of each party. The defendant demurred on the grounds that the petition failed to state a cause of action. Held, the passenger was not a "guest" within the meaning of the Kansas guest statute, and consequently, an allegation of gross or wanton negligence was not required. Sparks v. Getz, 225 P. 2d 106 (Kan. 1950).

The Kansas guest statute, Kan. G. N. Stat. G. S. 1935, 8-122 b, relieves an automobile owner from the common law liability to all passengers for injuries resulting from his ordinary negligence, and renders him liable to guests only for gross or wanton negligence. Counterparts may be found in statutes in a majority of the states, Gammon, The Automobile Guest, 17 Tenn. L. Rev. 452 (1942), and in the judge-made law of some others, e.g., Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917). To qualify as a guest within the meaning of these guest statutes, the rider must be a passenger without payment for transportation. Thus, the question narrowed down to whether there was payment in this "share-a-ride" agreement. The court, following its previous decisions, held that to preclude a person from being classified as a guest, the payment need not be in money, but it must constitute a benefit or advantage to the owner or operator, which is a substantial consideration, motivating, and not merely incidental, in character. Srajer v. Schwartzman, 164 Kan. 241, 188 P. 2d 971 (1948); Pilcher v. Erny, 155 Kan. 257, 124 P. 2d 461 (1942); LeClair v. Hubert, 152 Kan. 706, 107 P. 2d 703 (1940); Elliott v. Behrer, 146 Kan. 827, 73 P. 2d 1116 (1937). The defendant by his demurrer, ad-
mitted that the motivating purpose of this agreement was to save the expenses of both parties. Therefore, there was a substantial consideration moving to him, and the plaintiff was not a guest but a passenger for hire.

The decision in this case is similar to those in many other states having guest statutes. They hold that a “share-a-ride” plan, whereby the members alternate in driving each other to and from work, is sufficient payment to preclude the members from being classified as guests within the contemplation of the statutes. Huebotter v. Follett, 27 Cal. 2d 765, 167 P. 2d 193 (1946); Coerver v. Haab, 23 Wash. 2d 481, 161 P. 2d 194 (1945); Ott v. Perrin, 116 Ind. App. 315, 63 N. E. 2d 163 (1945). The rider is a guest if the carriage confers a benefit only upon him and no benefit other than such as is incident to hospitality, good will or the like, is conferred on the driver. Hasbrook v. Wingate, 152 Ohio St. 50, 87 N. E. 2d 87 (1949). These decisions are a strict interpretation of the guest statutes, but since the statutes are in derogation of the common law and of the rights of those injured by the negligent operation of an automobile while being transported therein, the strict interpretation placed upon them by the courts seems justified.

The leading case in which members of a similar “share-a-ride” plan were held to be guests is Everett v. Burg, 301 Mich. 734, 4 N. W. 2d 63 (1942). Six employees had alternated weekly in driving their cars to work. The court held that their “share-a-ride” plan was simply an exchange of amenities between fellow employees and not a passenger for hire relationship. In a later case the same court found the riders in a similar plan to be passengers for hire. After carefully examining the facts and circumstances at the time the agreement was entered into, it found that it was a business arrangement and not for pleasure or social purposes. Bond v. Sharp, 325 Mich. 460, 39 N. W. 2d 37 (1949). The present efficacy of the holding in Everett v. Burg, supra, is doubtful since it is difficult to classify the primary motive of a “share-a-ride” plan between fellow employees as a social rather than a economic benefit, or a business arrangement.

The obvious effect of these decisions, coupled with the fact that the various jurisdictions are in conflict regarding the validity of anticipatory releases, 17 C. J. S., Contracts, Section 262; 45 Am. Jur., Release, Section 17, is to discourage the public from entering such “share-a-ride” agreements as the one in the present case. For not only is the driver without the benefit of the guest statute which relieves him of liability for ordinary negligence, but he is held to be a carrier for hire and subject to the regulations affecting such operators. His private license may not be sufficient when operating as a carrier for hire; his registration may have to be changed; his insurance would ordinarily have to be altered to cover passengers for hire. These expenses, plus any supplemental taxes levied upon carriers for hire, face the car owner who enters such an agreement. If, on the other hand, the courts held the members to be guests, the numerous regulations pertaining to carriers for hire would not apply.
The critical shortages of gasoline, oil and tires during World War II necessitated strict government controls. Many car owners in order to best comply with the regulation, joined "share-a-ride" plans similar to the one in the present case. During the litigation which arose under the guest statutes, the argument was advanced that to hold such riders to be passengers for hire and not guests would discourage the public from entering these plans which were an effective means of meeting the shortages. To this argument one court responded in Miller v. Fairley, 141 Ohio St. 327, 340, 48 N. E. 2d 217, 223 (1943):

... It is just as important to the war effort to provide security for the worker who is injured, or to his dependents in case of his death, from the negligent acts of the motorist transporting him to and from his place of employment, as it is to conserve the tires of the vehicle in which he is transported.

