JUDICIAL REVIEW:
ITS ROLE IN INTERGOVERNMENTAL RELATIONS

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from START to FINISH

It's easy to pick a good horse at the finish—but mighty difficult at the start.

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SOCRATES is reported to have said that if there ever was a fellow who in his talks with other fellows always wanted to know exactly what he was talking about, he was, or at least he had thought he was, that fellow. When we conduct a symposium upon judicial review, just exactly what shall we be writing or talking about? Let us take up the noun first. Review of what? Apparently of (1) legislation—lawmaking, enactment of precepts for governing conduct, adjusting relations and safeguarding interests in an ordered, civilized society; (2) administrative application of the enacted precepts or ordered policing of a community or politically organized society; and (3) adjudication—determinations of controversies between individuals or between them and groups or organizations of individuals, or as to the interpretation or application of enacted or administratively prescribed precepts.

Review how? In general, shall we say, by subjecting the proceedings, judgment, order or decision under review to the scrutiny of reason? This calls for study of review as it has been carried on in times and places, or specially in a given time and place, with reference to its purposes and achievements, and by systematic subjection of the idea of review, its purposes, methods, achievements and failures to the scrutiny of reason. In particular, which is no doubt what those who planned this symposium had in mind, it means applying trained reason and experience to particular items of legislation, of administrative determination and direction, and of judicial adjudication, in the assured expectation of bringing about postulated sound results.

* Dean Emeritus, Harvard University Law School.

1 This is Professor E. C. Clark's offhand translation of a characteristically homely Socratic saying in Plato's Hippias Major.
Review by whom? This is the special subject of the symposium. Does or should the judiciary, through a properly constituted and authoritatively empowered tribunal, have an incidental power of reviewing particular items of legislation, administrative determination or judicial decision as to their conformity to authoritative requirements of the established political-legal order?

This is not necessarily a general proposition of universal public law. It arises from and must be considered in the light of a fundamental proposition of American law: "This Constitution," says the Constitution of the United States, "shall be the supreme Law of the Land." That provision had its origin in the history of American public law. It was inherited along with the common law we in America inherited.

Two cases in the fourteenth century show the idea of a "law of the land" in its beginning. In 1338 a collector of the King's taxes distrained cattle of a subject who then brought an action of replevin. It appeared that the defendant had no warrant under seal authorizing the distress, and the Court of King's Bench rendered judgment for the plaintiff, holding that men could not go about the realm distraining the property of the subject or purporting to collect the King's taxes without a special warrant.3

The next year a certain Reginald de Nerford and his companions, perhaps as an after dinner prank, threw a neighbor out of his freehold. The latter having brought an action in which judgment went against Reginald and his companions, a writ of exi gi facias was issued against them. Thereupon Reginald, who seems to have been a person of some consequence, went to the King, who wrote a letter under his private seal to the sheriff stating that he had pardoned Reginald and his companions and commanding that they should not be put to damage. The sheriff returned the writ, reporting the King's letter as his reason for not executing it. The court would not listen to this and issued a new writ. Edward III, King of England, might pardon offenders, but Edward Plantagenet could not write a private letter to the sheriff interfering with the due course of the law which bound the whole realm.4

When Fortescue wrote in praise of the laws of England a century later, he said dogmatically that the power of a King of England was

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2 U.S. Const. art. VI.
4 Reginald de Nerford's Case, Y.B. 13 & 14 Edw. 3 (K.B. 1339), in Year Books of the Reign of King Edward the Third 333 (Pike ed. 1886).
not regal, so that he could make what innovations and alterations in the laws he pleased and impose on his subjects what burdens he chose, but was instead "political"; it was not a personal government by Edward or Henry, it was the political government of the King of England, exercised within the bounds which the law and custom of the realm had established.5

There was a long succession of cases between the reigns of Henry IV and Elizabeth I in which the Crown was seeking to make the royal power to protect social interests a source of revenue or a means of enriching favorites, while the courts insisted it should be exercised according to settled principles of reason and within limits recognized by law.

On the eve of the colonization of America, the contest between the common law courts and the Crown, dramatized in the Sunday morning conference between King James I and the judges of England,6 which is the glory of our legal history, gave us the phrase "supreme law of the land," which was taken over in our federal constitution and marked a fundamental concept of our constitutional polity. Coke, the champion of the common law in the contest with the Stuarts, held that the long line of decisions of the common law courts had established a general doctrine of the authority of the courts, since they administered the law and law was reason, to compel not merely private individuals and all agents of government, but the very sovereign itself to keep within the bounds of reason, by refusing to recognize or give legal effect to acts or ordinances of the sovereign which went beyond such bounds. He boldly said that when an act of Parliament is against common right and reason, the common law will control it and adjudge such acts to be void.7 The events of 1688 in England established the supremacy of Parliament and Coke's proposition failed to maintain itself. But the controversies between the Crown and the colonists which led to the Revolution, and perhaps experience of review of colonial legislation with respect to its conformity to the requirement of colonial charters, led us practically to adopt Coke's conception as one of recognized supremacy of law. When the framers of our national Constitution drew it to declare itself the supreme law of the land, they thought and wrote in terms of Coke's Second Institute.

Marbury v. Madison8 was preceded by a line of prior decisions in the

5 Fortescue, Governance of England 112 (Plummer ed. 1885).
6 12 Coke Reports *63.
7 Id. at *64.
8 5 U.S. (1 Cranch) 137 (1803).
state courts which held that courts would refuse to apply legislative acts or provisions in derogation of or in conflict with constitutional or charter provisions established as the law of the land.\(^9\) Judicial review of legislative, administrative and judicial proceedings or determinations in order to determine whether or not they conform to or are repugnant to the Constitution as the supreme law of the land is, under the Constitution, the decisive mode of fixing the meaning and application of constitutional grants and limitations of power. It was laid down substantially at the outset of our constitutional polity that “this is of the very essence of judicial duty.”\(^10\) It assured a consistent and complete basis of legislation, administration and judicial decision under a supreme law of the land.

But what is law? A deficiency in the vocabulary of the Anglo-American lawyer has promoted much confused thinking about “law” and “laws.” It stands in the way of clear recognition of a fundamental distinction and has led to a widely assumed proposition that law is no more than an aggregate of laws. In clear thinking we must recognize three ideas: (1) a body of rules for the policing of a local politically organized society, which we call “laws” and each item “a law”; (2) a body of ideals, principles and precepts by which a regime of just ordering of a society is achieved, and (3) what is called in French l’ordre juridique, in German Rechtsordnung, and what I have called “the legal order,” comparing it with the social order and the moral order, but what many are coming to call “the rule of law,” meaning a regime of social control through a system of law instead of by force or by compulsion of organized religion. In the science of law we must make careful distinction between the first and the third of these meanings—between law and a law, or, in other words, between law and laws. Law seeks to guide decision as laws seek to constrain action. Law is needed to achieve and maintain justice. Laws are needed to keep the peace, to maintain order. Law is experience developed by reason and corrected by further experience. Its immediate task is the administration of justice: the attainment of equal and exact justice to all. The task of laws is one of policing, of maintaining the surface of order. But we expect that function to be performed in accordance with the requirements of law. So speaks the Constitution of the United States.

\(^9\) Holmes v. Walton (N.J. 1780), 2 Am. Hist. Ass’n Papers 45-46 (1886); Rutgers v. Waddington (N.Y. 1784), 1 Thayer, Cases on Constitutional Law 63 (1894-1895); Bayard v. Singleton, 1 N.C. (1 Mart.) 5 (1787); Trevett v. Weeden (R.I. 1786), 1 Thayer, op. cit. supra at 73; Commonwealth v. Caton, 8 Va. (4 Call) 634 (1782).

\(^10\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
The Constitution declares itself the "supreme Law of the Land," that is, the supreme body of authoritative precepts for maintaining justice and a regime of peace and order in a modern civilized society, and expressly commits to the judicial power "all Cases . . . arising under this Constitution."11 So in effect it calls upon the judiciary to decide all cases where claims are asserted under or derived in reliance upon a provision of the Constitution as the supreme law of the land. This puts a heavy burden upon the Supreme Court and upon the courts which, in the first instance, may have to pass upon claims to have legislative acts or administrative orders, regulations, proceedings or hearings subjected to judicial review.

In England, where Parliament has complete ultimate authority and is in the end the final judge as to what it directs or authorizes and so what in every detail is the law of the land, nevertheless, as Sir Frederick Pollock put it, "it is idle to ask in general terms whether our Courts do or do not make law," adding, "the only answer is that they develop and mould it as interpreters, but do not create it as legislators. Development includes laying down a new rule, not being in contradiction of settled law, in cases where no recognized rule is found to be applicable. Such cases are said to be of the first impression."12

Sir Frederick continued:

[A]n English-speaking Court may not decline the task of decision because the case in hand cannot be brought under any known governing rule. At need a rule must be made; and, what is more, the Court has, for some centuries, been expected to justify its ruling. What then is to guide the Court in the constructive process thus imposed upon it? The usual and accepted answer is that it must find and apply the rule which in all the circumstances appears most reasonable, and I do not know that any plausible improvement on this has been suggested. But the answer needs explanation; for that which appears reasonable to one impartial man does not always appear so to another, and in fact we see that even just and wise men, with all the aid of full argument and mature deliberation, are often unable to agree. Law is reason, as a medieval judge said in rebuke of a colleague's jesting remark that the law is what the judges choose; but not the reason of any one man or assignable body of men. The Court has to look to an ideal standard, which cannot be precisely defined, but is none other than that general consent of right-minded and rightly informed men which our ancestors in the profession called Reason, and Continental doctors the Law of Nature.13

He argued that both caution and valor are needed for "fruitful constructive interpretation of legal principles."14

11 U.S. Const. art. III, § 2.
12 Pollock, Judicial Caution and Valour, 45 L.Q. Rev. 293 (1929).
13 Id. at 294-95. (Footnote omitted.)
14 Id. at 295.
The judges of England told the King that he ruled under God and the law.\textsuperscript{16} This idea of government under law, instead of an omniscient ruler imposing his will upon the people, took form in America in the provision that the Constitution should be the supreme law of the land, so that legislation can govern the courts only within limits which are judicially interpreted in the orderly course and substantially significant changes can be made only by amendment of the Constitution in the manner it prescribes.

We sometimes hear of "deference" due to the greater experience or more intimate knowledge of special situations or topics or occasions on the part of legislators or in particular by administrative officials, which calls upon courts to defer to the judgment of legislators or boards and commissions and abstain from judicial review of legislation or administrative decisions or orders except in very clear and urgent cases. The courts themselves have imposed limits such as refusal to pass upon what are in effect moot cases in which it is sought to establish rules for anticipated subsequently arising problems. Here the matter is not one of deference but one of want of judicial power.\textsuperscript{18} Also the courts will not inquire as to the constitutionality of a statute where its application involves no injury to the person seeking to question its validity.\textsuperscript{17} Abstract questions as to the power of Congress to enact specified legislation are not within the judicial power.\textsuperscript{18}

It must be confessed, however, that the question of deference does not admit of an answer on strictly analytical lines. Deference assumes a measuring of values, and the Constitution precludes that as between the departments of Government which it recites as established, not by one or all of them, but by the people of the United States as coordinate and coequal. But there are practical difficulties in maintaining an exact analytical separation of powers. One of these is brought out in what might be called the debate on judicial self-limitation between Maurice Finkelstein and Melville Fuller Weston in the \textit{Harvard Law Review} in 1924-1925. It began with a paper by Mr. Finkelstein\textsuperscript{19} in which he pointed out that it had become settled that there were certain controversies of which the courts will not entertain jurisdiction. They are said to be "political questions." He concluded:

\textsuperscript{16} 12 Coke Reports *65.
\textsuperscript{16} United States v. Evans, 213 U.S. 297 (1909); cf. 3 Story, Constitution of the United States § 1573 n.1 (1833).
\textsuperscript{17} Erie R.R. v. Williams, 233 U.S. 685, 699 (1914).
\textsuperscript{18} Texas v. ICC, 258 U.S. 158, 162 (1922).
\textsuperscript{19} Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924).
The line between judicial and legislative functions in government cannot be drawn with exact precision. But certainly to each department ought to be given a sphere of activity for which it is best fitted, both by its history and traditions and by the nature of its organization. These considerations point to the legislature as the proper social organ for the expression of the industrial policy of a state or nation. Consequently, it seems well to point out that in the standard of "political questions" the courts have an instrument adjustable with the flux of time and conditions, and malleable to the affairs of men.

The proposition that political questions are not judicial, as a doctrine of the common law, was laid down in the case of The Duke of York's Claim to the Crown in 1460, in which the question between the House of Lancaster and the House of York as to succession to Richard II, which was fought out in the War of the Roses, was sought to be put to the judges of England for decision. The judges refused to decide, saying that "they durst not enter into ... [any] consideration thereof." About a century later the widow of the Earl of Derby sued for dower rights in the Isle of Man. The King's Council (three justices sitting) would not take jurisdiction because the Isle of Man was "an old realm" and the rights involved were not legal but political. Mr. Finkelstein then reviewed a long line of cases in England ending with West Rand Cent. Gold Mining Co. v. The King, in which the question was whether the Crown assumed the obligations of the South African Republic after the Boer War. The court said: "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer." Until we get a law of the world, administered as such by local courts, this last seems clear enough.

The leading case in American law is Luther v. Borden, in which Chief Justice Taney said that the Supreme Court of the United States had no jurisdiction to reverse the judgment of a state court under the provision of the Constitution that the "United States shall guarantee to every State in the Union a republican form of government" and to determine whether a state government exists. The opinion goes at length into the consequences which might follow from a judicial decision that

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20 Id. at 363-64.
21 5 Rot. Parl. 375 (1460).
22 Id. at 376.
25 Id. at 409.
27 Id. at 45.
an actually functioning state government had no legal existence. This was evidently the ratio decidendi. This was followed by Chief Justice White in Pacific States Tel. Co. v. Oregon.28 It seems clear that the settled doctrine of judicial avoidance of deciding political questions has its basis in judicial caution rather than in legal or philosophical analysis.

Another type of case considered by Mr. Finkelstein has to do with foreign relations. The courts have steadfastly refused to embarrass the Government in its relations with the rest of the world by decisions which commit or dangerously appear to commit it on matters of international controversy. Also he considers questions of administrative or local legislative matters. As he puts it, “the courts have found it expedient to refuse to examine the merits of problems when the consequences of their decisions might be so vast as to be a source of great embarrassment to the legislature or to the nation.”29 He may perhaps carry this last proposition too far. Such, at least, was the view of Mr. Weston30 who also may have put his critique with too much assurance, asserting that the Constitution is based on a doctrine of “separation of powers” which provides an adequate solution of all the problems raised. Mr. Finkelstein considered this in a later paper.31 Much of the argument between them turns upon the nature of “interpretation” and how far what is done—and much today has to be done under that name—admits of exact analytical definition for practical purposes of government and of international relations.

What is significant here is a shift of the center of gravity between the three departments of Government as set up in the Constitution. The judiciary has the less power of enforcing its determinations, but for historical reasons in England and the United States it has a certain prestige which gives it weight. The judicial power, as we have understood it, is under attack by the partisans of administrative justice. That a legal periodical undertakes a symposium upon judicial review is a sign of the times.

28 223 U.S. 118 (1912).
29 Finkelstein, supra note 19, at 357-58.
30 Weston, Political Questions, 38 Harv. L. Rev. 296 (1925).
JUDICIAL REVIEW OF PROCEDURAL DECISIONS AND THE PHILCO CASES: PLUS ÇA CHANGE?

Louis L. Jaffe*

"To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts."

—Felix Frankfurter

INTRODUCTION

The more things change, it has been said, the more they are the same. This cynical or—depending on your point of view, reassuring—observation may be as vulnerable as most generalizations, but at least it implies the verity that there is more than one way to skin a cat. The judges have been notably adept in the past at removing the hide of an administrative agency. If in these more enlightened times they have, with elaborate pronouncements of virtuous self-denial, relinquished the butcher knife, the glint of the scalpel is still detectable behind the voluminous folds of their robes.

To reveal the purport of these oracular pronouncements, I must first recapitulate some well-trod ground. I commence with the general proposition that the function of judicial review is to curb unwarranted action.¹ Some such broad black letter may command an easy assent. But it is the formulation of criteria (the scope of review) to distinguish the warranted from the unwarranted which is controversial; and even more controversial is the question whether the criteria are being honestly applied.

The scope of judicial review is variously defined. It is most limited where the inquiry is restricted to jurisdiction, the test applied by English courts in common law certiorari.² Under this test it is not enough to invalidate an action that it rests on legal error. The error, if substantive, must be one which, as the judges see the statute, puts the challenged

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¹ I have set forth my ideas as to the role and scope of judicial review in Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401 & 769 (1958); Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239 (1955).

action outside the granted area of competence; if procedural, it must be a failure to comply with a statutory or common law requirement of a crucial character. In this country any material substantive or procedural error is fatal. But the judges do not permit themselves to set aside a decision simply because they themselves would not have made the same decision. They all recognize that a statute may empower the administrator to exercise discretion. Discretion has always been a key characteristic of administrative power, but its range has been widened enormously in this century. Discretion is the power of choice. In our context it means that on a given record a court will not disturb the administrator's choice.\(^3\)

It is the statute, of course, which creates the occasions for choice and which, more or less, determines who is to make the choice. The delegation of some power to make choices is an unavoidable incident of law enforcement, the most ubiquitous example being the need to delegate the power to choose between competing factual inferences. Administrative choice, however, quite typically turns not so much on the resolution of a factual dispute as on the evaluation of admitted facts. Even though the statute itself may furnish evaluative criteria, the criteria rarely exclude the need for further evaluation. A statute, for example, may require that an applicant for a license have a "good character." This perforce leaves a good deal to the judgment of the administrator, a judgment which will, for the most part, rest on policy choices sometimes only dimly felt or expressed. Also, the range of choice is often much greater than is realized. Conduct which to one administrator demonstrates a conclusive lack of character may strike another either as venial or irrelevant. For example, do the illegal price-fixing activities of Westinghouse establish that Westinghouse cannot be trusted to fulfill the public responsibility of a broadcast licensee? It is a safe hazard that judges would feel that they must tolerate either a "yes" or "no" answer even though as administrators they would have decided to the contrary.

The broadly phrased grants of power so characteristic of modern legislation multiply the occasions and expand the scale on which the administrator must make policy. This power to make policy can be seen as lawmaking, particularly where embodied in a general pronouncement, since the pronouncement functions as a "rule of law." It troubles some judges that an officer should have this power to make law; they would say that "questions of law are for the court," which they take to mean that the judge is responsible for ascertaining the "right" rule. In the

\(^3\) The recent decision and opinion in United States v. Drum, 368 U.S. 370 (1962), is an excellent example of review of discretion.
1920's and 1930's this view was strongly held, particularly by judges hostile to current administrative programs. These judges were attacked by critics of the "liberal" persuasion. They were usurping, it was argued, the administrative function. By the 1940's the criticism had had its effect; judicial deference to administrative policy decisions became one of the central credos of our administrative law.

It is, however, much easier to defer to a decision which one approves than to one which he dislikes. When agencies began to take a "conservative" turn, there was considerable strain on the tolerance of "liberal" judges. Having drastically diminished their power to control the substance of administrative policymaking, these judges, when faced with distasteful decisions, have been tempted to resort to flank attacks on administrative method and manner. There is considerable justification for an insistence on procedural and formal requisites, since policymaking by a small group of political appointees may be objectionally nonrepresentative. Deference to administrative decisionmaking assumes procedures which assure a fair hearing to the affected interests and a demonstration that the action is grounded on a bona fide intention to implement the legislative purposes. The very weakness of a decision may reflect procedural inadequacies. But judicial interference with procedural decisions as a tactic to obstruct or to delay an objectionable policy is justified only in exceptional circumstances.