With the recent cutback in rubber for civilian use, it is reasonable to expect an increase in the number of "share-a-ride" plans as an effective means of conserving tires. But there is no reason to expect the courts to reason differently today than did the court in Miller v. Fairley, supra.

The decision in the present case follows the definite trend of the courts of other jurisdictions having similar statutes. The statutes, since they deprive a guest of his common law right to recover for injuries caused by the driver's ordinary negligence, should be strictly interpreted, and if the car owner desires the benefits of the guest statute, he must comply with its requirements by furnishing transportation without payment. Perhaps the situation will become so critical that complete cooperation by the public in "share-a-ride" plans will be essential. To circumvent the well founded reluctance of individual car owners to accept the increased liability in case of accidents while driving in such plans, the law of this case would have to be altered.

DONALD J. BRENNAN

TORTS—RES IPSA LOQUITUR INAPPLICABLE WHEN PLAINTIFF INJURED BY REVOLVING DOOR WHICH SHE WAS OPERATING, BECAUSE DEFENDANT DID NOT HAVE EXCLUSIVE CONTROL THEREOF AT TIME OF INJURY.

Plaintiff bank customer was injured by the collapse of the wings of a revolving door which she was operating in attempting to depart from the bank building. Plaintiff attempted to invoke the doctrine of res ipsa loquitur in order to recover damages from the bank. Held, the res ipsa loquitur doctrine is inapplicable since at the time of the injury the bank had no control over the door. Terrell v. First Nat. Bank & Trust Co., 226 P. 2d 431 (Oklahoma 1950).

One essential ingredient of the doctrine of res ipsa loquitur is that the instrumentality causing the accident be under the exclusive control of the defendant. See 9 Wigmore, Evidence § 2509 (3d ed., 1940). But what constitutes this control? The court in the instant case adhered to a line of authority
which construes the word control in its most narrow sense, *i.e.*, actual physical control. So when a plaintiff has any control, however slight and instantaneous, over the instrumentality at the time of the accident, he is precluded from invoking the doctrine of res ipsa loquitur.

There is another line of authority which gives the word "control" a more liberal construction. In the words of the court in *Taylor v. Reading Co.*, 83 F. Supp. 804, 806 (E. D. Pa. 1949):

... exclusive physical control is not a sine qua non for the application of the doctrine; legal control, responsibility for the proper and efficient functioning of the device which caused the injury, and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury are sufficient.

In the *Taylor* case the court held that plaintiff was not precluded from relying on the doctrine of res ipsa loquitur simply because her decedent was the sole operator of a giant crane which toppled over. In *Metz v. Southern Pac. Co.*, 51 Cal. App. 2d 260, 268, 124 P. 2d 670, 674 (1942), the court held that the exclusive control requirement,

... does not mean, nor is it limited to, actual physical control. It has been held to apply to the mere right of control of the instrument which causes the injury at the time of the accident.

In the *Metz* case plaintiff was not barred from invoking res ipsa loquitur merely because her decedent was personally operating a small gas-engine car when it jumped the rails.

As a result of these two diverse theories the meaning of the word "control" has become confusion compounded. Courts which follow one theory, when confronted with cases following the other theory, are faced with the hopeless task of distinguishing indistinguishable facts or else must candidly admit that they do not adhere to the theory propounded in the cases cited by counsel. Thus, cases with similar fact patterns reach opposite results depending upon which theory the court follows.

Courts adhering to the liberal theory that control means no more than the right to control and the opportunity to exercise it have reached the following results. The operator of a cafeteria was held to have the requisite exclusive control and management of a glass decanter in which it served hot tea so as to render res ipsa loquitur applicable in the patron's action for burns sustained when the decanter broke spilling hot tea onto her lap, despite the fact that plaintiff had momentary physical possession of the decanter when it broke. *Johnson v. Stevens Building Catering Co.*, 323 Ill. App. 212, 55 N. E. 2d 550 (1944). Owner of the premises was held to have sufficient control over a semi-automatic elevator to enable a laundry delivery man to invoke res ipsa loquitur in a suit for injuries sustained from falling into the shaft when the elevator suddenly moved upwards after plaintiff had opened its door placing himself in physical charge of the elevator. *Class v. Y. W. C. A.*, 47 Ohio
App. 128, 191 N. E. 102 (1934). The lessor of a building was held to have remained in exclusive control of a fire escape, as evidenced by his keeping it in repair, enabling lessee's telephone operator to rely upon res ipsa loquitur in an action for injuries received when fire compelled her to mount and physically occupy the fire escape whose horizontal stairway, designed to descend slowly to the ground, dropped violently, throwing plaintiff off. Killian v. Logan, 115 Conn. 437, 162 Atl. 30 (1932).