I address myself first to the exception. It must be admitted that the stance of deference to administrative judgment can produce in the judge extreme tension. A judge who finds himself bound to affirm and thus to be implicated in an objectionable decision, or, even worse, in a course of decision, may suffer some loss of respect for his role. He is entitled to take comfort from the accepted legal doctrine which fixes responsibility on the administrator and assigns a positive value to his own self-restraint. But every precept, every specific for right action has its limits. No doctrine, no arrangement is absolute. It will not do to insist that a judge put his general morality into deep freeze before ascending the bench. For his own good health and ours, the whole man should be permitted to enter

into the calculation. This means that the judge should be allowed and should allow himself a certain leeway, a certain intuitive variability in applying concepts of judicial deference.

Having granted so much by way of exception (and it is for each judge to say how much that is), it is the burden of my thesis to show that judicial deference is as relevant to procedural as to substantive decisions. I gather the impression that some judges who quite insistently display a "correct" attitude of deference on substantive issues apply a different standard to procedural decisions: they do not hesitate to protract and to complicate the administrative process. Their premise may be that the considerations that dictate deference to substantive decisions are inapplicable to procedural ones. This is only partly true. Deference is characteristically based on the assumed expertness of the administrator, and this may be thought more relevant to substantive than to procedural decisions. And insofar as procedural questions involve estimates of fairness, the judges are not only expert, but are free from the pressure on the administrator to realize his program. But even as to procedure there is discretion. Procedural questions arise (both in courts and agencies) under rules embodying general standards requiring the exercise of discretion. What kind and magnitude of interest entitles a person to be heard? What kind of claim is worth hearing, and with what particularity should it be alleged? Even in civil litigation there is no single solution for problems of this sort. The party and pleading rules in antitrust suits are not identical with those in negligence suits. Since procedural decisions should be made to serve the substantive task, it follows that expertness in matters of substance are relevant to the exercise of procedural discretion.

There will be a web of substantive rules and considerations applicable to any one case. Some rules are more important than others; some more capable of application; some more amenable to proof. This kind of special knowledge is an aspect of a more general criterion. An agency entrusted with grandiosely stated responsibilities and far-reaching powers can only realize a modest measure of its potential. It must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are most nearly related to its core responsibility. What problems are most exigent, how they can best

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7 See Philco I, pp. 668-73 infra.
8 See Philco II, pp. 674-83 infra.
9 See the opinion of Commissioner Elman, dissenting in Gimbel Bros., 3 Trade Reg. Rep. (1962 Trade Cas.) ¶ 15748, at 20568 (FTC Feb. 23, 1962):

A court is a passive, disinterested arbiter of controversies that happen to be pre-
be solved—and by implication, which problems must be put aside or left to other agencies—are questions the solution to which peculiarly demands a feeling for the whole situation. It is in terms of this whole situation that responsibility must be fixed and its fulfillment judged. If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjected criticism disperses accountability, how much more is this true where the deployment of forces is involved.

I, therefore, conclude (1) that the exercise of discretion is relevant to the making of procedural decisions; (2) that in the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference; and (3) that reasonableness should be considered in terms of the responsibility of the agency for a total program, allowing for the fact that the agency's resources are limited. These conclusions arise out of a study of the performance in the last few years of the United States Court of Appeals for the District of Columbia Circuit in reviewing the actions of the Federal Power and Federal Communications Commissions, particularly the latter, a performance culminating in the two Philco cases. It is my feeling that there is a serious question whether the court has not in these cases exceeded the proper bounds of review.

I

Prelude to Philco

In 1957 the National Broadcasting Company (NBC), a wholly owned subsidiary of Radio Corporation of America (RCA), petitioned...
the FCC for a renewal of its license to operate WRCV-TV in Philadelphia. The FCC granted the application without hearing. Philco Corporation (Philco), a manufacturer of electronic equipment in competition with RCA, "protested" the Commission's grant of the renewal and demanded a hearing. The Commission's actions in the protest proceedings were reviewed by the District of Columbia Circuit in two decisions which I call Philco I and Philco II.

To understand the reaction of the court to the Commission's actions in these two cases, we must first tell the circumstances under which NBC acquired the Philadelphia station and explain the Commission's general policy towards broadcasting networks. In 1955 NBC and Westinghouse applied to the Commission for approval of an exchange of licenses. In return for assignment of certain NBC stations (AM, FM, TV) and the payment of $3,000,000 to Westinghouse, Westinghouse assigned, inter alia, the Philadelphia station to NBC. NBC is a so-called chain or network, which is not as such a broadcaster. As a network, it holds no license from and is subject to no regulation by the FCC. It makes and assembles programs which it sends over telephone wires to its "affiliates," who are licensed broadcasters, for simultaneous broadcast by them. Under its agreement with each affiliate, the chain has the power "to option" the affiliate's broadcasting time, i.e., it can demand that the licensee "clear" a certain time for the broadcasting of a network program. This enables the network to sell the program to sponsors (advertisers) for simultaneous broadcast in a minimum number of major markets. If the affiliation contract is basic to the network's capacity to operate, it is equally the case that a network affiliation is of crucial importance to the broadcaster. There are only three networks, and where there are more than three broadcasters in a market, the networks' bargaining power is very great.

The FCC in 1941 promulgated its so-called Chain Broadcasting Regulations, which are directed in terms to licensees. They regulate the contract which a licensee may make with any chain, limit the amount of option time which the licensee may grant to the network, and in other ways require the licensee to maintain his freedom of action in dealing with the network. The regulation also limits to seven each the number of AM, FM and TV licenses which may be granted to any one person. The networks themselves have been permitted to own stations within the maxima. Obviously each network will seek to maximize its broadcasting coverage by acquiring the permitted number of stations in the

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12 The Regulations are set out in full in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
markets of greatest strategic significance. The Chain Broadcasting Regulations rest on a series of equally important premises of partly contradictory character. The implication is that the chains are oligopolies operated and maintained by practices which are presumptively in restraint of trade. Because they serve a valuable programming function, however, they are to be tolerated insofar as is appropriate to enable them to perform this function.

The Commission staff raised a question whether the NBC-Westinghouse exchange did not violate the Commission’s network policies. The staff’s preliminary inquiry suggested that NBC had refused to renew Westinghouse’s affiliation contracts unless and until Westinghouse assigned to NBC its Philadelphia station. The Commission nevertheless approved the exchange without a hearing. Commissioner Bartley, dissenting, believed that there was a substantial question of “duress” or of abuse of the network’s power. He thought a hearing was required. Commissioner Doerfer concurred with the majority although he took the charges to be true. “A complete disclosure of all relevant facts has been frankly made.” But, he continued,

it is impossible to read from this record that the board of directors of Westinghouse were intimidated by force or fear. We must take them upon their word that the transfer was based upon the exercise of a prudent business judgment.

. . . [T]here is no scintilla of evidence that NBC conspired with anyone to monopolize production of network or local programs.

Since it was the staff alone which questioned the assignment, there was no one to appeal the Commission’s action. But the Antitrust Division of the Department of Justice brought a civil action under the Sherman

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14 Id. at 375-76.
15 Id. at 377.
16 Id. at 381.
17 Could the Antitrust Division have “protested” or intervened and appealed from an adverse decision? Though the question is not free from doubt, I would be prepared to argue in the affirmative. See my discussion of United States ex rel. Chapman v. FPC, 345 U.S. 153 (1953), and Far E. Conference v. United States, 342 U.S. 570 (1952), in Jaffe, Standing To Secure Judicial Review, 75 Harv. L. Rev. 255, 298 (1961). Some think that an officer can appeal only where he represents a “proprietary” interest of the United States. Judge Parker, ruling for the lower court in the Chapman case, 191 F.2d 796 (4th Cir. 1951), noted that Chapman did not, as Secretary of the Interior, have authority to go into court for the protection of the interests of “the United States.” But he assumed that he would have standing if he could point “to some special interest for which he is charged with responsibility.” Id. at 799-800. The judge did not find any such “special interest.” The Supreme Court held that Chapman had standing but wrote no opinion. It is permissible
Act\textsuperscript{18} which was pending at the time of NBC's applications for the renewal of its Philadelphia license.

II

\textit{Philco I}

As mentioned previously, the FCC granted, without a hearing, NBC's application for renewal. This renewal was "without prejudice to whatever action the Commission may deem appropriate at such time as presently pending anti-trust actions involving . . . [RCA] and . . . [NBC] may be terminated."\textsuperscript{19} Philco Corporation (Philco, as it happens, had itself once owned the station and had sold it in 1953 to Westinghouse for $8,500,000), a manufacturer of electronic equipment and a competitor of RCA, the parent of NBC, "protested" the renewal under section 309(c) of the Communications Act of 1934, which provides:

Wherever any . . . authorization is granted . . . without a hearing . . . any party in interest may file a protest . . . and request a hearing . . . [The] protest . . . shall specify with particularity the facts . . . showing that the grant was improperly made or would otherwise not be in the public interest. . . . The Commission shall . . . render a decision making findings as to the sufficiency of the protest . . . and shall designate the application for hearing . . . except . . . after affording protestant an opportunity for oral argument [insofar as it] finds . . . that even if the facts alleged were to be proven, no grounds for setting aside the grant was presented.\textsuperscript{20}

A protest thus must allege facts showing (a) that the protestant is "a party in interest," and (b) that the grant was improper or not in "the public interest." Philco alleged that it is in competition with RCA, that RCA dominates the nontelephonic communications industry, and that it uses its approximately seventeen NBC stations to procure free advertising for its products by broadcasting announcements which identify NBC with RCA or by carrying occasional news stories in which RCA figures. This "unfair competition" was stated to be "harmful." The extent of this advertising and how it worked to harm Philco were neither alleged nor proved. NBC, pointing out that Philco had suffered a drop in pretax earnings from $33,000,000 in 1950 to $557,000 in 1956, asserted that Philco was seeking a scapegoat for its own managerial failures and a weapon in its $150,000,000 treble damage action against RCA. Philco's


theory would appear to be that insofar as the publicity reduced RCA’s unit advertising cost, RCA secured a competitive advantage. (This would seem to be too minute a fraction of total cost to be competitively significant.)

We shall proceed to treat the standing question as distinct from the merits, i.e., without regard to the substantive character of Philco’s objections to the grant of the license, even though, in my opinion, it is not sound to separate the two. But it is the teaching of FCC v. Sanders Bros. Radio Station,21 as presently understood, that any person who is in fact “aggrieved” has an absolute “right” to protest, even though the asserted invalidity is not a “wrong” to him. It is enough under this view that the grant would be against the “public interest.” No court has gone further than the District of Columbia Circuit in emptying the requirement of injury of significant content and in its insistence on the absolute “right” of the affected individual to intervene, to appeal or to require a hearing.

The tone of the court’s attitude is indicated in Virginia Petroleum Jobbers Ass’n v. FPC.22 Here the Commission had refused intervention on the ground that the intervenor might introduce duplicative evidence unnecessarily prolonging the hearing. The court replied that efficiency should be achieved not by denying participation but “by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence.”23 But surely the court is aware how nearly impossible this is, considering the great number of intervenors allowed under these relaxed rules, the endless fights concerning what is cumulative and what is irrelevant, the countless objections and the requirement of service of all proposed findings. Do these well-known facts not argue for a touch of realism? If we are to be forever belaboring the agencies for their vast, expensive, cumbersome procedures, must we not give them some discretion?24

21 309 U.S. 470 (1940).
23 Id. at 176 n.1, 265 F.2d at 368 n.1.
24 In Public Serv. Comm’n v. FPC, 295 F.2d 140 (D.C. Cir. 1961), the court refused to permit the Commission to read its regulation covering intervention by state commissions as entitling it to refuse intervention where, in the view of the Commission, the state body had had “interest.” Though the statute provides that the FPC “may admit as a party any interested state,” the FPC regulation does not in terms require an interest and provides for automatic intervention. “We read this language as meaning what it says.” Id. at 143. To the Commission’s argument that it may “waive” its rules, the court replied that the Commission did not purport to “waive” but rather to apply its rule, and in so doing
I have recently urged that, at the most, the standing of a person without a "right" should be a matter of discretion and that in the exercise of that discretion the character of the substantive issue is relevant. But at this point in the analysis of Philco I, I shall treat the matter precisely as did agency and court: on the premise that if Philco was a "party in interest" it was entitled to protest regardless of the relation of its injury to the merits. Furthermore, both agency and court proceeded on the assumption that the test of standing was the same whether at the administrative or appellate level. It was decided in Sanders that a person is "aggrieved" for purposes of standing to appeal if the grant of the challenged license "may work economic injury to him" or is "likely" to cause him financial injury. Applying this test the Commission decided that Philco was not "a party in interest." The Commission asserted that it was incumbent upon a protestant "to establish that the grant ... is reasonably likely to result in some injury of a direct, tangible and substantial nature." Its own earlier decision required "a clear showing of causal relationship between the action being protested and the alleged economic injury." It quoted in support the words of the court of appeals in National Broadcasting Co. v. FCC that Sanders "presumably" intended that the financial injury be something more than "nominal or highly speculative," that it be "probable injury of a substantial character."

The court of appeals reversed. Drawing the line, admitted Judge Fahy for the majority, was "difficult."

Commission and courts are called upon to exercise a judgment upon the facts of cases as they arise. On the one hand sufficient breadth must be given to "party in interest" to permit those seriously affected to participate in the administrative

misread it. Judge Danaher, concurring, believed that the PSC did have an interest: it was complaining that if the Commission approved the prices in question on gas from fields in Texas for resale in Chicago, it would affect prices for gas from those fields for resale in New York. This view of "interest" tends to the conclusion that all the state public service commissions in gas consuming states are entitled to intervene in every proceeding which may affect the price of gas!

26 See id. at 277.
27 309 U.S. at 476-77.
28 15 P & F Radio Reg. at 975.
29 Id. at 972.
32 Ibid.
and judicial proceedings, without on the other hand placing the proceedings beyond control of the public tribunals. 34

But there is not the glimmer of a suggestion that in making this "difficult" judgment the Commission's estimate was given any weight.

Nor does the court, in my opinion, adequately meet the Commission's decision that the alleged injury is "speculative and . . . indirect." It begins by setting out Philco's allegations (as summarized by the Commission) of the misconduct which gave rise to its injury:

The protestant claims that such "preferential publicity" is exemplified by (1) NBC owned stations inserting the phrase "a service of RCA" during station identification breaks; (2) "news" stories broadcast by NBC stations relate to RCA activities "which other news agencies do not find justified by their news value"; (3) broadcasts of NBC color television programs "again and again" advise the public that RCA is "the pioneer and developer of compatible color"; (4) the "Today" program, a NBC Network presentation, emphasizes its origination, when that is a fact, in "RCA Exhibition Hall" where RCA products are allegedly on display; and (5) NBC stations incorporate "RCA" and "RC" into their call letters, thereby giving RCA an "amount and type of advertising which Philco (and other competing manufacturers) cannot hope to obtain by however a large expenditure." 35

The Court then says that it is further alleged that NBC has "been actually using the facilities injuriously to Philco in the manner described." 36 But on the face of it, this collection of random instances without any suggestion as to their relation to the advertising budgets of either RCA or NBC, without giving a clue even of the nature of their impact on Philco's merchandising beyond the statement that they are "injurious," gives no promise of proof of substantial or serious injury. The claim of injury would seem to be precisely what is meant by "highly speculative." It may well be that injuries of this type are inherently "highly speculative." Were Philco pressing a claim before a tribunal primarily entrusted with the enforcement of a legally protected interest and seeking, let us suppose, an injunction against the continuance of a practice, the law should not impose an impossible burden of specificity. But here Philco appears as one who is only peripherally concerned with the matter at hand; it is permitted to force the agency's machinery into action in "the public interest" (as Sanders would have it), and if this right to pursue its own interest under the guise of the public interest is to be conditioned by the requirement, as the opinion in Philco itself

34 Id. at 280-81, 257 F.2d at 658-59. (Emphasis added.)
35 Id. at 280, 257 F.2d at 658.
36 Ibid.
states, that it be "seriously" affected, surely there is no injustice in demanding that the requirement be met. It seems to me that the Commission's decision that the requirement has not been met is a reasonable one.

The chief reliance of the court is on two earlier decisions in which, says the court, "the likelihood of substantial injury . . . seems to us about as real," the implication being that since it was not very real in those cases, it need not be very real here. One of those cases was Reade v. Ewing, an appeal by a consumer against the decision of the Federal Security Agency whose function of setting food standards is precisely that of consumer protection. The other was the court's own decision in National Coal Ass'n v. FPC. In that case it was held that coal producers, coal-carrying railroads and coal-worker unions could seek review of an order certifying new natural gas supplies. The court there noted that Congress (as shown by the legislative history) wished the Commission, in determining whether to certify new gas, to consider the effect on competing fuels.

The likelihood of probable injury in those cases, we can agree, is "speculative" enough, but in making this "difficult" decision, in "drawing the line," it was surely relevant that the interest of the appellant was an interest which it was Congress' intention to protect. On the other hand, the claim made by Philco for protection against unfair competition is far removed from the Commission's central concern. Those cases (which, as the court implies, themselves strain the criterion of injury to the point of unreality) are authority for Philco only if one ignores the remaining factors bearing on the plaintiff's interest and the Commission's responsibility for exploring the aspects of the controversy which give rise to the plaintiff's interest. My criticism, indeed, adds nothing to the

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37 Id. at 281, 257 F.2d at 659.
38 205 F.2d 630 (2d Cir. 1953). This case follows the lead of the famous case of Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), vacated on other grounds, 320 U.S. 707 (1944), which established the proposition that a consumer was within the class of "persons aggrieved" by the actions of an agency, the function of which was consumer price protection.
40 Id. at 138, 191 F.2d at 465.
41 When NBC filed its petition for certiorari in which the FCC concurred, the Solicitor General submitted a memorandum supporting the court of appeals decision. This memorandum concludes as follows: "This is not . . . to say—and the Court of Appeals does not suggest—that an interest which is merely 'remote and insubstantial' . . . would suffice to confer standing. The question of standing thus depends, in final analysis, upon an evaluation
dissent of Judge Madden. "In none of the cases cited by the Court," he says, "was the alleged economic injury unrelated to the subject which was regulated by the public tribunal." The decision of the court was said to represent "an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC), which is completely unjustified." And he then adds by way of a prophecy, which if true is highly pertinent: "I think that there is not even a possibility that the further proceedings which the decision imposes upon the FCC will result in anything useful." There is good reason to believe that his prophecy will be proved correct. To test it we must address ourselves to *Philco II*.42

of the particular facts." I would not disagree with this, and it may well be that if this is the test to be applied by the Supreme Court to the lower court's decision, there is no such error as would justify certiorari. But in my opinion this same standard is applicable to the review of the Commission's decision by the court of appeals. When the Solicitor General says, "The view of the United States is that the decision of the Court of Appeals is correct," he has failed, in my opinion, to apply his criterion to the Commission's action. Its "evaluation of the particular facts" seems well within the margin of discretion. I would further submit that the Department of Justice, which feels so deeply committed to its antitrust responsibility and which had brought a suit involving this transaction, was not a disinterested judge of the merits of the court's decision.