On the other hand courts adhering to the strict theory that the control essential to the doctrine of res ipsa loquitur means actual physical control in defendant have reached the following results. Res ipsa loquitur was held inapplicable in an action against a carrier for a passenger's cuts from broken glass received from the sudden and unexplained fall of an open window, on the ground that defendant was not in exclusive control, since the window was subject to physical control of the person injured to close it or not as he preferred. Briganti v. Connecticut Co., 119 Conn. 316, 175 Atl. 679 (1934). Res ipsa loquitur was held inapplicable in a suit against a store for customer's injuries sustained when a chair in which she sat down collapsed, because defendant was not in exclusive control since plaintiff exercised physical control over the chair from the moment she moved it six inches in order to be seated. Kilgore v. Shepard Co., 52 R. I. 151, 158 Atl. 720 (1932).

The liberal construction theory offers the best solution to the problem of what constitutes the control necessary to allow res ipsa loquitur to be invoked. Those cases which construe the word "control" in a narrow literal sense as was done in the instant case have destroyed a more or less flexible term in order to reduce the exclusive control requirement of res ipsa loquitur to an absolute rule of thumb. The logical result of such a construction will tend to restrict the res ipsa loquitur doctrine to falling objects. This would confine it to the fact pattern in which it was born in Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863). The liberal construction theory will allow res ipsa loquitur to fulfill the office for which it was designed. It will enable the injured plaintiff to take his case to the jury when the factual causes of the injury are peculiarly within the knowledge of defendant or more readily accessible to him.

ROBERT E. CONN
TRADE REGULATION—THE PENNSYLVANIA FAIR TRADE ACT IS NOT APPLICABLE TO SALES BY PENNSYLVANIA RETAILERS TO CONSUMERS IN OTHER STATES.

Sunbeam Corporation, the owner of the trade-mark “Shavemaster”, advertised and distributed a shaver under that trade-mark and entered into fair trade contracts with retailers in Pennsylvania under the provisions of the Pennsylvania Fair Trade Act. S. A. Wentling, a retailer who conducts a mail order business, with knowledge of these outstanding fair trade contracts in Pennsylvania and the price lists in connection therewith, advertised in publications of national circulation and sold six Shavemasters for $17.25 each when the listed fair trade price was $23.50. Sunbeam Corporation brought action against Wentling for injunctive relief and damages. The United States District Court for the Middle District of Pennsylvania rendered a decree for the plaintiff with respect to sales by defendant in intrastate and interstate commerce, and the defendant appealed. Held, the Pennsylvania Fair Trade Act is not applicable to sales by Pennsylvania retailers to consumers in other states, or to advertisements in publications published in other states. **Sunbeam Corp. v. Wentling, 185 F. 2d 903 (3d Cir. 1950).**

This decision from the Third Circuit is the first holding that a state fair trade act does not apply to sales by retailers in interstate commerce. Previously there had been dicta to this effect in several cases interpreting fair trade acts. **Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 586, 191 Atl. 873 (1937); Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 467, 55 P. 2d 177, 187 (1936).** See also the well reasoned speculation in 2 CCH (1948) Trade Reg. Serv. ¶ 7308. The Supreme Court of the United States has held that the Illinois and California Fair Trade Acts, which are substantially like those enacted in forty-three other states, including Pennsylvania, do not violate the due process and equal protection clauses of the Fourteenth Amendment. **Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183 (1936); Pep Boys v. Pyroil Sales Co., Inc., 299 U. S. 198 (1936).** In the **Old Dearborn** case the Court also held that state fair trade acts are not price fixing statutes but merely permissive legislation whereby a manufacturer of a commodity bearing a trade-mark may fix the minimum resale price by contract.