43 Id. at 281, 257 F.2d at 659.

44 Id. at 281, 257 F.2d at 660. A most striking instance of imposing upon an administrative agency a futile and remote task is the decision of the Court of Appeals for the District of Columbia Circuit in City of Pittsburgh v. FPC, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956). This was an application to discontinue a natural gas line. It appeared likely that the pipe line would then be put to the carriage of petroleum. Oil carrying barges asserted that they would be adversely affected, particularly since the cost of the pipe line having already been recovered, the pipe line could cut prices with the result that a monopoly of transportation would result. The court held that the barges were "aggrieved" and that the FPC must "consider" whether the proposed plan would "tend to produce monopolization of a petroleum products market." Id. at 126, 237 F.2d at 754. But is it not obvious (a) that the Commission is in no position to decide so completely hypothetical a question and that to do so intelligently would require an enormous expansion of the inquiry, (b) that the task is remote from the Commission's statutory concern and competence, and (c) that it would impose a far-ranging burden on an already overburdened Commission? The court brushed aside, as it did in *Philco*, the point that the Attorney General has the primary competence and responsibility. "Although the Commission has no power to enjoin conduct as illegal under the Sherman Act . . . it certainly has the right to consider a congressional expression of fundamental national policy . . . ." Ibid. It is only fair to say that there was another appellant which had a case justifying reversal. The FPC on remand dutifully "considered" the barge claim and reaffirmed its holding. *Texas E. Transmission Corp.*, 17 F.P.C. 843 (1957).
III
Philco II

It being established that Philco was a "party in interest" and thus had standing as a protestant under section 309(c), the Commission was now required to determine whether there would be any grounds for setting aside the grant even if the facts alleged were to be proved. These allegations were: (1) that NBC stations afford RCA a vast amount of preferential publicity and free advertisement; (2) that NBC by contract with its affiliates embodying the device of "option time" had made program sponsorship "prohibitively expensive" and had foreclosed the use of certain broadcasting time to Philco on any nonnetwork basis other than spot advertising; (3) that RCA "dominates" the nontelephonic communications industry by reason of its varied and extensive holdings in such areas as electronic manufacture and distribution, broadcasting, show business and news gathering; and (4) that a number of civil actions alleging illegal practices on the part of RCA and NBC are "outstanding." The list of alleged wrongdoings contained in these cases is long and impressive, including "charges that RCA and/or NBC conspired to monopolize radio and television research, patents and patent licensing; production, distribution and use of musical compositions through Broadcast Music, Inc.; and exhibition of a television program 'Fashion Show'." The Commission acknowledged that a substantiation of even a minimum of these charges would preclude both NBC and RCA from an award of the grant.

There were then four alleged areas of misconduct which, if true, tended to show that NBC was unfit to be a broadcasting licensee. It has been Commission doctrine for many years that certain kinds of misconduct are relevant to a licensee's qualification. This doctrine was formally enunciated by the Commission in 1951 in its Report on Uniform Policy as to Violation by Applicants of Laws of the United States. The Commission there stated, inter alia, that violation of the antitrust laws would be relevant and that the Commission could evaluate independently the questioned conduct even though it was the subject of a litigation not yet concluded. There have been relatively few applications of this policy. Indeed, refusal to renew for any reason has been rare and has come to be regarded as a "forfeiture."

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49 It may be thought questionable to speak in terms of forfeiture. The statute limits
In two early cases the Federal Radio Commission refused to renew licenses on the ground of abuse of the license. In one, a minister had consistently used the station to blackmail, to publish libelous material, and to attack Catholics and Jews. In the other, the licensee, Dr. Brinkley, had used the license to diagnose publicly over the air and prescribe his nostrums. In 1945 the Commission refused to renew where the licensee had over the years made false statements in its applications, stating that "in the performance of our statutory duties . . . we are forced to rely to a great extent upon the representations made in applications . . . ."

The most famous and nearly relevant case is Mansfield Journal Co. v. FCC. This concerned an application for a new license; thus it did not involve the loss of investment consequent on a refusal to renew. The facts, furthermore, lay within a narrow compass and were substantially undisputed and highly relevant to the licensing function. The Mansfield Journal was the sole newspaper in Mansfield, Ohio. The only other medium of mass communication was radio station WMAN. The Journal used its position to coerce advertisers to enter into exclusive advertising agreements with it and to refrain from using WMAN. The Commission

the license to three years. It also provides that the license shall contain a statement that the license "shall not vest in the licensee any right to operate the station . . . beyond the term thereof . . . ." Communications Act of 1934, § 309(h), added by 74 Stat. 892 (1960), 47 U.S.C. § 309(h) (Supp. II, 1959-1960). Nevertheless, licenses are bought and sold for vast sums, and the Commission appears—at least in the last decade—to have felt that a refusal to renew is for the most part too heavy a sanction to police the licensee. The court of appeals itself in 1947 in Churchill Tabernacle v. FCC, 81 U.S. App. D.C. 411, 160 F.2d 244 (1947), in reversing a refusal to renew as excessively harsh, spoke of the renewal interest as a "valuable right" that "should not be destroyed except for the most compelling reasons." Id. at 414, 160 F.2d at 247. Note also the Supreme Court's remarks in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). "Legal theory is one thing. But the practicalities are different." Id. at 332. In Thomas S. Lee Enterprise, Inc., 14 F.C.C. 993 (1950), the license of a regional network which had flagrantly violated the network regulations was renewed because refusal to renew would have been too drastic a sanction; it would, noted the Commission, not only terminate the license in question, but all other licenses of the same licensee. In Hearst Radio, Inc., 5 P & F Radio Reg. 994 (1951), the incumbent's license was renewed in a comparative hearing where its programming had been inadequate and had improved only after the threat of comparative hearing. There were dissents in both cases.

51 KFKB v. FRC, 60 App. D.C. 79, 47 F.2d 670 (1931).
concluded that the *Journal* sought a monopoly; it rejected the application and ordered a later rival application to be placed in its pending file. The only other significant expression of the policy cited by Philco was in a comparative hearing case for a new license where an applicant, implicated in restrictive advertising practices, though otherwise qualified, was rejected in favor of a rival applicant.\(^{54}\)

Now to an analysis of Philco's protest. The allegations in support of its general charge that "RCA dominates the non-telephonic communication industry"\(^{55}\) combine three elements: (a) a catalogue of RCA's electronic holdings; (b) NBC's six AM, four FM and seven TV stations;\(^{56}\) and (c) NBC's use of the stations for free advertising of RCA's electronics.\(^{57}\) The weakness of these allegations is that the licenses rest on a long series of actions taken by the Commission itself. Insofar as the claim of illegality rests on multiple ownership by a network, the Commission's actions were the very consequence of the determination embodied in its network regulation to permit networks to own a limited number of stations. These regulations, to be sure, are not beyond question, and the Commission is now reconsidering them in a rulemaking proceeding. But it is clear that the Commission cannot forfeit licenses which it has itself granted in pursuance of a considered policy. It is true, however, that nothing in the network regulation sanctions or bears upon the ownership of broadcast facilities by a powerful—no doubt the most powerful—manufacturer and distributor of electronics. The setup may violate the antitrust laws. But the Commission has, of course, known of this situation in granting and renewing over the years NBC's many licenses. It is unthinkable that it would now forfeit on this ground this vast investment. If there is a violation of the Sherman Act, the obvious remedy is such a proceeding as that brought by the Antitrust Division against the acquisition of the Philadelphia station, which could result in divestiture but not in forfeiture.

The same analysis is more or less applicable to the claim that the NBC stations have been used by RCA for free advertising. For the most part this has been the nearly inevitable consequence of RCA's ownership of the stations. As Judge Madden said in his dissent:

> The problem is really the broad one of whether a radio or television network


\(^{55}\) 15 P & F Radio Reg. at 968.

\(^{56}\) WKNB-AM and WNBC-TV are owned through NBC ownership of New Britain Broadcasting Company. Id. at 966 n.3.

\(^{57}\) Id. at 968.
should be permitted to be owned by the owner of any other business. . . . So
long as such ownership is permitted, it would seem absurd to conclude that the
owner could not advertise over his own facilities, though his competitors could
do so. The solution of this broad problem of station or network ownership is
not to be found in revoking, or refusing to renew the license of NBC’s Phi
adelphia station. It must be accomplished by generally applicable legislation
or by regulation . . . .

Judge Madden is saying that the conduct or consequence here complained
of is the result of the Commission’s own action, not only in connection
with NBC’s seventeen licenses, but in hundreds of others, and it would be
not only appropriate, but unjust to forfeit NBC’s Philadelphia station
or, as logic would require, all of its seventeen stations. If it be that NBC
has gone beyond what is inherent in the situation, the Commission has it
in its power to order it to cease and desist.

There remains the allegation that there are eleven suits “alleging
illegal practices on the part of RCA and NBC . . . now outstanding”
and that the substantiation of even the barest minimum of these charges
would require “the conclusion . . . . that neither RCA nor NBC could
possibly be awarded a grant . . . .” The Commission found that these
allegations did not meet the requirement of section 309(c) that a protest
“shall specify with particularity the facts relied on.” Surely the Commis
sion is correct in saying that the mere fact that an applicant has been
made a defendant in a series of lawsuits does not “specify with particu
larity” an issue upon which the Commission is required by the statute
to act. The reference to eleven lawsuits with a short description of the
allegations made therein is not an allegation by the protestant itself ex
cept as to the one suit brought by it. What issue, it may be asked, is
offered for trial by an allegation that “proof of the barest minimum of
charges” filed in eleven different suits will prove that the applicant’s
license should not be renewed? Can such an allegation be thought “to
specify with particularity”? Judge Edgerton answers that we are not to
measure “the requirement of Section 309(c) by the technicalities of
pleading formerly applicable in civil litigation. What is required is merely
an articulated statement . . . .” And he then goes on to decide that
what he takes to have been “articulated” by Philco would suffice to

60 110 U.S. App. D.C. at 390, 293 F.2d at 867. Earlier decisions reversing Commissi
on rulings that the pleading was too general are Federal Broadcasting Sys. v. FCC, 97 U.S. App.
D.C. 293, 231 F.2d 246 (1956), and Federal Broadcasting Sys. v. FCC, 96 U.S. App. D.C. 260,
225 F.2d 860 (1955).
block renewal. Even as a matter of law Judge Edgerton's conclusions might be thought "wrong"; but though they may not be "wrong," they are not so clearly "right" as to entitle the court to substitute its judgment for the Commission's.

I address myself first to the substantive framework pursuant to which the procedural judgments must be made. It is Judge Edgerton's view that there are "particular" allegations of misconduct—the free advertising and the network affiliation contracts—which may warrant refusal to renew. (The court concedes that Philco's over-all charge of monopoly "is phrased more generally.") Now let us keep in mind (though no one—judge, Commission, NBC or Philco—has deemed it appropriate to note the point) that logic would seem to compel the conclusion that if NBC is "unfit" to operate WRCV-TV, it is unfit to operate its sixteen other stations. Would the decisions cited by the court support the forfeiture of these seventeen stations—possibly worth some $100,000,000—on the basis of the aforesaid free advertising and chain affiliation contracts? These are practices, some of which have been specifically approved by the FCC and most of which, as Judge Madden says, are inherent in RCA's ownership of NBC.61 If forfeiture of all seventeen seems to go "a little too far," on what basis can WRCV-TV be chosen for the sacrifice?

Judge Edgerton makes much of Mansfield Journal Co. v. FCC,62 in which the applicant for a license, the only local newspaper, had refused in the past to sell space to advertisers who used the local radio station. Judge Edgerton, accepting without question Philco's characterization of the free advertising as "unfair competition," makes the questionable assertion that it is "similar" to the conduct in Mansfield. Even if his characterization is conceded, it should be noted that the case involved only the refusal of an initial license: the Commission has never, so far as I know, refused to renew for violation of the antitrust laws.63 The point

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63 In Paramount Pictures, Inc., 8 P & F Radio Reg. 135 (1952), petition for reconsideration denied sub nom. ABC-Paramount Merger Case, 8 P & F Radio Reg. 541 (1953), a case involving permission to assign licenses and to renew the licenses to be assigned, the Commission did consider alleged violations of the antitrust laws by the assignors and assignees. The majority, however, renewed the licenses and approved their assignment. In Westinghouse Broadcasting Co., 22 P & F Radio Reg. 1023 (1962), the Commission, after holding up renewal of the licensee's 14 stations (AM, FM, TV), renewed 13 of them without hearing. (The remaining renewal was held up on an unrelated issue.) Westinghouse's parent, Westinghouse Electric, had pleaded guilty to willful price fixing, bid rigging and market division.
may be made clearer by contrasting the application for renewal with NBC's application to approve its initial acquisition of the station. The allegations there were to the effect that the very transaction to be approved was not only a violation of the antitrust law, but a violation which offended the Commission's own regulatory policies. As in Mansfield the claim was being made at the time of acquisition and involved no forfeiture of an investment made in reliance on the Commission's own approval. It was a case in which both the refusal to probe deeply and the ultimate exercise of judgment seemed shockingly to disregard the Commission's central and persistently avowed responsibility. It would have justified judicial intervention on procedural and on substantive grounds. The Commission's decision in the earlier matter may perhaps explain the court's rulings in the later Philco cases, but I doubt that it justifies them. The Commission's action in the earlier case did not, as the Supreme Court later decided, foreclose action against NBC under the Sherman Act, but it did, in my opinion, foreclose Commission refusal to renew on the ground of NBC's unfitness for this and/or the other sixteen licenses.

But let us now continue the analysis of Philco II on the theory that the alleged misconduct might justify refusal. Why then is the Commission's exercise of discretion set aside? The court's conclusion is that

The Commission's majority awarded the standard three-year renewal. Id. at 1030. Commissioners Minow and Ford would renew for one year, id. at 1031, 1033, and Bartley would have held a hearing to determine who had ultimate responsibility for the broadcasting operation. Id. at 1033. The majority conceded that the choice was difficult, but the crime which was "a serious reflection" on the applicant's character was more than balanced by "excellent service of long duration." Id. at 1029. Furthermore, the crime was not directly related to broadcasting, and top management, whether or not cognizant of the crime, had adopted a contrite attitude. The degree of independence of Broadcasting's management seemed to cut both ways: if, said Bartley, the parent company is in control, the antitrust violation is of "serious import"; if not, questions are raised as to whether licensee responsibility is properly fixed. Id. at 1033.

64 In Paramount Pictures, Inc., supra note 63, at 139, the Commission specifically held that it should investigate alleged antitrust violations.


66 Contra, Note, Broadcast Licensee's Past Conduct as a Determinant of the Public Interest, 23 U. Pitt. L. Rev. 157 (1961), which takes the position not only that "the Commission's refusal to recognize these charges is incomprehensible," id. at 165, but "should NBC emerge victorious in spite of such substantiation, the statutory coupling of broadcasting with the public interest must necessarily be characterized as illusory." Id. at 171.

67 It may be argued that the Commission in Philco II did not purport to be exercising its substantive discretion and that consequently the court in Philco II was justified in reversing for the failure adequately to explain why its Policy as to Violations of Laws of the United States was inapplicable. It is quite true that the Commission's opinion is not as
there were well-pleaded issues requiring trial. But as to the issues which the court singles out as well-pleaded—the advertising practices and the affiliation contracts—there was no factual dispute. The matter was already ripe for the Commission’s judgment. There remain the allegations of monopoly which, as the court admitted, were “phrased more generally.” The Commission found a lack of particularity in those allegations. This, says the court, is to measure particularity “by the technicalities of pleading formerly applicable in civil litigation.” I have set out enough to enable the reader to judge for himself whether the Commission’s action reflects the spirit of Baron Parke. But in any case, it is not the court but the Commission which is administering this law. Whether the allegations present a matter upon which the Commission should expend its resources is par excellence a matter for the Commission, subject to review only for error of law or a grossly mistaken judgment.

The requisite degree of specificity is not an abstract question of grammar and logic. It is a function of the total situation. A negligence plaintiff who has pleaded his case rather generally and against whom the statute of limitations has otherwise run should not be dismissed on the “technicalities of pleading formerly applicable in civil litigation.” To dismiss his action results in the complete forfeiture of his claim. It is a one-shot matter. But the position of a person protesting the renewal of a license is different. The very requirement in the statute “to specify with particularity” arose out of a congressional finding that persons with an inadequate interest and improper motives were holding up the grant

outspoken and clear as it should be. It never quite faces up to the fact that it is exercising substantive discretion. Its conclusions are summarized as follows:

Upon detailed consideration, then, the Protest is found to be legally insufficient to warrant the hearing requested. As shown hereinabove, this is so for various reasons: many arguments and allegations urged by Philco in its Briefs contain matters dehors the Protest which may not be considered; certain matters raised by the Protest—pending litigation and Congressional inquiry—are either not alleged at all or without sufficient particularity; certain matters have not been supported by facts stated with sufficient particularity under Section 309(c) of the Act; and still other matters raised are not new to this Commission and occurred so long ago that they do not warrant consideration. It is concluded, therefore, that even if the well-pleaded facts alleged in the Protest were proven, grounds have not been presented for setting aside our conditional grant herein.

20 P & F Radio Reg. at 419. Thus it never states in so many words that if what is alleged amounts to violations of the antitrust laws, it will nevertheless renew in the exercise of its discretion. However, it comes close to so doing in its statement: “still other matters raised are not new to this Commission and occurred so long ago that they do not warrant consideration.” I shall try to make clear that, taken as an exercise of discretion, its action was warranted.

68 110 U.S. App. D.C. at 390, 293 F.2d at 867.
of licenses and putting an unnecessary burden on the Commission.\textsuperscript{69} The interest of this protestant was both peripheral and speculative. If it be replied that "the public interest" is involved, it comes back once more to the point that it is the Commission and not the court which has responsibility for "the public interest."

For the exercise of this responsibility, it has a variety of means. A decision not to act now or in a particular manner is thus not final. The main concern of the FCC is effective broadcasting, whereas the prime question raised by Philco's pleading involved the application of the antitrust laws to the electronics industry. The very number and variety of the lawsuits in which RCA is involved, the very range of the issues spread across the pages of Philco's pleading, open up a whole world of complicated, baffling issues. The court criticizes the Commission's determination to await the outcome of the lawsuits. "Determination of the public interest cannot be postponed pending the outcome of lawsuits.\textsuperscript{70} But the lawsuits are themselves a device for determinations of the public interest, and no way has yet been found to avoid the "postponement" inevitably involved in the requirement for trial. Is the FCC to try tax evasions which no less than violations of the antitrust laws can be evidence of bad character? Does the division of labor contradict the concept of "public interest"?\textsuperscript{71} The very generality of the standard of public interest is an argument for defining it in terms of effective administration. As I turn the Philco decisions about in my mind, I find disturbing the suggestions that any trial is the reason for trying anything else that can be abstractly considered as relevant to the "public interest," and that a sanction more or less tailored to meet a stated problem is freely available to solve quite different ones.

Some years ago I attacked the FCC's performance, particularly in

\textsuperscript{69} It is true, however, that the congressional concern manifested in the amendments leading to the relevant version of \$ 309(c) was not so much with the clog on the Commission's time as on the delay of new licenses. The protest procedure became a device used by those already in business to delay the certification of new competitors. The congressional committee, noting the very broad judicial interpretation of "party in interest," said that under its amendments the Commission could curb abuse of the protest procedure by disposing of protests on a demurrer basis without a hearing. S. Rep. No. 1231, 84th Cong., 1st Sess. 3 (1955). The more recent amendments put an even heavier pleading burden on a protestant. The allegations must be supported by affidavits of persons with personal knowledge. "The provisions of . . . \$ 309]," said the Committee, "have been broadly interpreted by the courts and have proved to be a most effective device for delaying the disposition of Commission business." H.R. Rep. No. 1800, 86th Cong., 2d Sess. 9 (1960).

\textsuperscript{70} 110 U.S. App. D.C. at 391, 293 F.2d at 868.

comparative hearing cases.\textsuperscript{72} The FCC has been since then under continuous attack. It has been charged that the Commission has shown an unjustifiable inconsistency in the application of its avowed policies. Some imply that deviations from policies have been motivated by political considerations; others believe that the Commission no longer is committed to those policies but is unwilling to accept the responsibility for formally disavowing them. The Commission's performance in the earlier stage of this situation is disturbing. The judges of the District of Columbia are in as strong a position as judges can be to assess the Commission's performance. I feel sure that some of them mistrust the Commission.\textsuperscript{73} In the beginning of this article I conceded that the judges should allow themselves some leeway in applying concepts of judicial deference. But this is an exception to the general rule of deference, and that rule should operate in procedural as in substantive areas.

Finally, what of the prophecy in Judge Madden's dissent that "there is not even a possibility that the further proceedings which the decision imposes upon the FCC will result in anything useful"?\textsuperscript{74} Judge Madden implies—and I think my analysis supports him—that the almost inevitable outcome of this proceeding, insofar as it lies in the FCC's hands, is a renewal of the license. Now this does not mean that the remand will necessarily have been without usefulness. If, presumptively, the added expenditure of time and energy to realize a foregone conclusion puts an unnecessary burden on the agency, it does not follow that it is always unjustified. The court, I have argued, may in an "extreme" case manifest its displeasure; this may serve as a useful warning in the future if not in the case at hand. I doubt that this was such a case, but others may think it was.

There has, as it happens, been a further development which may give Commission and court a graceful "out." The United States and NBC have settled the antitrust suit: NBC has agreed to sell WRCV-TV within a given time. This can be taken as a decision on the antitrust aspects of the matter by the branch of the Government most immediately

\textsuperscript{73} In Beachview Broadcasting Corp. v. FCC, 104 U.S. App. D.C. 377, 262 F.2d 688, petition for rehearing denied, 106 U.S. App. D.C. 341, 273 F.2d 76 (1958), cert. denied, 359 U.S. 936 (1959), Judge Bazelon, dissenting to the refusal to grant a rehearing, said, "I vote to grant the petition for rehearing en banc in order to reconsider the court's recent rulings which appear to render us powerless to restrain the Commission from employing shifting emphasis of comparative criteria obliterating any predictable power of decision." 106 U.S. App. D.C. at 342, 273 F.2d at 77.
\textsuperscript{74} 103 U.S. App. D.C. at 281, 257 F.2d at 659.
responsible. NBC will be giving up "the fruits" of its allegedly illegal action by the device of divestiture, a device which, it may be, does not lie within the power of the FCC. Insofar as there is in question NBC's fitness to operate WRCV-TV, it may help a little that NBC is to have a limited tenure of operation. This, of course, would not meet the point—if the claim of unfitness is seriously intended—that all of its other sixteen licenses should be lost. But I have already given my reasons for concluding that no one is that sincerely committed to the avowed logic of the game which is here being played.
JUDICIAL REVIEW OF ADMINISTRATIVE ACTION:
MIXED QUESTIONS OF LAW AND FACT

BERNARD SCHWARTZ*

"... expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

—William O. Douglas

An article on judicial review of administrative agencies can usefully start by referring to a recent federal decision which contains an unusual attempt at detailed analysis of what is perhaps the most difficult problem in the field—that of the proper scope of review of mixed questions of law and fact. At issue in NLRB v. Marcus Trucking Co.1 was an aspect of the National Labor Relations Board's so-called "contract-bar" rule. The Board found that respondent employer had recognized another union during the period of "contract-bar" protection—i.e., during a two-year period after it had made a valid collective bargaining agreement with a Board-certified union. The indispensable premise was the finding that respondent became bound to the contract with the first union. Was such finding one of law or fact?

The court ruled that it was one of "fact" which may not be disturbed if it is based on inferences within the range of reason, though the court would not have drawn them itself. The opinion noted that the controversy whether application of established legal standards to raw evidentiary material is a question of law or fact is an old one. It conceded that, analytically, the making of a contract is a question of law rather than fact, and that that is the proper construction of "fact" on review of a lower court.2 But, it asserted, the issue before it was whether Congress in fact adopted such a restrictive notion in delineating the respective functions of administrative agencies and courts. The court categorized the cases presenting the issue of "question of fact" vs. "question of law" as

(a) Cases . . . where the chief problem is the propriety of an administrative conclusion that raw facts, undisputed or within the agency's power to find, fall under a statutory term as to whose meaning there is little to dispute;

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1 286 F.2d 583 (2d Cir. 1961).
2 Id. at 590.
(b) Cases where there is dispute both as to the propriety of the inferences drawn from the raw facts and as to the meaning of the statutory term . . .

(c) Cases where the only principal dispute relates to the meaning of the statutory term . . .

After classifying cases in the first group as presenting questions of fact and those in the last as questions of law, the court distinguished its case from the first group on the ground that the pertinent legal terms—"contract," "authority" and "ratification"—were not contained in the relevant statute. It pointed out that this would be a significant difference if the meaning of the terms were in doubt, thus presenting a question of law. "But if the application of undisputed legal terms in the statute to raw facts is a 'question of fact' . . . it is hard to find any basis for not reading these same words as covering the application of equally undisputed non-statutory legal standards." Hence, the disputed finding was subject only to limited review as one of "fact."

It is so rare for courts to attempt to think through such problems on the scope of review that it may seem ungrateful to indicate doubt with regard to the court's reasoning. On the other hand, it may be questioned whether erroneous analysis is really more useful to the law than judicial silence. Even in our system, judicial power does not extend to changing realities by the use of labels. With a noted British judge, one may protest against "the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact." Calling an agency finding on a mixed question one of "fact" merely enables the scope of review to be narrowed without impairing the theoretical symmetry of a system in which narrow review is supposed to be the rule only with regard to factual issues.

To understand what was involved in the case just discussed, some background on the general theory of judicial review in our administrative law is necessary. The scope of review of Anglo-American administrative action has been dominated by the distinction between "law" and "fact" —a distinction that is fundamental throughout our law and that has, indeed, been the keystone upon which our whole system of appellate

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3 Id. at 590-91.
5 285 F.2d at 591.
review has been built. As an English administrative lawyer put it, "it is generally agreed that the jurisdiction of superior Courts should be invoked only on questions of law . . . . To re-open all disputed issues of fact might lead to endless litigation, with no very satisfactory conclusion in the end." Applied to the field of administrative law, this separation of law and fact sounds attractively simple. "The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene." Only questions of law would be decided judicially.

From an historical point of view, the use of the law-fact distinction in the field of review of administrative action was a wholly natural development. When Anglo-American courts came to be confronted with cases involving challenges to the legality of agency acts, they had at their disposition the fully developed law of appellate review of lower courts as well as that governing the respective roles of judge and jury—both of which were grounded entirely on this distinction. In evolving the law of agency review, it was not surprising that our judges proceeded, so far as possible, by analogy with the principles that had been constructed so meticulously by their predecessors in the above-mentioned fields, particularly that of appellate court review. In their origins, indeed, cases involving review of agency action by the Court of King’s Bench appear to have been treated exactly like cases involving review of inferior courts by that tribunal. The prerogative writs themselves, which became the basic nonstatutory method of securing review of administrative acts in the common law world, were originally available only to control inferior courts. When those same writs came to be used as a means of controlling administrative agencies, it was natural for them to be governed by the rules that applied when they were issued against lower courts—including that limiting the scrutiny of the reviewing court to questions of law.

The law-fact distinction, whose penetration into the law of review of administrative action can thus be explained historically, may also be said to have a significant practical basis in the field of administrative law. A theory of review grounded upon the distinction rests upon a division of labor between judge and administrator, giving full play to the particular competence of each. The judge, both by training and tradition, is

7 Allen, Law and Orders 159 (1945).
8 Carr, Concerning English Administrative Law 108 (1941).
best equipped to deal with questions of law.\[11\] In the area of factfinding, however, the advantages of *expertise* are with the administrator.

[T]he findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the courts in a similar case.\[12\]

This division of labor is not, however, inexorably carried out, for constitutional principles require some judicial review upon fact as well as law. "An approach to the problem of judicial review cannot neglect the fact that its essence springs from the Anglo-American conception of the 'supremacy of law' or 'rule of law,' as it is variously called."\[13\] That concept calls for a judicial examination of the administrative determination to see that it has an evidentiary basis. An administrative finding of fact that is not supported by evidence cannot be said to have been within the jurisdiction conferred upon the agency. Or, to put it another way, "the question whether the administrative finding of fact rests on substantial evidence . . . is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized."\[14\]

Nor should it be assumed that judicial inquiry into the evidentiary basis of administrative factfinding is inconsistent with the law-fact distinction upon which, as we have seen, the scope of review of agency action has been grounded. Since the primary purpose of judicial review in our system is to keep administrative agencies within the bounds of the powers delegated to them, the courts can intervene when the agency finding of fact has no evidentiary basis and is thus ultra vires. That this is, in fact, the approach of our courts is shown by *Florida E. Coast Ry. v. United States*\[15\]. There the Interstate Commerce Commission had considered in the same proceeding the question of reducing the rates on three railroads running through the State of Florida. Although the evidence showed reduced costs on only two of the lines, the Commission had included all three in its rate-reducing order. The Court set aside the order in so far as it affected the third line, saying that there was no evidence justifying that part of the order, for testimony as to the


\[13\] Landis, op. cit. supra note 11, at 123.


\[15\] 234 U.S. 167 (1914), reversing 200 Fed. 797 (Commerce Ct. 1912).
condition of traffic on certain lines did not necessarily tend to establish similar conditions on another railroad in regard to which no testimony was given.

Though the reviewing court must reexamine agency factfinding, this does not mean that such findings are to be handled like findings of law, for there is an essential difference in the treatment of each. If a question of law is at issue, the reviewing court must determine it upon its own independent judgment; where the challenged finding is one of fact, the court cannot substitute its judgment for that of the administrator. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body";16 it is not concerned with the weight of the evidence.17

It is interesting to note that, although the law of review of administrative agencies developed from that governing appellate review of inferior courts, there is little doubt but that the scope of review of agency findings of fact became narrower than that of similar findings by a trial judge. The factfinding of an agency came to be treated, for purposes of the scope of review, substantially like a special jury verdict, and under the law developed by the federal courts, "evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding."18 As Justice Reed put it, "since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.'" 19 Where an administrative agency is involved, on the other hand, its findings of fact must be upheld if they are supported by only substantial evidence—all of which leads Judge Frank to declare:

A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness.20

To say that judicial review of administrative action depends upon the distinction between "law" and "fact" does not, however, by itself dispose

18 Orvis v. Higgins, 180 F.2d 537, 540 (2d Cir. 1950). (Footnote omitted.)
20 Orvis v. Higgins, 180 F.2d 537, 540 n.7 (2d Cir. 1950).
of the matter, for the distinction between "law" and "fact" itself is not nearly so well defined as is often supposed. The extent of review depends upon which side of the law-fact dividing line the challenged administrative finding is seen to fall. Often there will be great difficulty in concrete cases in making this determination. The distinction, Mr. Justice Frankfurter has asserted, "is often not an illuminating test and is never self-executing." The difficulty in arriving at the dividing line has led to terming a large number of questions as "mixed questions of law and fact." As Mr. Justice Jackson stated it:

Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing "questions of law" from "questions of fact." This is the test Congress has directed, but its difficulties in practice are well known and have been the subject of frequent comment. Its difficulty is reflected in our labeling some questions as "mixed questions of law and fact" and in a great number of opinions distinguishing "ultimate facts" from evidentiary facts.

In American administrative law, the problem of the so-called mixed questions has arisen most frequently in recent years in connection with the application of statutory language to particular factual situations. The extent to which the courts review the application of legal terms or concepts to the facts is, indeed, now the heart of the problem of scope of review. "The difficulty is," as an English treatise points out, "most acute when statutes include words of variable meaning, for example 'producer' or 'employee.' If a statute gives a right of appeal on law and a party wishes to challenge the administrative holding that he is a 'producer,' is that an appealable point of law?"

In our system the answer must now be a negative one. Such was the doctrine established by Gray v. Powell. The administrative finding at issue there was similar to that mentioned in the just-cited quotation, namely, that the party seeking review was not a "producer." Petitioners were the receivers of a railway company and as such were the holders of coal leases on certain lands from which they were having coal mined

23 Davis, Administrative Law § 30.01 (1959).
25 314 U.S. 402 (1941), reversing on rehearing 114 F.2d 752 (4th Cir. 1940). Reversed was an order of Director of the Bituminous Coal Division of the Department of the Interior denying petitioner's application for exemption from the requirements of the Bituminous Coal Act. "Petitioners" as hereinafter used in reference to Gray v. Powell means the applicants for exemption.
by independent contractors. The coal thus mined was used by petitioners in the operation of the railway. The receivers, as producers of coal, filed an application under the relevant section of the Bituminous Coal Act 26 asking that they be held exempt from the price-fixing provisions of the act by reason of the exemption contained therein, to the effect that such provisions would not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him. The receivers asserted that they were producer-consumers within this provision and hence entitled to exemption. The agency concerned held that they were not "producers" consuming their own product and issued an order denying the claimed exemption. It was this order that the receiver sought to have reviewed.

The court of appeals reversed the agency order, declaring that "the decision of the Director is not supported by substantial evidence and is based upon error of law." 27 According to it, the petitioners clearly were "producers" of coal within the meaning of the statutory exemption. The court refused to accept the argument that for purposes of the act it made a difference whether the petitioners mined the coal themselves or had it mined by an independent contractor. 28 Since the agency construction of the relevant statutory provision was, in the opinion of the court, erroneous, its order could not stand.

That the Supreme Court reversed the decision of the court of appeals is less important than the reasons given for so doing. Review of the agency conclusion that petitioners were not producers is not to be based, as was the decision below, upon independent judicial determination of whether they came within the statutory term. Instead, said Justice Reed,

In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here... the function of review placed upon the courts... is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. 29

The Court indicated that, although Congress could itself have legislated specifically as to individual exemptions but instead delegated that job to the administering agency, the sweep of the statutory term "producer" must be left to that body. As in most cases, the application of that term

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27 114 F.2d 752, 757 (4th Cir. 1940).
28 Id. at 756.
29 314 U.S. at 411.
in a particular case is a matter of degree, and the Court explained that
the location of this particular respondent on the line between the opposite
poles of inclusion and exclusion was the task of an expert, that is, one
completely familiar with the industry concerned.30 Such, briefly stated,
was the decision of the Supreme Court in Gray v. Powell. Its importance
lies in the Court's statement with regard to the scope of review of the
administrative finding that the petitioners were not "producers" within
the exemption provision of the relevant statute.

Three dissenting Justices adopted a position similar to the court of
appeals, finding petitioners to be "producers" even though the actual
mining was carried on by independent contractors. Mr. Justice Roberts,
speaking for the dissenters, saw the decision as an abdication of the
function of review wherein the Court accepts the agency's construction
of a given term and then so molds the related provisions to conform
with the predetermined definition, completely reversing the normal
method of construing a statute.31 Where the agency construction of the
term "producer" is erroneous, Justice Roberts believed it the duty of the
reviewing court to reverse its order.

Both the decision of the court of appeals and the dissent in the Su-
preme Court indicate that the Director of the Bituminous Coal Division
may well have been wrong in giving to the term "producer" the meaning
which he had. In the opinion of the majority of the Supreme Court, how-
ever, it does not follow from this that his decision must necessarily be
reversed, for Gray v. Powell stands for the proposition that the test upon
review is not the rightness of the challenged administrative finding, but
only its reasonableness. This means that the reviewing court can reverse
only when it "can say that a set of circumstances deemed by the Com-
mision to bring them within the concept 'producer' is so unrelated to
the tasks entrusted by Congress to the Commission as in effect to deny
a sensible exercise of judgment."32 In such a case, it would seem that
the administrative finding is not only not right, but also not reasonable.
Where, on the contrary, the agency determination, though perhaps
erroneous in the view of the reviewing court, is a reasonable one, "it
is the Court's duty to leave the Commission's judgment undisturbed."33

It may be going too far to assert, as did Justice Roberts in his dissent,
that the majority of the Court adopted its construction of the term

30 Id. at 413.
31 Id. at 420.
32 Id. at 413.
33 Ibid.
“producer” “apparently only because the Director has adopted it,” but it is certainly true that, under the Court’s reasoning, it could not substitute its judgment for that of the Director on the proper construction of the statutory term. We have seen that the question of reasonableness is what the courts must ask themselves in reviewing administrative findings of fact. *Gray v. Powell* is important to American administrative law precisely because it makes the scope of review of mixed questions of law and fact similar to that applicable to findings of fact. In both cases, the reviewing court can determine only whether the challenged findings possess a rational basis.

The doctrine of *Gray v. Powell* has been applied in a number of recent cases and seems by now to be established in our administrative law. A more recent case well illustrating its effect is *O’Leary v. Brown-Pacific-Maxon.* The agency there had found as a “fact” that a death for which compensation was sought had arisen “out of and in the course of employment.” The Supreme Court agreed that the question whether the death so arose was to be treated as a question of fact. “Doing so,” said Mr. Justice Frankfurter, “only serves to illustrate once more the variety of ascertainment[s] covered by the blanket term ‘fact.’” Since only a question of fact was involved, the Court held that review was to be governed by the substantial evidence rule.

The Court’s labeling of the challenged finding as only one of “fact” can hardly obscure the fact that it actually possesses both legal and factual elements. Justice Frankfurter himself seems to recognize this when he concedes that the agency’s conclusion in issue does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts.

In actuality, the designation by the Court of the finding as one of “fact” is simply a means of ensuring that its review will be governed only by the narrow scope of review associated with the substantial evidence rule. It was the convenient styling of the finding as one of fact by the majority of the Court in *O’Leary* that led Mr. Justice Minton, dissenting there, to declare, “I suppose the way to avoid what we said today in *Universal

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34 Id. at 422.
36 Id. at 507.
37 Ibid.
38 Ibid.
Camera Corp. v. Labor Board . . . is to find facts where there are no facts, on the whole record or any piece of it." Although the administrative finding in this type of case may well be, in large part, one of fact—i.e., whether the death did arise out of and in the course of decedent’s employment depends upon the factual circumstances under which the death occurred—it also involves a question of statutory interpretation. To apply the statutory term “out of and in the course of employment” to the facts of specific cases is to give concrete meaning to that term.

It is recognized that it will be denied that a finding of the type under discussion is one of statutory interpretation in the strict sense. It has been urged that the interpretation and application of statutes are two different things. In this view, interpretation, properly so-called, includes only the determination of the proper sensible meaning of the statute. Application is the process of determining whether the facts of the particular case are within or without that meaning. Under this view, it will be said, findings of the type we are concerned with involve only the application, not the interpretation, of the relevant statute.

So to differentiate interpretation from application is to make a mere dialectic distinction; to find the meaning of a statutory term only in the abstract is to engage in vacuous academic exercises. Actually, the steps in the process of interpreting statutes may be divided into three parts: (1) finding or choosing the proper statute or statutes applicable; (2) interpreting the statute law in its technical sense; and (3) applying the meaning so found to the case at hand. A statutory term can have meaning only in its application to the particular facts of a particular case. As Mr. Justice Frankfurter has aptly pointed out, “meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication.” Indeed, as one authority well puts it, the final application to a specific case is the crux of the whole process of statutory interpretation.

If an administrative agency finds that an individual is an employee of

39 Id. at 510. The reference to Universal Camera was to the rule there laid down governing review of agency findings of fact under the substantial evidence rule. Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).
41 Id. at 1.
44 de Sloovere, supra note 40, at 20.
some other individual so as to make the regulatory law administered by it applicable to him, the agency appears clearly to be interpreting the statutory term "employee." Calling the agency's act mere application and not interpretation cannot change the fact that its action is giving specific meaning to the legislative language. And if questions of statutory interpretation are to be determined by the reviewing court upon its own independent judgment, it is difficult to see how the court can logically limit its review over findings claimed to misapply statutory terms.

If the appellate courts must make an independent examination of the meaning of every word in . . . legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case?  

It was this approach that led Mr. Justice Roberts to dissent from the decision of the Court in a case applying the doctrine of Gray v. Powell to review of an agency finding of the existence of an employment relationship: "The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question."  

That the doctrine of Gray v. Powell is one which, in reality, applies to review of agency interpretations of their enabling legislation has been admitted (in less guarded moments perhaps) by members of the highest Court themselves. Under Gray v. Powell, Justice Black has stated, "when administrators have interpreted broad statutory terms, such as here involved, we would recognize that it is our duty to accept this interpretation even though it was not 'the only reasonable one' or the one 'we would have reached had the question arisen in the first instance in judicial proceedings.'"

Gray v. Powell assimilates review of questions of statutory interpretation to review of questions of fact. This is a plain statement of its effect, no matter how courts or commentators may try to obscure its meaning. And it is because of its effect that Gray v. Powell is of such great consequence. It blurs the distinction between law and fact upon which the scope of review in our administrative law had been grounded. It drastically limits review of agency constructions of statute-law, which under the traditional theory of Anglo-American judicial review are

matters more legal than factual in nature and hence proper for court review. By conveniently labeling them matters of application, rather than interpretation, the courts have continued to pay lipservice to the form of the traditional theory. But the doctrine of Gray v. Powell tends to make the practical effectiveness of that theory a thing of the past in our administrative law.