The Pennsylvania Fair Trade Act, as do the other forty-four state acts, provides in effect that: (1) resale price maintenance contracts are legal, and (2) all persons, including non-contracting dealers, are prohibited from selling below the price stipulated in the contract. Purdon’s Pa. Stat. Ann. 1939, Tit. 73, §§ 7 and 8. In the instant case, the issue whether a resident non-contracting retailer selling to consumers outside the state is subject to the Pennsylvania Fair Trade Act was resolved solely by an interpretation of the state statute. The court based its decision on the “grave constitutional difficulties involved in any broader interpretation” of the Pennsylvania Act, and arrived at this base by using a hypothetical illustration of non-uniform retail
prices in different states. Absent permissive federal legislation it would be
ture that any broader interpretation would involve the multiple complexi-
ties found in any non-uniform state legislation affecting any aspect of inter-
state commerce, but in fact Congress has spoken by enactment of the Miller-
Tydings Act. If this federal legislation does not cover interstate resales by a
retailer of a state having a fair trade act, the court's decision is unquestionably
unassailable, for in case of doubt the construction of any statute is intended
to be confined in its operation and effect to the territorial limits over which
the lawmaker has general and legitimate power. American Banana Co. v. United
Fruit Co., 213 U. S. 347 (1909); California Adjustment Co. v. Atchison, To-
peka & Santa Fe Ry. Co., 179 Cal. 140, 175 Pac. 682 (1918). While it would
seem that the federal legislation should have been exhaustively considered, the
court did little more than conclude that it should be wary of interpreting the
Miller-Tydings Act as anything more of an authorization to the states than
the words require.

The Miller-Tydings Act, 26 Stat. 209 (1937), 15 U. S. C. § 1 (1946), re-
moved the prohibition of the Sherman Act from

... contracts or agreements prescribing minimum prices for the resale of a
commodity ... when contracts or agreements of that description are lawful as
applied to intrastate transactions under any statute ... now or hereafter in
effect in any state ... in which such resale is to be made, or to which the com-
modity is to be transported for such resale. ...

While the Miller-Tydings Act does not specifically provide that non-contract-
ing dealers are to be bound by resale price agreements, it has been held that
this amendment to the Sherman Act was enacted with full knowledge of the
non-contracting dealer provisions in the state fair trade acts and thus Congress
intended to include them within its scope. Schwegmann Bros. v. Calvert Dis-
tillers Corp., 184 F. 2d 11 (5th Cir. 1950), certiorari granted, 340 U. S. 908

It is an economic reality that Sunbeam and most other manufacturers of
nationally marketed trade-marked articles have contracts in all states having
fair trade acts and that prices are uniform throughout the forty-five fair trade
states. If, under the Third Circuit's ruling, the non-contracting retailer is
not bound by the fair trade act, and contracts pursuant thereto, of the state of
his residence, would he be bound under the fair trade act, and contracts pur-
suant thereto, of the state of residence of the consumer to whom he sold the
fair-trade commodity? If the courts of the consumer's state should hold as did
873 (1937), that their fair trade act is a mere direction to a resident merchant
that he must not resell trade-marked or branded articles at less than the price
fixed by the producer or owner of such marked commodities, the non-contract-
ing retailer would not be liable in either state. Thus, in effect, the non-signing
price cutter would be free to pursue policies clearly contrary to federal and
state legislative intent by the simple expedient of establishing an office and selling across the state line, even though both states had a fair trade act.

It is suggested that the non-contracting as well as the contracting retailer is liable in the instant situation since the Miller-Tydings Act inferentially subjected interstate resales by a retailer to the provisions of the resale price agreement if such agreement is permitted by the law of the state of residence of the retailer. If not, conceivably the decision could lead, to a limited extent, to the very price cutting which the federal and state governments have evidenced by permissive legislation to be against public policy with respect to trade-marked commodities.

WILLIAM C. KELLER

*Ed. Note: This case has been reversed. Schwegmann Bros. v. Calvert Distillers Corp., 71 Sup. Ct. 745, decided May 21, 1951 held that the non-signer provisions of the state fair trade acts are not exempted from the operation of the Sherman Act by the Miller-Tydings Act. In the light of this decision the same result would be reached in the instant case but for a different reason.
BOOK REVIEWS


The preparation of this casebook, the second within a short period dealing with estate and gift taxes, and its publication, which naturally implies the publisher's expectation of widespread use, are indications that the neglect by law schools of this subject may be coming to an end. In most schools any course in taxation is an elective, notwithstanding the increasing impact of taxes on routine, everyday transactions, and where such a course is offered the time allotted to it is all too often inadequate. Estate and gift taxation, being but one phase of a larger subject, usually receives even more cavalier treatment. Where only one course is offered it is natural and appropriate that the income tax should be stressed because of its broad base and its position as the backbone of our federal revenue system. But where more time is, or can be made, available a course in estate and gift taxation is highly desirable. Without it, the school which would not think of graduating a man without courses in wills and trusts, is neglecting to equip him with the knowledge necessary today for intelligent and effective drafting of wills and trusts and for handling the administration of estates.

Professor Bittker's book contains some 491 pages of cases, notes, provisions of statutes and regulations, and excerpts from books, periodicals and legislative committee reports. His introduction furnishes valuable material for student reading, or as a basis for lectures, which should serve to orient the student as to the purposes and revenue potential of estate and gift taxes and to stimulate his interest in their social and economic aspects.

Part One is devoted to the gift tax and is quite brief. It is intended only as a background for the more extensive treatment of the estate tax which follows. Part Two covers the estate tax and does it very thoroughly. As is appropriate, the great bulk of Part Two is devoted to the questions involved in determining the gross estate-property owned at death, marital rights, jointly held property, community property, transfers in contemplation of death, revocable transfers, transfers contingent on the transferor's death, property subject to powers of appointment, life insurance, and valuation. The complexity of some of these topics is such that within the limits of the time usually available they

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will have to be given the "broad-brush" treatment, but that is true of some phases of all law school subjects. The space (forty-five pages) allotted to contemplation of death is perhaps unwarranted in the light of the changes made by the Revenue Act of 1950, but those changes may have come too late for this book. It is believed that most critics will agree that the space allotted to revocable transfers (fifty-two pages) and to transfers contingent on the transferor's death (sixty-eight pages) is well warranted. Both are important and difficult topics, and the one last mentioned would prove insoluble without a full understanding of the Hallock,1 Church2 and Spiegel3 cases. More space could have been devoted to powers of appointment, but that is a matter of emphasis and judgment, especially in the light of the agitation for a thorough-going revision of the statutory provision. The inclusion of a chapter on valuation is to be applauded.

The balance of Part Two is devoted to chapters on the net estate, the computation of the tax, estate and gift tax procedure, and estate tax apportionment. It is realized that there is little or no case law on the subject of the marital deduction, but it is perhaps the most important deduction permitted and represents a revolutionary change in the estate tax law; more space could well have been devoted to its explanation. The chapter on computation is much too brief, but that is probably due to the fact that a pamphlet of specimen estate and gift tax returns, with explanation, is furnished with the book. The chapters on procedure and apportionment are good and represent a recognition of the fact that in teaching taxation it is necessary to do more than expound legal principles.

Part Three relates to state jurisdiction to levy transfer taxes and is limited to the Frick4 and Aldrich5 cases. The book would be complete without Part Three, but its addition does afford an opportunity for the lecturer to remind the student that state taxes are also important.

Though, as will have been gathered, the writer might have organized the book a little differently, this casebook makes available an excellent tool for teaching the subject covered. Let us hope that more schools will offer courses in estate and gift taxation and that those which do will provide adequate time for the exploitation of the material offered.

JOHN W. AHERN*

2 Commr. v. Estate of Church, 335 U. S. 632 (1949).

For the first time in our national history an irresistible surge of circumstances has forced us to cloak with secrecy freedom of expression in fields of scientific, industrial, and economic endeavor which has been characteristic of and to a certain extent the very catalyst of New World progress.

The startling revelation of the atom's secrets and the clinical appreciation of its destructive potential at a time when there coexists a ready vehicle for its swift dissemination to any point of the globe has changed completely our entire concept of common defense. The individual citizen has been impressed involuntarily, forcibly and irrevocably into what is aptly termed total war. Not only is each individual now exposed to all the horrors of holocaust but his very conduct on the level of the mere individual can quite possibly have a direct influence on the peace of the world. A most awesome secret—atomic fission—had been born. This could be, and in fact was, disclosed by selfish individuals, traitors to their country and to civilization, to the great peril of international peace. In other areas secret information might decide the issue of a battle, and conceivably in some rare campaigns, a national contest. Never before could a disclosure be of such magnitude as to be the spark which would precipitate an explosion into global war. Never before did a traitor wield such terrible power to push us over the brink of disaster.

To cope with the problem our government has had to strive to maintain its marginal lead in scientific development. To lag would be to lose the next war if that curse should once again revisit our land. This marginal lead had to be enhanced, not merely maintained. Our secrets, our know-how which produced this lead had to be guarded while further research went on. The conduct of the ordinary individual became the focal point for maintaining that margin. His loyalty assumed proportions of paramount importance. Not all individuals will rise to such an occasion. There are always those who would sell out their native land, but now the bargain included the world.

A need for military security and unquestioned loyalty in our scientific endeavors appertaining to national defense became axiomatic. The only model in existence was copied and adopted. Military security and censorship was introduced into science. Loyalty orders and security clearances implemented the set scheme. The civilian scientist found himself inhibited on all sides.
From the military came the security system. In that system were imbedded the age-old defects of reluctance to declassify and unfounded refusal to disseminate. Many military intelligence officers have for centuries followed the path of intellectual timidity and cast into their iron bound safe much needed materials which they had been directed to evaluate and disseminate to appropriate tactical and strategic organizations. They found there had been few reprimands for unwarranted burying of material whereas indiscreet disclosures had cut short many military careers.