We can now return to NLRB v. Marcus Trucking Co.,\textsuperscript{48} the recent federal case with which we began our discussion. Such decisions really involve judicial deference to the administrator on questions of statutory interpretation. They overlook the fundamental need for judicial control of administrative findings with regard to such questions. Professor Jaffe has well characterized the doctrine of Gray v. Powell and the decisions following it as “heresy,”\textsuperscript{49} and it is perhaps unnecessary to state that the present writer shares Jaffe’s view. This doctrine is inconsistent with the very basis of the law of judicial review in the Anglo-American world. From almost the beginning of our administrative law, review has focused upon two main questions: that of jurisdiction and that of proper application of the law. The courts have left questions of fact for the administrator, subject only to limited review. Ensuring that agencies remain within the limits of their delegated powers and that they have not misconstrued the law traditionally has been conceived of as a judicial function. Yet under Gray v. Powell both statutory construction and the determination of agency jurisdiction are taken from the reviewing court and vested primarily in the administrator.

Nor are the essential effects of the Gray v. Powell doctrine altered by the characterization of a disputed agency finding as only one of “fact” or as involving merely the application and not the interpretation of a statute. Nothing can change the fact that a finding like that at issue in Gray v. Powell has both legal and factual elements. And, as a leading supporter of the doctrine of limited review concedes, “analytically, the question [in Gray v. Powell] whether the railway was a ‘producer’ was at least in part a question not only of law but also of statutory interpretation—a question of the meaning of the term ‘producer.’”\textsuperscript{50}

The proper approach to the Gray v. Powell type of finding is that of the late Master of the Rolls in In re Butler,\textsuperscript{51} an important English

\textsuperscript{48} 286 F.2d 583 (2d Cir. 1961).

\textsuperscript{49} Jaffe, Judicial Review: “Substantial Evidence on the Whole Record,” 64 Harv. L. Rev. 1233, 1258 (1951).

\textsuperscript{50} Davis, op. cit. supra note 23, \S 30.05, at 548.

\textsuperscript{51} [1939] 1 K.B. 570.
case. At issue was an administrative finding that certain buildings were "houses" rather than "other buildings" under the relevant section of the Housing Act of 1936.52 Lord Greene in the course of his opinion said:

It seems to me that these buildings properly fall under the word "houses" in the section. Whether a particular building does or does not fall under that word is a mixed question of law and fact; fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word "houses" to those facts involves the construction of the Act.53

Under Lord Greene's view, the reviewing court may use its own independent judgment with regard to the application of the statutory term to the particular factual situation. Due weight is to be given to the administrative ascertainment of the facts, but it is for the court to determine whether those facts come within the statutory concept. The approach of Lord Greene seems preferable to that followed by our Supreme Court in the Gray v. Powell line of cases.

While the judicial refusal in this country to concede that statutory interpretation is involved in the Gray v. Powell type of case cannot obscure the fact that such interpretation is involved, it must be conceded that it has enabled the Supreme Court to all but nullify the language in section 10 of the Administrative Procedure Act,54 which might be said to eliminate the Gray v. Powell doctrine. Under that section "the reviewing court shall decide all relevant questions of law [and] interpret . . . statutory provisions . . . ." Since the Gray v. Powell type of finding does contain legal elements and involves statutory interpretation, it can be claimed that this provision of the APA eliminates the doctrine of narrow review in the Gray v. Powell situation. This result is avoided, however, by the refusal of the Supreme Court to concede that an agency finding of the kind under discussion involves statutory interpretation. In O'Leary v. Brown-Pacific-Maxon, on the contrary, the Court held that a finding that a death arose "out of and in the course of employment" was one of "fact," whose review was governed by the substantial evidence rule.55 By the use of its power to classify challenged agency findings, the Court has been able to maintain the Gray v. Powell doctrine unaltered, despite the seemingly contrary language of the Administrative Procedure Act.

Cases like Gray v. Powell and the recent federal case referred to at

52 26 Geo. 5 & 1 Edw. 8, c. 51.
the beginning of this article well illustrate the judicial tendency to defer
to administrative expertise. The history of our administrative law,
indeed, has been one of constant expansion of administrative authority,
accompanied by a correlative restriction of judicial power. Yet, though
recent years have seen some accentuation of this development, they have
also given rise to a widely expressed desire to put an end to the ag-
grandizement of administrative authority and to reestablish judicial
review as a true balance of our governmental system. "Judicial review,"
Mr. Justice Douglas has recently written, "gives time for the sober
second thought. . . . The confidence of the citizen in modern government
is increased by more, rather than less, judicial review of the adminis-
trative process."56

Significantly, it is Justices like Douglas and Frankfurter, formerly the
most ardent partisans of administrative autonomy, who recently have
been expressing doubts about the wisdom of leaving the agencies a law
unto themselves. Thirty years ago it would have been almost unthink-
able for one of Justice Douglas' political convictions to call for more,
rather than less, judicial review. The administrative process then was
seen by its proponents as the great hope in our governmental system.
Through it they hoped to work a progressive modification of the economy
and the society, comparable, at the very least, to the great English
Reform Movement of the nineteenth century. Many of them, in fact,
grew even further and saw in the administration the ultimate supplanter
of private industry, which would take over the role of economic leaders-
ship in the "public interest." "This was the ultimate view that enthralled
the extreme New Dealer. This was the horrid specter that terrified the
world of private industry."57

More recently we have come to see that neither the thrill nor the
chill adequately reflected the reality of the administrative process. The
irrational hopes and fears of the 1930's have given way to more reasoned
attempts to restrain administrative excesses, while, at the same time,
recognizing and desiring to retain the essentially good features of ad-
ministration. Such attempts have sought to confine the exercise of agency
authority within proper procedural bounds and to subject such authority
to closer judicial control.

The past three decades have brought about a greater expansion of
administrative authority than most people are yet aware of. The need

56 Douglas, We the Judges 445 (1956).
57 Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L.
Rev. 1105, 1107 (1954).
to deal with economic depression, the exigencies of total war, and the insecurities of the postwar period have led to ever-increasing delegations of power to the administrative agency. More and more the Congress has been delegating to the agencies significant powers of lawmakers. Nor should it be thought that the lawmaker powers thus vested in the agencies are powers of slight import. On the contrary, the exercise of rulemaking and adjudicatory authority by federal agencies well-nigh dwarfs the direct exercise of legislative and judicial powers by the Congress and the courts. The *Federal Register* vastly exceeds in size the *Statutes at Large*; and every year the values affected by administrative decisions exceed many times the dollar value of all money judgments rendered by the federal courts. Well could a distinguished judge characterize administrative law in 1954 as "the outstanding legal development of the twentieth century, reflecting in the law the hegemony of the executive arm of the government."58

"In the opinion of this House," reads a famous House of Commons resolution of the time of Charles I, "the power of the Executive has increased, is increasing, and ought to be diminished." There are doubtless many who would like to see a similar resolution moved in contemporary American legislatures. Yet it is not the growth of administrative authority as such that constitutes a great danger to our polity. Administrative power, properly controlled, is an essential tool to enable the modern state to perform its multifold tasks. The great danger is the delegation to the administration of uncontrolled discretion—of power which, in Justice Cardozo’s famous phrase, "is not canalized within banks that keep it from overflowing."59 A member of the Supreme Court, who has been anything but noted for his hostility toward the administrative process, has asserted: "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."60

Judicial self-restraint and deference toward the elected representatives of the people do not require the courts to leave everything to the administrative expert. "There is an obvious difference," the Supreme

Court pointed out in 1933—a difference that the more recent Court has too often ignored—"between legislative determination and the finding of an administrative official . . . . [T]he legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."61 The administrator is, it is true, presumed to be an expert in his own particular field of regulation. But this is not always an unmixed blessing. The expert tends all too often to become sterile in his outlook and to make his decisions within the narrow limits of his own restricted experience. To make the expert all-powerful would create an intolerable situation.62 The limitations of the expert—inability to see beyond the narrow confines of his own restricted experience, intolerance of the layman, and excessive zeal in carrying out his own policy regardless of the cost to other more vital interests of society—must be subjected to the trained scrutiny of the judge who, unhindered by the professional bias of the specialist, is able to take a broader view than that of merely promoting administrative policy in the case at hand without counting the ultimate cost.

Respect for administrative expertise must not lead the judge to abdicate his vital function of ensuring that agency authority does not transgress legal limits. Agencies must not, according to Chief Justice Warren, be free to ignore limitations on their authority.63 Deference toward the administrator cannot, as two dissenting members of the Court urged a decade and a half ago, "be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding."64 If the trend toward bureaucratic predominance that has occurred elsewhere in the world is successfully to be resisted in this country, the Supreme Court must not surrender control as the Congress has delegated power. Overdeference to the administrator not only reduces judicial review to a mere feint, it may even do positive harm by giving the illusion of a safeguard that does not really exist. And in a democracy, nothing is so dangerous as a safeguard that appears to be adequate, but is really a façade.65

FOR EVERY JUSTICE, JUDICIAL DEFERENCE IS A SOMETIME

Fred Rodell*

"Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instinct and emotions and habits and convictions, which make the man, whether he be litigant or judge."

—Benjamin N. Cardozo

For more years than I care to contemplate—nigh onto thirty—I have been teaching and writing about constitutional law with a slant that most of my fellows in the field consider at best unscholarly, at worst downright indecent. According to that slant, to put it briefly and unsuitably, any study of any aspect of constitutional law which leans primarily on the rightness or wrongness or in-between-ness of conflicting political and jurisprudential concepts, pretty much apart from the men who mouth those concepts, is almost wholly worthless for purposes of analysis or prediction or anything else except perhaps argumentation in an atmosphere of academic unreality. Government by judiciary, as Boudin once called it, is—and is most markedly where constitutional questions are concerned—far more a government of men, not laws, than of laws, not men. Nor activism nor self-restraint nor federal-state relationships nor absolute constitutional commands lead a Sutherland to vote against the New Deal, a Brandeis for wage and hour laws, a Frankfurter against state right to counsel, a Black for freedom of assembly—nor do these easy abstract theories explain why each so voted. From John Jay on to Potter Stewart the vote of each Supreme Court Justice, however rationalized à la mode, however fitted afterward into the pigeonhole of some pretty politico-juridical principle, has rather been the result of a vast complex of personal factors—temperament, background, education, economic status, pre-Court career—of whose influence on his thinking even the most sophisticated of Justices can never be wholly aware. Even if Sutherland did believe, quite apart from his laissez faire economic creed, in a strongly activist judiciary as a matter of abstract political principle, why did he believe in it, what other values would he sometimes let overweigh it, and again why? Even if Brandeis did believe, quite apart from his sympathy for social legislation, in the abstract propriety of judicial self-restraint, why did he believe in it, when would he sometimes choose to abandon it, and

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why? How can John Marshall’s readings of the commerce clause and the contracts clause make any sense, for all his eloquent logomachy, except in terms of his own personal commitment to the commercial-creditor class; and how can Roger Taney’s surface inconsistencies in choosing between federal and state supremacy be reconciled except by seeing him as the consistent spokesman of the agricultural, slave-holding South? Only by examining the Justices individually as whole human beings, by probing beneath the protective shell of principles expressed in opinions, to try to find what made or makes each Justice really tick, can past decisions be explained without constant contradiction and future decisions predicted with a surprising degree of accuracy. That, at any rate, has been my maverick approach to the study of constitutional law for more than a quarter century.

And so when the *Georgetown Law Journal* asked me to write “an article examining the extent to which the judiciary should defer to legislative judgment without abdicating its own responsibilities, and the criteria that should be applied in making this determination,” my immediate instinct was to politely decline. In the first place, the idea of judicial deference to the legislature is meaningless to me in the abstract; it is even potentially meaningless to me in the particular instance, the specific case, where, in context, a whole host of other considerations may make any sole emphasis or main emphasis on judicial deference or nondeference a forced and futile exercise in conceptual semantics. In the second place, even if I could winnow out of a case or a class of cases that one factor of judicial deference and weigh how much influence I thought should be accorded it on some strange scale for imponderables, who would or ought care, since I am not a judge, what kind of criteria I might come up with? Moreover, in the realm of is, not ought-to-be, I have already come as close as I think at all useful to outlining in the rough the attitudes of the current Justices toward judicial deference—in this very *Journal*, just three years ago—and to now repeat or plagiarize myself would strike me as silly. Yet the distinguished judges and professors who I am told are also contributing to this issue of the *Journal* will, I daresay, be concerning themselves with the allegedly, or properly, guiding principles that control or ought to control judicial deference and other aspects of judicial review. Hence, I am persuaded to essay a small experiment of a quite different nature. I should like to suggest that a Justice’s actual votes, regardless of his explicitly stated reasons, are rarely if ever primarily dictated by, or predictable in terms of, his firm belief or relative disbelief in judicial deference—in short,
that, coming down to cases, the deference question plays a rather indecisive role. For this purpose, I shall examine skeptically, if perforce sketchily, the records on this score of the two current Justices who are generally supposed to hold the strongest and most diametrically conflicting views about deference. I mean, of course, Justice Black and Justice Frankfurter.

For the past twenty-five years, Justice Black has been the Court's most articulate member in specifically scorning deference to legislatures—where he has wanted to scorn it. Thus, no one can doubt that Black, had he been on the Court in the early 1930's, would willingly have deferred to the New Deal and its state-enacted counterparts, as the Nine Old Men's majority did not. For this, there are two common and quite inadequate explanations. One, in which I myself have occasionally overindulged, is that Black defers on economic matters while scorning deference on civil liberties. The other, somewhat overlapping and often propounded by Black himself, is that he follows the words of the Constitution, explicit as they are on most civil liberties, but nowhere reads his own views into constitutional words, as did prior Courts with their substantive due process and their pinched construction of the commerce clause. What Black is saying is that he defers to the Constitution, not to any legislature, unless the Constitution—as he reads it—does not forbid what the legislature has done, in which case the legislature should have its way. An extreme illustration was Black's early solo effort to overturn half a century of precedent by completely depriving corporations of all judicial protection under the due process clauses, on the ground that a corporation is not a "person." A more nearly successful effort—in which, paradoxically, Justice Frankfurter briefly joined—was to abolish, regardless of alleged "burdens," all Court protection of commerce from state taxes and regulations, in the absence of prior congressional action; this because the Constitution gives federal regulation of commerce to Congress, not the courts. And of course, Black's crusades for jury trial in FELA cases and elsewhere (deference to Congress plus civil liberties), for judicial incorporation of the whole Bill of Rights into the fourteenth amendment (deference to the Constitution—as he reads it), and for the absoluteness of the first amendment's guarantees (deference to the Constitution as anyone must read it) are well and widely known.

Now, with all due respect to Justice Black—and I yield to no one in my immense respect for him, as Justice and as man—I simply do not believe that the notion of deference or nondeference to legislative will,
or to constitutional words either, can have been the controlling factor
that led Black to any of these stands. He has not blinked at according
corporations the status of artificial “persons” in other contexts than the
due process clauses. He has not objected to Court interference with state
regulation of commerce, in the absence of congressional command,
when the state’s purpose was racial discrimination, not tax revenue. He
has been far less insistent on following the letter of Congress-written
law in other circumstances than he has in the jury trial aspects of the
FELA and the Jones Act. Despite the magnificent historical scholarship
of his Adamson dissent, there is respectable historical evidence on the
other side; and more significantly, the commands of the first eight
amendments scarcely come sharp and clear from the words of the
fourteenth’s due process clause. Finally, as for the verbal absoluteness
of the first amendment, which no sane man can deny, my conviction
is that Black would vote precisely the same way in cases of free speech
and all the rest, even if the amendment’s words were less than absolute;
indeed, I believe he would do so if the first amendment were repealed,
perhaps by reading its guarantees into the due process clause of the
fifth! The point is not that Black is sometimes inconsistent—which,
like all Justices, he is—or intellectually dishonest, which he most as-
suredly is not. The point is rather that here the stark words of the
Constitution, there an exegesis that puts words into the Constitution,
here judicial deference, there judicial nondeference, are used as argu-
mentative tools to make more juridically respectable and intellectually
compelling the results that Black wants to reach for essentially quite
different reasons. Among the more obvious of these reasons, or motives,
are his passionate devotion to personal liberties, his greater concern for
the poor than for the rich and for people than for business organizations,
and his comparative indifference to the regulatory or tax burdens im-
posed on either personal or corporate wealth presumably for the general
public good. These predilections and others, such as his strong sympathy
for labor, were all readily predictable when he came to the Court—from
his early background, his hard-won self-education, and particularly the
nature of his pre-Court legal and political careers. And his votes on
the Court, although always bolstered by an impressive display of legal
learning, have been and remain predictable with far greater accuracy
from his many-faceted evangelical yet practical humanitarianism, than
from any complex of abstract jurisprudential principles.

For almost as many years as Black has openly scorned, as a primary
guide to decision, judicial deference to legislatures, Justice Frankfurter
has been the Court's most vocal champion of such deference—*where he has wanted to defer*. Thus, Frankfurter has not infrequently voted to strike down laws which Black has voted to uphold. The congeries of alleged reasons for this is considerably more complicated, coming from the professorial Frankfurter, but no less indecisive at bottom than Black's. There is Frankfurter's concern that the Court not exceed its proper function in the over-all U.S. scheme of government, *as he conceives of that function and that scheme*. While this may carry overtones of deference, as where he considers cases before the Court too political for the Court to handle, it also carries undertones of nondeference, as where he thinks some legislative action mars the structural symmetry of dual sovereignty. There is also his adherence to past constitutional precedent, at least since the bulk of the Holmes-Brandeis dissents were adopted, a few with his articulated blessing, as majority doctrine; and this despite the fact that adherence to such precedent requires at times the flouting of legislative will. There is, further, Frankfurter's oft-stated view that—absent an offense to the federal system or the compulsion of precedent—no law should be branded unconstitutional unless it is clearly unreasonable or some such adjectival synonym; and while this too may sound on the surface like a defense of deference, there have been cases where Frankfurter has found unreasonable and some of his colleagues have not. Indeed, the very essence of such a judgment—like the Frankfurterian criterion, in somewhat different context, of "conduct that shocks the conscience," by which he means *his* conscience—might well be classified, because the standard is so imprecise and personal, as the very antithesis of judicial deference. What the Frankfurter credo on judicial review adds up to is deference neither to legislatures nor, as Black claims for himself, to the written Constitution. It is deference to a nonexistent blueprint of the U.S. federal system, complete with dual sovereignty and separation of powers, *as he would draft it*; to the precedent of past decisions, *as he considers them compelling*; and to the reasonable-or-unreasonable test, *as he applies it*. And no more than Black's more simply stated rationale does all this constitute a reliable or revealing guide to analysis or prediction of Frankfurter's votes in specific constitutional cases.