Professor Gellhorn ably states this problem by weighing the value of the national scientific secret against the evil of atrophy of national scientific progress. He shows the disruptive effect on achievement wrought by an unnatural compartmentalization of scientific research while noting the fact, in passing, that all this secrecy and compartmentalization and security has not prevented disclosures in the past. Nor have we any assurance that they shall in the future. On the other hand the author of Security, Loyalty and Science points out a very real stultification of scientific advancement results from our present policy of non-disclosure. He points out that we cannot wall ourselves in scientifically like China did politically without suffering an analogous fate of intellectual stagnation while the rest of the world moves dynamically forward.

Gellhorn asks for sensible limits to secrecy, limits which would be compatible alike with military security and scientific advancement. He would have a sensible program of personnel clearance. The really important security check would be reserved for those whose work directly connects them with weapons of military potential and even for these men a clearance would be conditioned on their own conduct alone—there would be no guilt by association. This would be a forward step in protecting the professional reputations of many loyal scientists whose names might be suspected because of some chance remark of friend or relative—under the present system this might conceivably jeopardize a scientist’s entire career.

The author delves into the psychological and social aspects of the present loyalty program, he shines the spotlight of caution on the part played by the federal government in influencing the field of education by explaining the involuntary ideological conformity which is often the unwelcome concomitant of those necessary grants-in-aid.

As a recognized authority in the field of administrative law one quite expects from Gellhorn the substantial and excellent treatment that he gives to the need for fair procedures in the fields of security clearances,
loyalty hearings and loyalty dismissals. The attention the author pays to due process here is praiseworthy and is backed by court decisions at every turn.

*Security, Loyalty and Science* is a work of real practical worth. It should be the handbook of government attorneys who deal with loyalty proceedings, it should be on the shelves of counsel who are called to defend individuals in these proceedings and lastly it should be required reading for security and intelligence officers of every branch of the military and naval forces.

Gellhorn states the background and basic problems involved in our present security dilemma. He treats fairly the adequacies and inadequacies of the opposing philosophies of securing scientific secrets. He does not purport to solve all the problems but he does make some concrete recommendations for bettering our existing procedures.

The text is thoroughly documented in a separate running set of footnotes in the rear of the book. This makes for a rapid-reading, unimpeded text which can be substantiated by the reader when at any given point he chooses to consult the notes in the rear. For those who have problems in this phase of the law, Professor Gellhorn has done your research for you. He has, however, left many conclusions up to the reader. But this is literary wisdom, for what mathematician would be dogmatic about the results of an involved quadratic when more than one factor was still unknown.

JOSEPH M. F. RYAN, JR.*


This book is the first biography written about Melville W. Fuller, the eighth Chief Justice of the United States. Although his term was longer than any other Chief Justice with the exception of Marshall or Taney,¹ he is not generally well known among lawyers. This is understandable since as a jurist he has not taken a place alongside the greats of the Supreme Court. Demonstrative of this is the paucity in this biography of outstanding opinions which he himself wrote.² Consequently, the

* Member of the Bar of the District of Columbia.

¹ Fuller took the oath on October 8, 1888 and served for 22 years until his death on July 4, 1910.
² In Re Neagle, 135 U. S. 1 (1890), dissenting; In Re Baiz, 135 U. S. 403 (1890);
author of this biography, Willard L. King, himself a lawyer, does not attempt to make his work a lengthy analysis of Fuller as a jurist. Rather he presents the reader with a more general study of the life of his subject.

Mr. King devotes a large part of his book to Fuller's early life in Maine, his school days at Bowdoin, and later at Harvard; to his love for literature and poetry; to his great political activity and acumen; and of course to his prowess as a lawyer. But it is apparent from the fabric which he has woven that Fuller's greatest ability was his administrative skill and genius for handling men. The book is replete with instances proving Fuller's mastery in keeping the spirits of his associates unruffled. This was no easy task when one considers that such men as the ebullient Stephen Fields, the highly intellectual Horace Grey, the unsophisticated and brilliant Samuel F. Miller sat on the Court at one time or another and had to be handled gently and gingerly. Later on Fuller had to win the confidence of Edward Douglass White and Oliver Wendell Holmes. But Fuller was ever anxious to keep the members of the Court amiable and is accredited with instituting the daily custom of each justice shaking hands with every other one each morning. But over and above his genius for handling men, Fuller was an efficient manager of the Court's business. Perhaps most demonstrative of this was his ability to assign cases to the proper justices. He possessed the rare quality of handing decisions to those who he felt were best qualified and who later turned out to be so. Mr. King quotes Holmes who said:

In the assignment of decisions to the different judges, his grounds were not always obvious, but I know how serious and solid they were and how remote was any partiality from his choice.

Mr. King's admiration for Fuller is quite apparent. He has been wise in accenting Fuller's skill in the management of the court and his ability


3 The author, however, devotes many pages to demonstrate the part that Fuller played in the Insular cases and the Income Tax cases.

4 Fuller was extremely active in politics from his youth. He was prominent in both state and national conventions; he held a seat in the Illinois state legislature and was instrumental in Douglas' campaign for senator against Abraham Lincoln.

5 King, Melville Weston Fuller 112 (1950). Cullom, a Republican senator from Illinois, when asked by President Cleveland concerning the abilities of Democratic lawyers in Illinois answered guardedly that if he were asked to name the five ablest Democratic lawyers in Illinois, Fuller would be among them.

6 Id. at 134.

7 Id. at 334.
to handle men to the detriment of his other qualities. And even though at times the author seems anxious to make Fuller a greater Chief Justice than history has known him, he concludes his biography by stating that Fuller "... was an extraordinary Chief Justice in his relations with his colleagues"\(^8\) and that he was a successful Chief Justice.

Although this book is extremely interesting and well written it commends itself to a lawyer's library only as a source of acquaintance with the life of a Chief Justice whom he has not previously known. It is very readable and enjoyable; and the author has done a splendid job in transmitting his fervor and enthusiasm for Chief Justice Melville W. Fuller.

CHARLES F. CRIMI


Whether the reader be as seasoned practitioner of the Supreme Court Bar, an attorney who may some day appear before that Bar, or a novice student of the law, this book will fill a definite need. The authors have presented not only a manual of practice and procedure, but, in addition, an enlightening background on Supreme Court practice and the day to day functioning of the Court.

The stated object of *Supreme Court Practice* is to tell lawyers what they will need to know in order to handle a case in the Supreme Court of the United States. That object is well accomplished.

The book can be divided into three main parts: Jurisdiction of the Court; Procedure; and Forms, Statutes and Rules.

The problem of the jurisdiction of the Court, long the source of great difficulty to many lawyers, experienced and inexperienced alike, is simplified through the approach of the authors. In place of the historic discussion of the Court’s jurisdiction under the usual headings, the authors have presented the jurisdictional means available in relation to the Court from which review is desired and in connection with the type of case under consideration. These sections are well annotated to the statutes involved and cases in point. This arrangement materially contributes to the usefulness of the volume as a practice manual.

The chapter on the exercise of certiorari is hardly less valuable than those on jurisdiction. Therein is presented an interesting and detailed

\(^8\) Id. at 336.
discussion of the factors which motivate the Court, as well as the method of consideration and disposition of certiorari petitions.

The value of *Supreme Court Practice* as a practice manual is probably most evident in the chapters dealing with the procedure in connection with petitions for certiorari and on appeals. A detailed but concise section is presented on the structure of the petition for certiorari and the necessary brief. These chapters also include a discussion, in connection with the Court’s rules and customs, on time, fees and costs, the record, printing and papers to be filed in taking an appeal and their contents. The procedures on certified questions, original cases and extraordinary writs are similarly reviewed.

The forms presented, which are referred to throughout the text, includes those used in petitions for certiorari, on appeal, in original cases and writs, for certificates and motions. The forms are followed by an appendix containing the Revised Rules of the Supreme Court of the United States and pertinent sections of the *United States Code*.

The authors have not limited themselves in this work to the formal rules of practice before the Court. Included throughout the text are interesting and informative statements of experience and quotations from various justices, past and present, which well serve to acquaint the reader with the “mind” of the Court.

Neither have the authors lost sight of their purpose in presenting this volume. The book as a manual of procedure and practice is greatly enhanced in its usefulness to the practitioner by virtue of the many cross references to the rules and statutes as well as to other sections of the volume.

The value of this book is not limited to members of the profession engaged in Supreme Court practice, on the contrary it can be of great aid to all lawyers. Reading it enables one to become better acquainted with the Court’s jurisdiction and procedure which in itself makes the volume more than worthwhile.

PAUL R. MADDEN
This book was written for those Americans who want to know the Declaration of Independence intimately. In the preface, Mr. Dumbauld reveals his design for the reader: "... to understand it better, to interpret it correctly, to grasp its full meaning, and to ponder its significance for us today."1

Initially, the author refreshes the reader's recollection of those discordant events which goaded the Colonies to sever their political ties with England. After George III ascended the throne in 1760, there occurred in succession the Writs of Assistance, Stamp Act, Boston Massacre, Boston Tea Party and Intolerable Acts. This "... long Train of Abuses and Usurpations"2 aroused the temper of the Colonies and resulted in the reconvening of the Continental Congress, where the Declaration was conceived. It is noteworthy that the record of the Congress is one of patient recourse to the traditional modes of obtaining justice from the King and Parliament. Its members were neither extremists nor revolutionaries; rather were they educated and intelligent citizens versed in the law and in the procedures of the council chamber. They chose independence when it became apparent that only in making this decision lay any hope of attaining freedom and liberty, which they fervently believed to be a God-given right.