For no less than Black is Frankfurter often inconsistent in applying to issues right at hand his self-proclaimed rules for correct judicial conduct. Perhaps the most striking illustration of his nondeference to legislative will, where neither controlling precedent nor unreasonableness has required it, lies in his long leadership of a Court majority, over Black's
repeated protests, in striking down new and various state taxes as "direct burdens" on commerce. While this may be rationalized as in keeping with Frankfurter's concern for a neat dividing line between state and national powers, it is difficult to see how two small taxes on an interstate sale can upset or endanger the federal system any more than can two state taxes on the same income or the same inheritance, both of which Frankfurter has upheld—though he would doubtless lay the inconsistency to the "difference," which in interstate tax matters is no more than a tactical pleading difference between the commerce clause and the due process clause. Indeed, the record here and elsewhere makes clear that Frankfurter, though he would disown the distinction, has championed his judicial version of the old political shibboleth "states' rights" less militantly in economic cases than in those involving civil liberties. From his famous forced-flag-salute dissent, where many think he did protest too much, to his judicial benediction of the jailing, under a New Hampshire subversion law, of a concededly unsubversive mild-mannered minister—and since—Frankfurter has only rarely and sporadically found state infringements on the Bill of Rights so unreasonable or conscience-shocking as to warrant calling them unconstitutional. And yet on the constitutionality of state censorship statutes, he would apparently turn the Court into a case-by-case review board—scarcely a deference to the legislature or its agents or to the sacredness of federal-state dichotomy. And he has gone along, albeit perhaps reluctantly, in the precedent-upsetting desegregation decisions—despite nondeference to state constitutions, much less state legislation, despite dual sovereignty, and despite the fact that these were stark political questions if any ever were. It is in review of federal legislation, however, that Frankfurter's firmly stated belief in deference is said to come into full play; and indeed it is hard to find more than one or two minor instances where he has voted to brand a congressional act unconstitutional. Yet I dare to suggest a few factors which somewhat qualify the significance of this near-perfect record. First, in judging the scope of antitrust laws, tax laws, patent laws and other regulatory measures, Frankfurter, while scorning the sledge-hammer word "unconstitutional," has, more than any other Justice, used the stiletto of statutory interpretation to cut effective regulation to a minimum, often below what Congress clearly intended; the supplementary device of using narrow interpretation explicitly to avoid a constitutional issue is also a Frankfurter favorite; in either case, the result is the same—although the rationale is more superficially deferential—as would be a forthright ruling that the attempted reach of the
statute was unconstitutional. Second, Frankfurter has several times, most notably in his *Dennis* concurrence, refused to strike down claimed congressional violations of the Bill of Rights not just out of deference, but because he says it is up to the people, not the courts, to protect their own liberties; further, if it be argued that Congress is supposed to speak for the people short-term, presumably it is the Constitution that speaks for them long-term; thus, if it is the people’s will that matters, Frankfurter’s deference and Black’s nondeference stand on equal—and equally indecisive—footing. Finally, on the big over-all constitutional issue of our time, national security against individual liberty, Frankfurter has been talking increasingly in case after case about the Court’s duty to “balance” one against the other as a basis for decision. Yet what could be less deferential to Congress than to take such a patent policy judgment, without so much as reliance on constitutional guarantees, out of Congress’s hands?

As is true of Black’s, Frankfurter’s votes are subject to neither analysis nor prediction with any degree of accuracy from the complex of jurisprudential principles on which he overtly purports to depend. Again, motivations lie deeper. There is Frankfurter’s worship of the Court as an institution—a worship which works in two contradictory ways since, in order to protect its power and prestige, he would have it shrink its own use of its power to a minimum lest outside political forces move, as they have in the past, to cut down its power and depreciate its prestige. There is his vast and somewhat ambivalent adulation both for the British parliamentary system of government and, at least verbally, for the tripartite U.S. scheme—a dilemma which he tends, though with no consistency, to resolve by elevating the legislature to the top spot on the U.S. triangle. There is his preoccupation with form rather than substance, as when he once said: “The history of liberty has largely been the history of the observance of procedural safeguards”; or when, as I have commented elsewhere, he uses Cardozo’s phrase “ordered liberty” with the emphasis always on “ordered.” If these observations make Frankfurter sound like a man more concerned with governmental patterns and structures than with the plain effect of government action on living human beings, this is precisely true. But this is not to say that his passion for propriety and form is any more the unemotional product of pure reason than is Black’s passion for the well-being of men and women—nor is it to say that such passion, any more than Black’s, can be encompassed in a set of concepts to guide judicial attitudes; as on the question whether to defer or not defer, it blows now hot, now cold. That Frank-
furter would become the Court’s chief champion of order über alles might easily have been predicted—and was indeed obliquely predicted in the American Bar Association’s support of his appointment—from the for- malistic nature of his early background, of his higher education, and of his professorial pre-Court career, in which his favorite course was Federal Jurisdiction. (Since, despite my extravagant and often stated ad- miration of Justices Brandeis and Cardozo, I have several times been absurdly accused by Frankfurter’s friends of anti-Semitism because, for more than a score of years, I have been highly critical of his work as a Justice, I hasten to add that my first reference here is to the traditionally form-encrusted middle-European culture in which he spent his formative years—years whose influence, according to another famous man from Vienna, is ineradicable.) Moreover, Frankfurter’s votes on the Court, like Black’s, have been and remain far more accurately predictable in light of his personal predilections, of all of which he may not be entirely aware, than in terms of the allegedly impersonal, objective, reasoned rules with which those votes are regularly rationalized.

My small experiment is almost ended. Let me now risk ridicule plus the loss of whatever persuasiveness my heretical analysis may have had up to here by essaying a way-out-on-a-limb exercise in actual pre- diction. By extending to all nine Justices the same skepticism of stated principles and the same reliance on largely extralegal factors that I have detailed regarding Black and Frankfurter, let me apply this ap- proach to a concrete case which involves, among other constitutional questions, that of deference or nondeference; which has been argued before the Court this term but, as I write on March 15, has not been decided; and which might easily go either way. The case is the Tennessee redistricting case,† perhaps the most important to reach the Court since the Brown desegregation decision of eight years ago. To state it first flat- footedly, the Court will order the requested redistricting—in whatever way seems to it most feasible—by a vote of five to four. Easiest of the Justices to predict—indeed for anyone to predict—are Frankfurter, who will doubtless use a four-way parlay of political question, federal system, judicial deference and the precedent of his own Colegrove opinion; Black, who wrote the militant Colegrove dissent; and Douglas, who joined in

† The decision was handed down on March 26, 1962. Baker v. Carr, 369 U.S. 186 (1962). At Professor Rodell’s request, not one word of his article has since been changed. He accurately predicted the decision and the votes of seven out of eight Justices. He erred only on Justice Clark who joined the majority. Justice Whittaker, since retired, did not participate. [Editor’s footnote.]
that dissent. Of the six newcomers to the Court since Colegrove, Harlan will join his mentor, Frankfurter, as a matter of course; Warren and Brennan, in that order of enthusiasm, will agree less militantly with Black; Clark and Whittaker will silently side with Frankfurter. Thus Stewart will cast the deciding vote, in the sense that his vote will be the least firmly convinced and committed, and that vote—for reasons not basically legal but rather personal and both extra-Court and intra-Court political—will be with Black and for redistricting. Colegrove, of course, will be distinguished or, more probably, overruled. To hedge just a little, I should not be too astounded to see either Clark or Whittaker join the majority rather than bolster a lost cause; and should both do so, even Harlan might surprisingly ride along, leaving Frankfurter un-budging and alone. But I shall stick to my prediction of a five-four vote for redistricting—with Stewart probably or Brennan possibly, as the less militant members of the majority, writing the Court opinion. And of course, I could be dead wrong; the infinite variety of quirks and causes that may determine human choice on any matter where man is at the mercy of his own mind are fortunately far beyond the predictive capacity of even the most intricately attuned and adjusted calculating machine. What I do know is that he who would analyze, predict or understand the Supreme Court's constitutional decisions will fare considerably better if he concentrates on that same infinite variety of human factors which make precise prediction impossible, than if he grants face value to such conditioned verbal behavior from the high bench as is illustrated by random and self-rationalizing balderdash about judicial deference to legislative will.
JUDICIAL REVIEW OF EXECUTIVE ACTION

CHARLES FAHY*

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

—JOHN MARSHALL

While bearing in mind the essential differences in executive and judicial functions, any consideration of review by the Judiciary of Executive action\(^1\) looks for further guidance primarily to the Constitution. Its terms, however, have needed interpretation in the light not only of the nature of the two functions, but of the constitutional division of responsibility as well. Necessarily there has been an adjustment in the relationship between these two branches of Government, which is, indeed, a part of the adjustment of these two with the third, the Legislative. This process has taken account of limitations as well as of powers and has gone forward principally through decided cases. These have been an unending part of the history of the nation, varying as the times have created new problems. Withal, however, the thread of the law has been kept in hand as the legal pattern of government has taken form and grown almost immeasurably.

The powers and duties of the Executive and the Judiciary are enumerated in the Constitution with brevity in comparison with those of the Legislative, but they are set forth with remarkable adequacy, as time has demonstrated. The Executive authority is "vested in a President of the United States"\(^2\) who shall be Commander in Chief, have the pardon power, except in cases of impeachment, and have treatymaking and appointive powers. He shall inform the Congress of the State of the Union and make recommendations to that body; and "he shall take Care that the Laws be faithfully executed . . ."\(^3\)

Article III, section 1, vests the judicial power of the United States in one Supreme Court and such inferior courts as the Congress shall establish. In the same section occurs the important language that this

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\(^1\) Following somewhat the precedent of Charles Warren in his The Supreme Court in United States History (1924) [hereinafter cited as Warren], I shall usually use capital letters when referring generally to one or the other of the three branches of our Government.

\(^2\) U.S. Const. art. II, § 1.

\(^3\) U.S. Const. art. II, § 3.
judicial power of the United States shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties," and "to controversies to which the United States shall be a Party . . . ." Division is also made of original and appellate jurisdiction of the Supreme Court.

Article VI provides that the "Constitution and laws of the United States . . . made in Pursuance thereof; and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." And of course every federal judge is "bound thereby."

While the above are the basic provisions under which the relationship between the two branches of Government has developed, there have been twenty-three amendments, including the Bill of Rights, none of which contains an express grant of additional power to the Judiciary. However, since the substantive and procedural provisions of the amendments have added greatly to the subject matter of governmental operations, especially as they affect individual rights, this has caused, of necessity, an extension of the reach of the judicial powers previously granted, requiring in many instances a testing of Executive action in the light of these provisions.

Historically, the first significant step toward a clarification of the Judiciary's relationship to the Executive came about somewhat informally in 1793, rather than by direct review of Executive action. England and France were at war and President Washington had issued his Neutrality Proclamation. Vexing controversies involving American shipping plagued the Government with difficult legal problems. The President's Secretary of State, Jefferson, wrote the first Chief Justice, John Jay: "The President would . . . be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the Supreme Court of the United States . . . ." With wise discernment the Chief Justice replied directly to the President:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State, on the 18th of last month regarding the lines of separation, drawn by the Constitution between the three departments of the government. These being in certain respect checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the Executive departments. We exceedingly regret . . . .

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4 1 Warren 108.
5 1 Warren 110-11.
In short, the Court was not to render advisory opinions to the Executive.

Ten years later Jefferson had become President and Marshall Chief Justice. The Court was given an opportunity in *Marbury v. Madison*[^6] to clarify its power to review Executive conduct when one Marbury, by an original application to the Supreme Court, sought to obtain a writ of mandamus to compel Jefferson’s Secretary of State, Madison, to deliver to him his commission as a justice of the peace, which had been executed by Madison’s predecessor. Marshall’s opinion ruled that the Court lacked jurisdiction because the statute relied upon for the Court’s authority to issue the writ sought to confer original jurisdiction upon the Supreme Court in a situation where the Constitution had granted none, and that the Congress could not enlarge the Court’s original jurisdiction. Explicitly disclaiming authority to intermeddle with the prerogatives of the Executive, Marshall described the province of the Court as solely “to decide on the rights of individuals, not to enquire how the Executive, or Executive officers, perform duties in which they have a discretion.”[^7] Nevertheless, the Court went on to express its opinion that Marbury had a right to the commission: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”[^8]

In his analysis of the Court’s opinion, Charles Warren defines the standards there announced in the following language:

> Where a head of a department acted merely as a political or confidential agent of the Executive, in the case where the Executive possessed a constitutional or legal discretion, the Courts might not control him; but where a specific duty was imposed by law, he was “amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.”[^9]

The case thus brought into prominence the problems of both the separation of powers and the judicial determination of the lines of separation.

Opposition to the opinion was strongly expressed by the President, who felt that it encroached upon the domain of the Executive. The Court had assumed judicial authority to determine the existence of the Executive duty, that is, the absence of discretion in the matter. Jefferson’s antagonism was heightened by the fact that in asserting the right to determine the Executive’s duty with respect to a legal right of the

[^6]: 5 U.S. (1 Cranch) 137 (1803).
[^7]: Id. at 163.
[^8]: Ibid.
[^9]: 1 Warren 241.
individual, the Court was engaging in dicta since it held itself to be without jurisdiction to issue the writ. The importance of the decision to the nation’s constitutional development is emphasized by Jefferson’s view that the Chief Executive had authority to decide the constitutionality of his own action in fulfilling his responsibility as he saw it; to him the Constitution meant “that its [the Government’s] coordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional, and what not . . . would make the Judiciary a despotic branch.” With the possible exception of *Ex parte Milligan*, perhaps no other case for a hundred and fifty years approached the importance of *Marbury* to our subject.

Then in 1952 *Youngstown Sheet & Tube Co. v. Sawyer* came before the Supreme Court. Acting against the background of the Korean War, President Truman had ordered his Secretary of Commerce, Mr. Charles Sawyer, to take possession of and operate most of the steel mills of the country. In support of his action he marshalled the combined civil and military authority of the President under the Constitution and laws to avert “a work stoppage [which] would immediately jeopardize and imperil our national defense” due to an unresolved labor dispute. At the suit of the mill owners, Judge David A. Pine of the United States District Court for the District of Columbia issued a preliminary injunction, accompanied by a well-reasoned opinion that the President lacked authority to direct the seizure. The court of appeals, on application of the Government, stayed the injunction, thus preserving for the time being the Government’s possession of the mills. The Supreme Court without awaiting final decision by the court of appeals, and “deeming it best that the issues raised be promptly decided by this Court . . . granted certiorari on May 3 and set the case for argument May 12.” On June 2 the Court decided against the authority of the President, six members composing the majority and three concurring in a dissenting opinion by Chief Justice Vinson. For purposes of this article, the most significant comment is that in this important matter the authority of the Court to pass upon the conduct of the Executive,

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10 1 Warren 265.
11 71 U.S. (4 Wall.) 2 (1866).
12 343 U.S. 579 (1952).
16 343 U.S. at 584.
represented again by a Cabinet officer as in *Marbury*, was now so well accepted that it was not directly referred to in the forty-four pages of opinions. They are devoted to an exposition of the validity or invalidity of the Executive action under the Constitution and laws. The theory of Jefferson, whose influence in other respects has been so great, that the Executive should determine the constitutionality of his own actions had gained no headway; rather, the views of the earlier Court and of other statesmen had become established in the law.

But the appropriate application and scope of the accepted power of review have by no means been free of controversy in the process of maintaining both constitutional separation and constitutional cohesion. Halfway, figuratively, between *Marbury* and *Youngstown* came *Ex parte Milligan*, decided in the aftermath of the Civil War. Milligan had been sentenced to death by a military tribunal in Indiana under authority which stemmed from the President as Commander in Chief. In the famous opinion of Mr. Justice Davis, the Court held that the President had no power to institute trial by a military tribunal during the war in localities where the civil courts were open, as they were in Indiana: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." While the decision is characterized by Warren as the "famous decision [which] has been so long recognized as one of the bulwarks of American liberty," its rendition raised a "storm of invective and opprobrium which burst upon the court." The Court had previously held that the judicial power did not encompass appellate review of the decisions of a military commission, but only of the judgments of "judicial" courts. Jurisdiction was found in Milligan's case, however, because it came to the Supreme Court through the civil courts in habeas corpus proceedings which attacked collaterally the action of the military tribunal.

Looking back on these three leading cases, we see that *Marbury v. Madison* had not only important political overtones at the time, but permanent governmental significance. Its dicta constituted judicial appraisal of the validity of Executive action, held in the particular case to violate an individual's legal rights. The lasting significance of *Ex parte Milligan* is found in the exercise by the Judiciary of a power to protect the constitutional right of an individual, in that case trial by

17 71 U.S. (4 Wall.) at 120-21.
18 2 Warren 427.
jury, against Executive action. The case accordingly has its place in the continuing delineation of the control of civil law and civil authorities over the military. And while Youngstown pays deference to the President's interpretation of his powers, and to his motives and purposes, it left no room for questioning the Court's ultimate power to determine the legality of Executive action in a justiciable case or controversy.\(^\text{20}\)

While the supremacy of the law necessarily prevents such a complete separation of powers as would preclude judicial review of Executive action, it should be remembered that limitations upon the scope of review are also essential factors in the separation. There is the general limitation applicable to all judicial action—nonjusticiability. Reference has been made to Chief Justice Jay's wise letter to Washington indicating the nature of the judicial power under the Constitution.\(^\text{21}\) Reference has also been made to the "cases" and "controversies" language found in the Constitution, descriptive of the jurisdiction of the courts of the United States. The significance of this language in terms of limitations upon the Judiciary was the subject of careful consideration in Massachusetts v. Mellon, where it is pointed out that "proceedings not of a justiciable character are outside the contemplation of the constitutional grant."\(^\text{22}\)

Pertinent to this subject is Perkins v. Lukens Steel Co.,\(^\text{23}\) where, in the suit of prospective bidders filed against the Secretary of Labor, the lower courts concluded that the Secretary had not formulated certain wage conditions in accordance with congressional legislation. The Supreme Court, however, held that the complaining parties could not pit whatever views the Judiciary might have on the merits against those of the Secretary because the complainants lacked "standing" to invoke those views.

\[T]\]o have standing in court, [they] must show an injury or threat to a particular

\(^{20}\) Marbury arose on petition for writ of mandamus; Milligan arose in habeas corpus proceedings; and Youngstown arose in a suit for a declaratory judgment and an injunction. These remain the principal methods of obtaining review of Executive action, aside from the indirect methods through suits for monetary judgments in the United States Court of Claims and review of action of the Executive department, for example, in the administration of federal criminal law.

\(^{21}\) Were the constitutional language not involved, the judicial power need not necessarily exclude advisory opinions. For example, the Statute of the International Court of Justice, a part of the Charter of the United Nations, permits that judicial organ to give advisory opinions. Stat. Int'l Ct. Justice art. 65, para. 1.

\(^{22}\) 262 U.S. 447, 480 (1923). In the same connection see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

\(^{23}\) 310 U.S. 113 (1940).
right of their own, as distinguished from the public's interest in the administra-
tion of the law....

Our decision that the complaining companies lack standing to sue does not rest
upon a mere formality. We rest it upon reasons deeply rooted in the constitu-
tional divisions of authority in our system of Government and the impropriety
of judicial interpretations of law at the instance of those who show no more
than a mere possible injury to the public.24

Though the Court here speaks in terms of "standing," it seems to me
the opinion shows that a "case" or "controversy" had not arisen between
the prospective bidders and the Executive officials. Thus the Judiciary's
development of criteria for the kind of dispute or disagreement it will
consider as a "case" or "controversy" within its jurisdiction is an expres-
sion of the Judiciary's self-restraint in adjusting its relationship to
the Executive so as not unduly to interfere. Also contributing to the
development of the law on this subject is the Judiciary's feeling that the
judicial process must have the benefit of adversary proceedings in
which some substantial stake of the parties is involved.

The fact that the Judiciary is by nature passive, in the sense that it
does not initiate,25 is also a decided limitation. Not only must a situation
involve a legal right of someone asserted against another, with sufficiently
direct impact to create a "case" or "controversy;" or to give "standing"
to invoke judicial resolution of the issue,26 but the matter must be brought
to the Court; and this does not always occur. A legal scholar recently
characterized as "history's foremost exertions of sheer presidential power"27 the Louisiana Purchase by Jefferson, the Emancipation Procla-
mation by Lincoln, and the Destroyer Exchange by Franklin D.
Roosevelt. Yet none of these came under judicial review. The ultimate
validity of their status, however, was established; subsequent legis-
lation removed doubts as to the Purchase, the thirteenth amendment
served to reaffirm the Proclamation, and various appropriations and
other congressional legislation sanctioned the Destroyer Exchange.28

As a corollary to the limitation above referred to, actions of doubtful

24 Id. at 125, 132.
25 I do not refer of course to a contempt proceeding initiated by a court, an exception
with its own limitations.
26 See Consumer Mail Order Ass'n of America v. McGrath, 94 F. Supp. 705 (D.D.C.
27 Frank, Lincoln as a Lawyer 147 (1961).
28 On the same day the final agreements and leases carrying out the Destroyer Exchange
were signed in London, March 27, 1941, President Roosevelt transmitted the texts to Con-
validity often remain effective for substantial periods of time because litigation is delayed. Though the example of the National Industrial Recovery Act 29 could more appropriately be considered in connection with review of Legislative rather than of Executive action, the history of the act is illustrative. Effective June 16, 1933, it was put into operation almost immediately. The codes approved under the act fairly dominated the industrial scene for two years before a "case" or "controversy" over the act's validity was ripe for Supreme Court decision. When rendered, the decision 30 effectively terminated operations under the act.

The disadvantages of such delay are deemed to be less than those of any acceptable alternative. More rapid adjudication would unduly disturb the appropriate functioning of the two distinct branches of Government, interfering with political forces essential to a free society which must be able to act on many occasions without being brought to a standstill by a dissident individual unless he can show "some direct injury suffered or threatened, presenting a justiciable issue." 31

A further limitation upon the Judiciary arises from the immunity of the sovereign from a suit to which it has not consented. If the doctrine applies, the court refrains from reviewing the action of the Executive. This is a self-imposed limitation with historical roots in the common law which protected the sovereign from undue fetters upon his or her conduct, thus ending litigation even though the matter was otherwise justiciable. The subject is exhaustively treated in Larson v. Domestic & Foreign Commerce Corp., where the Court said:

[T]he sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. . . . [T]he suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the Court, in the absence of consent, has no jurisdiction. 32

The opinions in Larson demonstrate the difficulties in determining when the doctrine saves the challenged action from judicial review. The

29 Ch. 90, 48 Stat. 196 (1933).
30 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Compare, however, the speed with which Youngstown moved to its conclusion.
32 337 U.S. 682, 688 (1949). Of course, many suits against an Executive officer are not within the immunity. In none of the three cases mentioned above, Marbury, Milligan, or Youngstown, did the Court even discuss the problem of possible immunity; in fact, criticism of Marbury and Milligan at the time they were decided was not based on a claim of immunity in the sovereign, but on a difference of opinion as to the appropriate separation of powers between the Judiciary and the Executive.
Court said that in each case the question is whether, by obtaining relief against the officer, relief will not in effect be against the sovereign. Where no constitutional issue is involved, perhaps the test is sufficiently indicated by the statement in the majority opinion of Chief Justice Vinson: "[W]here the officer's powers are limited by statute, his actions beyond those limits are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief."33 It is not that the officer errs in the exercise of power lawfully delegated, but rather that he completely lacks "delegated power." Similarly, when the challenge is on constitutional grounds, *Larson* would answer the question of immunity by determining whether the officer had acted "under an authority not validly conferred." Though conferred in form, power may be lacking in substance because of its constitutional invalidity.

The difficulty of drawing the lines defining the area of the immunity doctrine's applicability, especially where the officer purports to act under a valid statute but is alleged not to act within the power delegated, is emphasized by the analysis of decisions in the dissenting opinion of Mr. Justice Frankfurter in *Larson*. The 1828 case of *Governor of Georgia v. Madrazo* is included, where the immunity of the Governor was sustained by Chief Justice Marshall because "the demand made upon him [was] not made personally, but officially."34 Mr. Justice Frankfurter observed that "the answer is not always as manifest as it was in that case, for the Governor was asked to surrender moneys actually in the State's treasury and property in its possession."35 I add only that it is obvious that the question of immunity is not resolved automatically. The Judiciary must determine whether or not the doctrine bars adjudication of the merits; in other words, the courts have the task of drawing the lines.

Perhaps the most important and interesting limitation upon judicial review of Executive action remains for discussion. It embraces what are known as political affairs. The reference of course is not to party matters but to those of polity. Nor is it a question of noninterference with Executive discretion, for while discretion is involved, these political activities are beyond judicial review, irrespective of any issue of Executive "abuse of discretion." The courts stand aside from this area of responsibility except when called upon to decide whether the litigation in fact involves a political matter. If the court concludes that it

33 Id. at 689.
34 26 U.S. (1 Pet.) 110, 123 (1828).
35 337 U.S. at 711-12.
does, the court may no longer entertain the suit; it may not pass upon the merits of the challenged action, for a court is a tribunal solely for the resolution of legal disputes.

The area of Executive political action which lies outside the scope of judicial review is vast indeed.36 The national and political leadership of the President, his conduct of foreign affairs, his legislative recommendations, his nominative and appointive selections, his formulation of national and international opinion, policies and decisions, the great attributes of the office thus suggested, are not of official concern to the Judiciary. Standing aside from these nonreviewable precincts of Executive responsibility, the courts control only through particular justiciable issues; but the permeations of a single decision are often widespread, however intangible. It may put out of operation an entire Executive program, as occurred, for example, in the wake of the passport case of Kent v. Dulles,37 when a method of controlling the issuance of passports, long in use, had to be abandoned. Further, such cases as Youngstown and Milligan obviously influence Executive action in a more lasting manner than merely to cause a return of the mills to their owners or to free one man from death at the hands of a military tribunal.

Among the President's political activities is the vital one of conducting the foreign affairs of the nation. This is beyond judicial cognizance except when the Judiciary is obliged to decide whether or not a particular matter falls within the conduct of foreign affairs. United States v. Curtiss-Wright Export Corp.38 is a leading case of modern times, involving the constitutionality of a congressional grant of power to the President, challenged as an abdication to the Executive of legislative responsibility. Our interest in the case lies in its illustration of the Judiciary's attitude toward action of the Executive in the conduct of foreign affairs and the Court's description of the difference between such Executive action and that limited to the domestic scene. Legislation provided that if the President found that the prohibition of the sale of arms to countries involved in a certain armed conflict in South

36 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring). This article was prepared before the decision of the Supreme Court in the Tennessee reapportionment case, Baker v. Carr, 369 U.S. 186 (1962). It is not believed that any views on the "political" or "nonjusticiable" problem herein advanced are inconsistent with the decision. The opinions in the case, however, contain the most exhaustive discussion of this problem in the history of the Court.


38 299 U.S. 304 (1936).
America would further the reestablishment of peace and should make a proclamation to that effect, then, with such exceptions as the President should prescribe, it would constitute a criminal offense to sell arms in violation of these provisions. Mr. Justice Sutherland refers to the Executive prerogative in foreign affairs as the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which . . . must be exercised in subordination to the applicable provisions of the Constitution."

In this statement is seen the Court's recognition of the great scope of the power of the President, subject to the Constitution, as well as an implicit limitation upon the Judiciary's power. Legislation respecting international affairs, the Court said, must also accord to the President a degree of discretion and freedom which would not be permissible were domestic matters alone involved. "In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates." The Court did not disclaim jurisdiction, for a criminal offense was charged. The justiciable issue, however, was of such a nature as to lead the Court to take a restrained view of its own participation, and also that of the Legislative, in foreign affairs.

Adjustments in governmental operations as they affect both individuals and the relations of one branch of the government to another sometimes have resulted from the evolution of a particular issue from a political to a justiciable nature. Thus a passport was once a purely political document, but through legislation and a Presidentially proclaimed emergency, a passport became essential to the lawful right of a person to leave the United States for travel to certain other countries. This change in the nature of a passport brought change in the judicial attitude toward Executive denial of a passport. Questions of due

39 Id. at 320.
40 Id. at 319.
41 Judicial recognition of the place of the Executive in foreign affairs is expressed again in United States v. Belmont, 301 U.S. 324 (1937), and in United States v. Pink, 315 U.S. 203 (1942). The removal by the President of an obstacle to recognition of a foreign government by approving that government's arrangement for settlement of claims of our nationals was said by the Court in Pink to be within "a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'" 315 U.S. at 229. See also Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
process of law and of freedom of association arose for consideration under the first and fifth amendments. Here was not the more ordinary type of conflict between Executive action and a person's legal right, as in Marbury's case, but the entry of the third force, as it were, of the Bill of Rights, reminiscent more of Milligan's case.

Fundamental to the field of Constitutional law is the rule that a person may not be deprived of life, liberty or property without due process. As a result, any Executive action which can fairly be construed as such a deprivation may be the subject of judicial correction. Not all who claim a deprivation, however, incur it; the claim may be too indirect or tenuous. For example, the nonrecognition of a revolutionary government in a foreign state, though it may in some remote way affect the property of an American citizen, is so political and nonjusticiable in nature as to be beyond judicial review. On the other hand, prevention of an individual's traveling to Europe by denying him a passport may have some indirect political consequence or may in a vague way be part of the conduct of foreign affairs. It has been held, however, to be such a direct deprivation of liberty as to fall on the side of the line where courts may scrutinize it to decide whether the deprivation is accomplished in accordance with due process.43 The Supreme Court in Perkins v. Elg,44 in an opinion by Chief Justice Hughes, held that the Secretary of State could not deny a passport on the mistaken basis that the applicant was not a citizen when in fact she was. The Court was careful, however, to disclaim interfering with the wide discretion of the Secretary to issue or deny a passport. When the more recent cases reached the Supreme Court,45 the transition of a passport into a document essential to the desired travel posed a question of due process, not of discretion. The Court then stated that denial of the "right to travel" was a deprivation of a liberty protected by the fifth amendment, but it did not reach the question whether due process had been actually afforded. To do so was unnecessary because the Court could not find, either in the inherent or the legislatively delegated power of the Executive, authority for the use of the criteria of political association and belief, upon which basis the passports had been denied.46

In reviewing Executive action in the passport cases the Judiciary thus

44 307 U.S. 325 (1939).
considered not merely the authority of the Executive as such, but the significance of applicable legislation or lack of it; the decisions indeed may be said to have caused a readjustment of relationships between the Executive and the Legislative branches which, in the course of changing circumstances, had become inconsistent with law.

Such a readjustment also was involved in *Myers v. United States.*\(^{47}\) President Wilson had appointed Myers a postmaster for a statutory term of four years; prior to the expiration of his term, Myers' resignation was demanded and refused. He was then removed by order of the Postmaster General acting under direction of the President. The governing statute provided that those in Myers' position "shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."\(^{48}\) If the statute were constitutional, it barred the removal because the Senate had not consented to it.

In one of the most monumental opinions in the Court's history, Chief Justice Taft covered seventy pages in detailing the constitutional appointive and removal power of the President and held the statute which sought to limit this power unconstitutional. Mr. Justice Holmes dissented, stating that since Congress alone conferred on the President the power to appoint to the office, Congress could "at any time transfer the power to other hands."\(^{49}\) Mr. Justice Brandeis in his dissent asked: "May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?"\(^{50}\) His answer, similar to that in Mr. Justice McReynolds' dissent,\(^{51}\) was in the negative.\(^{52}\)

\(^{47}\) 272 U.S. 52 (1926).
\(^{48}\) Act of July 12, 1876, ch. 179, 19 Stat. 81.
\(^{49}\) 272 U.S. at 177.
\(^{50}\) Id. at 241.
\(^{51}\) Id. at 178-79.
\(^{52}\) The opinion of the Chief Justice referred to the terms of the Tenure of Office Act of March 2, 1867, that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred articles of impeachment against President Johnson for refusal to comply with, and for
The seeming reach of the majority opinion in *Myers*, interpreting the President's removal power to permit its exercise in disregard of a statutory limitation, was significantly restricted in *Humphrey's Ex'r v. United States*.\(^{53}\) Unlike *Myers*, Humphrey was not an employee in an Executive department; he was a member of the Federal Trade Commission, a quasi-legislative tribunal. President Franklin D. Roosevelt, failing to secure Humphrey's resignation, issued a removal order. Like *Myers*, Humphrey refused to acquiesce. The Federal Trade Commission Act provided: "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."\(^{54}\) On certification of questions by the Court of Claims, the Supreme Court held the removal to be invalid since it was not for a cause specified in the statute. *Myers* was distinguished. The "essential co-equality" of the three departments of Government was thought to require each to be free of the control or coercive influence, direct or indirect, of the other.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.\(^{55}\)

The reference to "essential co-equality" brings to mind Jefferson's view that "co-equality" should enable the President, in the sphere of his own responsibilities, to equal the Judiciary in appraising the validity of his action. In *Humphrey's*, however, the Judiciary again intervened, in the name of co-equality, to hold Executive action invalid where it was found to infringe upon the independence of the Legislature. One sees here a necessary limitation upon the independence of the Executive under a rule of law which, in a case or controversy properly in litigation, calls upon the judicial function for its solution. In *Myers* a divided Court, under the Chief Justiceship of a former President, gave generous scope to the constitutional power to the Executive, notwithstanding legislation which sought to condition it. In *Humphrey's* the

\(^{53}\) 295 U.S. 602 (1935).


\(^{55}\) 295 U.S. at 630.
Court receded at least from the breadth of language of the former opinion so as not to disable the Legislative in its efforts to free quasi-judicial or quasi-legislative agencies from Executive control. In these two cases, which turned upon the nature of the governmental functions of the personnel involved, we see the Judiciary acting to prevent the Executive and the Legislative from unduly interfering with one another.\footnote{The method of judicial review of Executive action used in Myers and Humphrey's, and such other important cases as United States v. Lovett, 328 U.S. 303 (1946), and United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), was indirect, by suit in the United States Court of Claims for a monetary judgment against the United States under statutes which waive sovereign immunity; see Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B.J. 179 (1961), which explains this subject in the detail its importance deserves.}

Myers and Humphrey's were recently reviewed by the Court in Wiener v. United States,\footnote{357 U.S. 349 (1958).} which involved the validity of President Eisenhower's removal of a member of the War Claims Commission. Under an act of Congress the member's term was to expire with the life of the Commission, and there was no statutory provision for removal. The President's express desire was to have the Commission administered "with personnel of my own selection,"\footnote{Id. at 350.} similar to the desire of President Roosevelt in removing Humphrey. The Court was unanimous in concluding that the case came within Humphrey's rather than Myers, and therefore that the removal was invalid.

The assumption was short-lived that the Myers case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. Within less than ten years a unanimous Court, in Humphrey's Executor v. United States . . . narrowly confined the scope of the Myers decision to include only "all purely executive officers." . . . The Court explicitly "disapproved" the expression in Myers supporting the President's inherent constitutional power to remove members of quasi-judicial bodies.\footnote{Id. at 352.}

A series of other cases called upon the Judiciary to consider Executive action of an entirely different character respecting personnel. I refer now to the recent loyalty programs of the Executive, which grew out of concern over possible subversive infiltration into the huge federal establishment and into private industry engaged in public work calling for the use of classified information. Here, in contrast with Myers and Humphrey's, the Bill of Rights played a significant part, lest these
constitutional safeguards be ignored by the ambition of the program. Perhaps the chief characteristic of the Supreme Court decisions in the security cases has been their adherence to the tradition of avoiding direct constitutional issues if reasonably possible. The desire of the Court to avoid testing Executive action against constitutional provisions, while at the same time safeguarding legal rights against encroachment, led to judicial insistence that the Executive adhere to its own rules and regulations, procedural and substantive. Thus the discretion of the Secretary of State under Executive order and the “McCarran Rider” legislation was held not to permit a discharge, on security grounds, accomplished in a manner inconsistent with procedures the Secretary himself had established. The President had referred to the regulations as protecting “the national security without unduly jeopardizing the personal liberties of the employees . . . .”

The Court’s decision in Accardi v. Shaughnessy gave some guidance in the security cases. Accardi was not a government employee but a person subject to the discretionary deportation authority of the Attorney General. Failing to secure relief, he claimed that the Attorney General had foreclosed himself from exercising discretion by publicly announcing that he planned to deport petitioner as a person of “unsavory character.” The Court held that if Accardi could sustain his allegation he would be entitled to a hearing under department procedures, free of the effect of the Attorney General’s failure to abide by the procedures he himself had established.

The security problem spread to persons privately employed in plants manufacturing goods for the armed services and to those employed on military service installations. In Greene v. McElroy plaintiff’s access to classified information was revoked with serious adverse consequences to him, including loss of opportunity for the highly skilled private employment for which he was qualified and in which he was engaged. In the proceedings leading to the revocation, he had not been accorded the right to cross-examine and to confront the witnesses

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61 Letter From Harry S. Truman to Dean Acheson, September 6, 1950.
relieved upon by the Executive officials. No Presidential or congressional
authorization supported this procedure, and in the absence of such
authorization, the Court held that these traditional safeguards could
not be dispensed with. The Court accordingly was not required to decide
the issue of due process as it would have been if authority for the
procedures had existed.

In Cafeteria & Restaurant Workers Union v. McElroy,66 however,
the issue of due process was reached and decided adversely to the
individual. Plaintiff was a cook privately employed in a cafeteria located
within a Navy installation in the District of Columbia. After eight
years of such employment, she was told she did not meet security
requirements and her permit to enter the premises was lifted with
the result that she could no longer pursue her employment there. She
was given no reason why she did not meet security requirements and
was given no hearing of any kind. Recognizing her right to due process
of law, the Court pointed out that due process varies with the circum-
stances, which here included the nature of the Government’s function
as well as the nature of the private interests affected. The Court did
not view the discharge as a badge of disloyalty or infamy and held
that the due process requirements of the fifth amendment had been met.
Mr. Justice Brennan wrote the dissent, joined by the Chief Justice and
Justices Black and Douglas.67

It is understandable that the general reluctance of the courts to
intervene in Executive action should be especially emphatic in Executive
personnel matters. This is due not merely to the deference accorded to
a coordinately responsible repository of public trust, but to the theory
of separation of powers as well. Nevertheless, when a constitutional or
statutory safeguard of an individual is involved in a justiciable case
or controversy, the Court must decide. It cannot separate itself from
vindicating the law, especially the Constitution. Undue deference here
would be abdication of the Judiciary’s own entrusted responsibility. The
passport and security risk cases are instances where these problems
have had to be resolved.

67 Id. at 899. See also Cafeteria & Restaurant Workers Union v. McElroy, 109 U.S. App.
D.C. 39, 58, 284 F.2d 173, 192 (1960) (Fahy and Edgerton, JJ., dissenting). In his James
Madison Lecture, “The Bill of Rights and the Military,” New York University Law Center,
February 1, 1962, Chief Justice Warren said of the Supreme Court’s decision: “While the
dilemma is in some cases serious, Cafeteria Workers, the most recent expression of the
Court’s views on the subject, does not, in my judgment, represent a satisfactory guidepost
There are many other types of personnel cases which seem to be sufficiently a part of the problem under discussion to require some mention. Where Congress has clothed Civil Service employees and veterans with procedural and substantive protections, the task of the Judiciary in cases properly brought to it has been primarily to determine the correctness of Executive administration of the enactments and regulations. In the area where the employee has no special legislative protection, there is even less for the courts to do. Although they do not seek to guide Executive discretion or to become engaged in personnel management, arbitrary action remains judicially questionable.68 In upholding the Executive action in Cafeteria Workers, the Court pointed out that while it has consistently acknowledged that, absent legislation to the contrary, the interest of a government employee in retaining his job could be summarily denied and his employment revoked at will, nevertheless, an individual's interest in government employment is entitled to constitutional protection, quoting from Wieman v. Updegraff79 as follows: “We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”70 The Court added that Updegraff and United Pub. Workers v. Mitchell71 both “demonstrate only that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.”72

It should be remembered that consideration of the cases which arose under the loyalty programs as merely personnel cases would be too undiscerning; they are part of the living process of government under our Constitution and laws in which the Judiciary must aid in draw-
ing lines of authority and of freedom from authority’s unlawful exercise. Harmon v. Brucke\textsuperscript{78} affords an illustration of how one so-called personnel decision may affect many people. The Secretary of the Army had given other than “honorable” discharges to the petitioning soldiers. The Secretary acted on the basis of the soldiers’ preinduction activities rather than exclusively upon their records in the military service. The Court, upon review of applicable legislation, held that in so doing the Secretary had acted in excess of the powers Congress had granted to him. The language of the Court recalls Marbury v. Madison:

Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. . . . The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercise of his administrative discretion, and in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries.\textsuperscript{74}

We turn now to a partial consideration, supplementary to our previous reference to Ex parte Milligan, of the relation of the Judiciary to the Executive’s conduct of war.\textsuperscript{75} The conduct of war is generally both an Executive and a Legislative function. Being essentially military, it is nonjudicial in most respects. Yet the Judiciary is sometimes a factor in ways which are crucial to many individuals, if not to national survival. World War II gave rise to a number of such instances, some involving the exercise of both Legislative and Executive war powers, while in others the Executive acted alone. Cases of the former type resulted in three Supreme Court decisions affecting persons of Japanese ancestry on the west coast after the attack at Pearl Harbor. Hirabayashi v. United States\textsuperscript{76} tested the validity of the curfew; Korematsu v. United States\textsuperscript{77} the area Commanding General’s order requiring individuals of Japanese ancestry to leave specified areas; and Ex parte Endo\textsuperscript{78} the

\textsuperscript{73} 355 U.S. 579 (1958).
\textsuperscript{74} Id. at 581-82.
\textsuperscript{75} In referring again to Ex parte Milligan, I take occasion to note as pertinent to our discussion the case of Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), which in the early years of the nineteenth century sustained in substance the famous dissent in the lower court of young Judge Cranch, in which, for the reasons he eloquently set forth, he stood against Executive authority which he thought had invalidly brought about a commitment for treason growing out of the Aaron Burr conspiracy.
\textsuperscript{76} 320 U.S. 81 (1943).
\textsuperscript{77} 323 U.S. 214 (1944).
\textsuperscript{78} 323 U.S. 283 (1944).
continued control sought to be exercised over a citizen who, though
of Japanese ancestry, had been cleared as loyal and law-abiding after
reaching a relocation center following evacuation. The action taken in
Hirabayashi and Korematsu was based on the combined powers of the
President and Congress, and was upheld; in Endo it was not. In each,
however, the Judiciary accepted jurisdiction to decide on the merits
the challenge of individual rights to the claims of military necessity.
The most extensive consideration of the war powers appears in
the first of the cases, that of Hirabayashi. There, and also in Korematsu,79
the Court upheld the right of the Government to pursue the program it
adopted but repudiated the attempted extension of the war powers to
the situation presented by Endo.