The several stages in the formulation of the Declaration are covered in a brief interesting chapter wherein the author portrays Jefferson in the throes of authorship, and discloses a critical Congress surprisingly unresponsive to the great man's work. The author relates that:

During the debate, Jefferson was sitting by Benjamin Franklin, who consoled him by telling the story of John Thompson, the hatter. That tradesman, having composed an inscription for the signboard of his shop, submitted it to his friends for criticism; after their amendments nothing remained but his name and the picture of a hat.3

Similarly, throughout the book, Mr. Dumbauld has enlivened his detailed study interlacing the informative historical data with delightful character studies of the star performers.

The Declaration is considerably more than the mere written record of an event which shaped the future of this nation. It is a synthesis

2 *Id* at 158.
3 *Id.* at 19.
of original ideas, political philosophies and the impact of events upon those who conceived it. Therefore, Mr. Dumbauld has wisely chosen to dissect its text into its component words and phrases, considering each segment independently, and again, in its relation to the whole document. As a consequence, the story of the Declaration moves along very naturally, each fragment providing the key to significant data. This plan simplifies the problem of understanding exactly what idea certain words were meant to convey, upon what fundamental political philosophy they have their basis, and what particular event in history inspired them. Take for example the beginning of the second paragraph of the Declaration, "We hold these Truths to be self-evident..." The author believes that the two words, "these Truths", are a particularly significant part of the paragraph that sets out the true foundation of American political philosophy. He cites Plato to demonstrate that wise men had long accepted as truths the principles set forth there. But a quotation points up the real value of reaffirming "these Truths" in the Declaration:

> It is not enough, said Condorcet, that the rights of man "should be written in the books of philosophers and in the hearts of virtuous men; it is necessary that ignorant or weak men should read them in the example of a great people. America has given us this example. The act which declares its independence is a simple and sublime exposition of those rights so sacred and so long forgotten."  

However, "these Truths" were not universally accepted in America. Mr. Dumbauld sketches briefly the antagonism of the pro-slavery group to these words and mentions the divergent views of the Harvard philosopher Santayana, which are of more recent vintage. That the author is able to explore a wealth of related material in but two pages is a tribute to his admirable research, documentation and annotation.

Certainly Mr. Dumbauld has done what he set out to do in writing this book. He has made it possible for the reader to gain a new and better understanding of the Declaration. If one would wish to make a serious study of the document, he will find on every page an exhaustive annotation to the textual material, and at the end of the book a remarkably thorough bibliography of public records, pamphlets, articles and books.

Apart from its value as an authoritative and convenient study of a notable historical document, the book has the added merit of being

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4 *Id.* at 157.
5 *Id.* at 54.
particularly suited to the times in which we live. A major share of the peoples of the world are shackled by the tyrannical rulers of the Kremlin. And among the free peoples of the earth there is fear for the future. For enslaved and free men the message of the Declaration is as valid today as it was in 1776. It tells us, writes the author:

... the state is the servant, not the master, of the people. ... It is not a mystical, glorified, metaphysical monstrosity as in nations where totalitarian collectivism and similar dogmas prevail.6

In the propaganda war of ideas being waged today, the principles enunciated by Jefferson and immortalized in the Declaration would provide a ready source of highly explosive ammunition. There is a tremendous appeal in the proposition that the rights of mankind are inalienable because they are derived directly from God and Nature. Yet if we Americans are to make effective use of the ideas which are the foundation of our own cherished liberty, we must re-examine the historical background, the events and the men out of which they spring. It was with this high purpose in mind that Mr. Dumbauld wrote of the Declaration of Independence.

ARTHUR R. BARRY

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6 Id. at VII.
BOOKS RECEIVED


ERRATA

At 39 Georgetown L. J. 149 (1950) following the word “upon” in the last line add:
religious instruction is a violation of the separation of Church and State.

The editors wish to correct a statement appearing in 39 Georgetown L. J. 243 (1951). Reference was there made to the University of Kansas City Law School. This reference was erroneous and should have read University of Kansas School of Law. The editors extend their apologies to both schools.

At 39 Georgetown L. J. 365 (1951) strike the footnote material and substitute:
*B.A., Princeton, 1933, LL.B., Yale School of Law, 1936; Member of Maryland Bar. Member, law firm of Constable and Alexander, Baltimore, Maryland.