The somewhat earlier case of Ex parte Quirin80 was explicitly di-
stinguished in Endo. In Quirin the German saboteurs who came to our
shores by submarine were tried by military commissions for violations
of the laws of war. The commissions had been created by a Presidential
proclamation81 which sought to exclude the civil courts from all con-
nection with the matter. In civil habeas corpus proceedings initiated
subsequent to convictions by the military commissions, the Supreme
Court said in reply to this effort to exclude the courts:

[N]either the Proclamation nor the fact that they are enemy aliens forecloses
construction by the courts of petitioners’ contentions that the Constitution and
laws of the United States constitutionally enacted forbid their trial by military
commissions. . . . But the detention and trial of petitioners—ordered by the
President in the declared exercise of his powers as Commander-in-Chief of the
Army in time of war and of grave public danger—are not to be set aside by
the courts without clear conviction that they are in conflict with the Constitution
or laws of Congress constitutionally enacted.82

Ex parte Milligan was not considered controlling because the offense
there was one which in this nation is “constitutionally triable only by

79 Korematsu was not excluded from the Military Area because of hostility to him or
his race. He was excluded because we are at war with the Japanese Empire, because
the properly constituted military authorities feared an invasion of our West Coast
and felt constrained to take proper security measures . . . .
323 U.S. at 223. Some years later in Kent v. Dulles, the Court referred to the Korematsu
case as follows:

[W]e allowed the Government in time of war to exclude citizens from their homes
and restrict their freedom of movement only on a showing of “the gravest imminent
danger to the public safety.” There the Congress and the Chief Executive moved in
coordinated action; and, as we have said, the Nation was then at war.
80 317 U.S. 1 (1942).
82 317 U.S. at 25.
a jury.” In *Quirin*, on the other hand, “these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.”

The wide range of judicial probing into the constitutional scope of Executive power in time of war can be seen in the foregoing cases. They show careful consideration of the meaning today of provisions long since imbedded in the Constitution regarding the “law of Nations,” construed in conjunction with the constitutional grant of Executive power. Reconciliation of these portions of the Constitution with the Bill of Rights was a solemn task for the Court, first in respect to saboteurs on the east coast, then as to persons of Japanese ancestry affected by the west coast program. Still later the reach of the Executive power extended itself into the far Pacific in *In re Yamashita*, the Japanese War Crimes Case. There a Japanese General had been tried by a military commission of the United States. The Court, through habeas corpus proceedings, undertook review of the resulting conviction. However, once the Court decided that the military tribunal could validly try the offense charged, review by the civil courts of the result of the trial was limited.

This is further elucidated in *Burns v. Wilson*, which also came to the Court in habeas corpus proceedings initiated in a federal district court in an effort to upset court-martial judgments of death confirmed by the President. Petitioners had exhausted all remedies available for review under the Articles of War. Resorting then to the civil courts, they claimed that the proceedings which led to their convictions denied basic constitutional rights. The Supreme Court said: “The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power. Accordingly . . . our concern is with the manner in which the Court should proceed to exercise its power.” Confining its review narrowly, since Congress had specially provided other procedures than those of the civil courts to carry the burdens in this type of trial, the Court held that no such fundamental unfairness had occurred in the trial and review processes of the military courts and authorities as to warrant the civil courts in setting aside the result.

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83 Id. at 29.
84 327 U.S. 1 (1946).
86 Id. at 139.
87 In *Hirabayashi*, although there were separate concurring opinions by Justices Roberts, Douglas and Murphy, there was no dissent. In *Korematsu*, there were dissents by Justices
Turning now to a different phase of our national life, Executive action also came under judicial review as an accompaniment of the westward movement in our growth and the development of our natural resources. Many disputes have arisen among private interests and between private interests and the Government affecting the public domain, viz., land, mines, forests, oil and gas—the property of the United States which had been opened to private persons and enterprises for development, including Legislative grants to the railroads to encourage their westward extension. The Constitution places in the Congress control of the property of the United States. With exceptions, such as the Naval Petroleum Reserves, the Congress has given principal responsibility for administering these valuable resources to the Department of the Interior. Inevitable controversies arose involving not so much constitutional problems as the construction of statutes and regulations. The interpretation and application by the Executive—usually through the Secretary of the Interior—of these statutes and regulations, sometimes in contests between individuals and the public authorities, sometimes just between individuals themselves, gave rise to judicial decisions which have drawn many intangible lines of the law defining rights.

Noble v. Union River Logging Rd. is instructive in the guidance it gives to judicial review of Executive action respecting the public domain. Marbury v. Madison is there referred to as the “great case” which held “that there is a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial . . . [W]ith respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts” and may be controlled by either mandamus or injunction as the circumstances require.

The homestead cases are well represented by Lane v. Hoglund,

Roberts, Murphy and Jackson. Mr. Justice Jackson pointed out that “the armed services must protect a society, not merely its Constitution. . . . But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.” 323 U.S. at 244. In Yamashita there were dissents by Justices Murphy and Rutledge. Mr. Justice Jackson took no part in the consideration or decision in Yamashita.

88 “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .” U.S. Const. art. IV, § 3.

89 147 U.S. 165 (1893).

90 Id. at 171. In Noble the Court concluded that a predecessor Secretary of the Interior had acted within his allowable discretion under the applicable statute, and so his successor could not competently revoke the action.

91 244 U.S. 174 (1917).
where, in issuing a writ of mandamus against the Secretary, the Court held that he had illegally cancelled a homestead entry contrary to his plain duty under applicable statute. "True this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so."92

The courts have frequently taken jurisdiction to review Executive action claimed to infringe private rights with respect to oil and gas leases on the public domain where rights thereto were granted by statute. On reaching the merits, the courts have followed the principles outlined above. A recurring problem in these cases has been how to determine whether the Executive has acted within his permissible discretion or has denied a plain legal right. If the latter, his duty has been described as "ministerial" and therefore one he can be judicially directed by writ of mandamus to perform. In McKenna v. Seaton,93 where the question was which of two applicants for an oil and gas lease was the first qualified applicant under the Secretary's regulations, the court sought to loosen somewhat the rigid concept of "ministerial," or at least to describe action subject to judicial direction in language which escapes the rigidity of the term "ministerial" as a touchstone: "[A] fair common denominator, as it were, of the conditions which will cause judicial repudiation of administrative action by the Secretary, is at least that he is plainly wrong."94

We have seen that judicial review of Executive action has frequently not been confined to consideration of Executive action in isolation. It has often required interpretation of laws of the Congress which were

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92 Id. at 181.
94 Id. at 54, 259 F.2d at 784. A somewhat unique instance in which Presidential action with respect to the public domain was reviewed and upheld is United States v. Midwest Oil Co., 236 U.S. 459 (1915). The United States sued to recover oil-producing land which had been entered by private parties purporting to do so under statutory authority after a Presidential proclamation had in terms temporarily withdrawn the lands from entry in aid of proposed legislation. The President had no express statutory authority for the withdrawal, but the Court in upholding his action relied in good part upon a long Presidential practice in which the Congress had acquiesced. The case was discussed and distinguished years later in the Youngstown seizure case. See also McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F.2d 35 (1955), and the exhaustive review of the subject in West Coast Exploration Co. v. McKay, 93 U.S. App. D.C. 307, 209 F.2d 818 (1954).
being administered by the Executive. A large part of the conduct of the President and of departments under him is carried out pursuant to the command of the Constitution that the President “shall take Care that the laws be faithfully executed.” And “the laws” are those of the Constitution and the Congress. Since these are the laws which shall faithfully be executed, action beyond them is subject to judicial correction in a case or controversy properly brought to court. The correction comes about because of the general nature of the judicial function and of its particular nature under the Constitution. This function, however, does not embrace the nonjusticiable activities which give special character to the general nature of the Executive authority and to its particular nature under the Constitution. With the guides furnished by the character of and differences between these two branches of Government, there has been throughout our history, and continues, an unending adjustment to law as need arises in the life of the nation. The need has varied as new problems have arisen or old ones have come forward for reconsideration. The pole star of decision remains the Constitution, supplemented by the laws and treaties made pursuant thereto; and of all these no part is deemed more important than the Bill of Rights.

Not every adjustment of governmental relationship, not every judicial decision, has been accepted uncritically. But the nation as we see it today is witness to the operational effectiveness of the Judiciary in relation to the Executive. It is witness also to the devotion of those who, with the people, have preserved and made workable a means of government which the Founders, who loved liberty, could hardly have anticipated would more fully realize their hopes and expectations.

95 There is a type of judicial review involving federal criminal law administered by the Executive. Review comes about through court rulings during trials and on appeals from judgments of conviction. The Supreme Court, especially for the past seventy-five years, beginning, let us say, with Boyd v. United States, 116 U.S. 616 (1886), has devoted much of its attention to these rulings. They are concerned primarily with the safeguards of the Bill of Rights. The subject is better left for more complete treatment in a separate article, but two recent cases are illustrative: Green v. United States, 355 U.S. 184 (1957), and Elkins v. United States, 364 U.S. 206 (1960). In a related area see Mallory v. United States, 354 U.S. 449 (1957).

96 It is interesting to recall that the great controversy over the Court, augmented by President Roosevelt twenty-five years ago, was not due to judicial interference with Executive action but with the Court's treatment of Legislative action, though of course the President was deeply concerned with the Legislative program.
FEDERAL JUDICIAL "INTERFERENCE" WITH THE FINALITY OF STATE COURT PROCEEDINGS

LINDSEY COWEN*

“We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. ... The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same person and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedures.”

—WILLIAM HOWARD TAFT

INTRODUCTION

To many Americans it is a source of considerable satisfaction that our federal constitution has served virtually from its inception as a model both for constitutional reform in existing nations and for basic documents in newly emerging countries. Federalism, in a multitude of forms, has proven to be an exceedingly popular system for very practical reasons—it permits accommodation of a variety of interests, and under it in this country, where it has existed in its modern form the longest period of time, we have achieved degrees of personal freedom, standard of living and national power which are unequalled in history. But it should give us pause that the judicial system of this country has not recommended itself to others to the same degree that other aspects of our system have; and this alone should be adequate reason for periodic reexamination of our judicial system for the purpose of accomplishing such improvements as may be indicated. However, we are faced not only with foreign skepticism, but domestic dissatisfaction as well. There seems to be almost continuous internal criticism from one interest or another. Someone seems always to be disturbed either by excessive federal encroachment upon state preserves or, at the other extreme, at federal inactivity in correcting abuses. And the federal

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1 See generally Federalism: Mature and Emergent (Macmahon ed. 1955); Studies in Federalism (Bowie & Friedrich ed. 1954).


3 For example, at the time of this writing a substantial portion of the time of certain
courts, particularly the Supreme Court of the United States, are frequent targets of criticism for participating in, if not leading, the alleged federal encroachment on the powers of the states. For instance, in 1958 the responsible and respected Conference of Chief Justices adopted the report of its Committee on Federal-State Relations as Affected by Judicial Decisions, a report which was sharply critical of the Supreme Court for pressing the extension of federal power and pressing it too rapidly. It read in part:

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.4

The criticism seemed to be not that the Supreme Court has a decisive voice, but that it exercised it too frequently and often improperly. The Chief Justices recognized that "by necessity and by almost universal common consent," ultimate judicial powers of Constitutional and legislative interpretation are vested in the Supreme Court and that any other allocation "would seem to lead to chaos."5 But they advised the Court to exercise restraint in giving effect to what it might feel is merely "desirable" and by adhering to constitutional fundamentals with regard to the separation and distribution of powers and "the limitations of judicial power which are implicit in such separation and distribution."6

There are many aspects of the problem, all appropriate subjects for extended discussion. This article undertakes to explore only a narrow sphere—the power of the federal courts to "interfere" with the finality of state court proceedings, other than through the writ of habeas corpus, which is the subject of a separate study.7

Our judicial organization is unusual and therefore our problems may

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5 Id. at 3.

6 Id. at 30-31.

be unique. On the one hand we have the federal judiciary whose jurisdiction is limited by the Constitution and by statute. On the other hand we have the judiciaries of the various states which exercise a broad general jurisdiction, a considerable portion of which, however, is concurrent with that of the federal courts. Nevertheless, at a very early date it was said that "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

From the earliest days of the Republic, the Congress and the federal courts have been aware of potential friction between the two judicial systems. With respect to litigation pending in the state courts, the federal courts have since 1793 been prohibited by statute from staying "proceedings in any court of a state." In addition, the federal courts themselves have developed a considerable body of "abstention" law pursuant to which federal courts decline to exercise their jurisdiction in an effort to promote an harmonious relationship without congressional restriction. The development of this body of abstention law began relatively late and even now may not have reached its maturity. But be that as it may, these limitations, statutory and judge-made, demonstrate the federal sensitivity to the frictions which develop with respect to pending or anticipated state litigation.

Similar frictions arise after a state court has proceeded to final judgment and that judgment is directly challenged in the federal system. This may take the form either of direct review of the judgment  

8 See authorities cited note 2 supra.
9 U.S. Const. art. III, § 2.
11 Claflin v. Houseman, 93 U.S. 130, 137 (1876).
12 Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. The current statute prohibiting the staying of state court proceedings is 28 U.S.C. § 2283 (1958). With respect to state taxes and rate orders, this section is supplemented by 28 U.S.C. §§ 1341-42 (1958) which, broadly speaking, precludes federal injunctive relief when (among other things in the case of rate orders) "a plain, speedy and efficient remedy may be had in the courts of such State, even where no state court proceedings have been instituted."
13 For the most recent extensive discussions of the doctrine, see Martin v. Creasy, 360 U.S. 219 (1959); County of Allegheny v. Frank Mashunda Co., 360 U.S. 185 (1959); Harrison v. NAACP, 360 U.S. 167 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).
15 Use of the abstention device in United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962), may presage additional development.
or of an independent suit in equity to stay its enforcement. The former was authorized in certain situations by the framers of the Constitution, and jurisdiction to entertain the latter type suit has been assumed, although not without relatively recent challenge.

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DIRECT REVIEW

The first Judiciary Act provided for Supreme Court review of a "final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had" where, broadly speaking, the case arose under the Constitution, laws or treaties of the United States. The constitutionality of this statute was periodically challenged until the time of the Civil War, and it was subjected to attack in Congress for a few years thereafter. In 1816, however, the Supreme Court decided the issue in favor of constitutionality and has not wavered since. In Martin v. Hunter's Lessee, the Court reasoned that because article III of the Constitution, in its references to both the judicial power and appellate jurisdiction, speaks in terms of cases rather than courts, it follows that, whatever the court, if the case pending therein meets the appellate jurisdictional requirements, it is reviewable by the Supreme Court of the United States with such exceptions and under such regulations as the Congress might make. Although from time to time there have been amendments to the language of the statute, the current law is nevertheless similar to the original. Basically, when a state court has decided a federal question, there is potentially a power to review either by appeal, which is theoretically a matter of right, or by writ of certiorari, which is discretionary with the Supreme Court of the United States. As is indicated above, for the first one hundred years of this country's history, there were periodic formal challenges either in the courts or in the Congress to this right of review. Had the Congress and the Court not sharply limited its exercise, the antagonisms caused by its exercise might have reached serious proportions. However,

17 See pp. 750-51 infra.
20 Warren, Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act, 47 Am. L. Rev. 1, 3 (1913).
21 14 U.S. (1 Wheat.) 304, 323 (1816).
once the basic issue was resolved, the Congress has never been accused of "over-reaching," and in general the Supreme Court has indicated an awareness of the inherent difficulties, although there is some question as to whether it has always acted appropriately. These doubts make it desirable to examine the various limitations on this right to review to ascertain if in fact they are being observed and to determine whether additional limitations are suggested.

1. General Limitations on the Exercise of Federal Judicial Power

First of all, there are the limitations on the exercise of federal judicial power which are applicable generally. The federal judicial power extends only to "cases" and "controversies." The federal courts, including of course the Supreme Court, cannot render advisory opinions nor respond to abstract, hypothetical or conjectural questions. Feigned and moot actions are precluded as are those where the plaintiff is not an appropriate party under the law. The federal courts cannot exercise their judicial powers if power to review the judgment is granted to one of the other branches of the Government. Further, the question presented must be neither "political" nor "administrative" in character, although the definition of a "political" question has only recently been made even more difficult.

2. Special Limitations on the Power of Direct Review

A. FEDERAL QUESTION

Once these obstacles are passed, the problem of subject-matter jurisdiction is reached. From the first Judiciary Act to date, it has consistently been held that the power of the Supreme Court to review state court decisions is limited to "cases arising" and only to the federal

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23 U.S. Const. art. III, § 2.
24 See 3 The Correspondence and Public Papers of John Jay 486-89 (Johnston ed. 1891). See also United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947), in which the Court says: "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."
25 E.g., see United Pub. Workers v. Mitchell, supra note 24, at 89 & n.20.
29 Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
30 Colegrove v. Green, 328 U.S. 549 (1946).
questions actually presented. And while it is at least arguable that the constitutional language authorizes review of both federal and non-federal issues decided by a state court, the acts of Congress defining this jurisdiction have never been construed so broadly.

The present statute provides for Supreme Court review of state judgments based on federal question by appeal or writ of certiorari. The availability of the "appeal" is limited to two relatively narrow situations: (1) where there is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; and (2) where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity. Both situations are concerned with the most delicate of federal-state relations. In the first, a state court has been called upon to rule on the constitutionality of a federal statute or treaty and has declared it unconstitutional, a situation which strongly suggests that the final federal voice be heard. In the other situation, the state court has been called upon to rule on the federal validity of a state statute and has declared that the state statute does not violate the federal law. Here, too, the state court has in effect ruled against the federal claim, again suggesting the need for the final federal voice.

A writ of certiorari may be sought by a litigant where the case in which review is sought draws in question the validity of a federal treaty or statute, or a state statute on the ground that it is "repugnant to the Constitution, treaties or laws of the United States." This is the "case arising" or "federal question" jurisdiction which is also exercised originally or on removal by the district courts. There are procedural

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33 For instance, in Herb v. Pitcairn, 324 U.S. 117, 125 (1945), it is said: "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." See also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).


39 28 U.S.C. § 1331(a) (1958) confers the general federal-question jurisdiction where there is involved an amount in controversy in excess of $10,000, exclusive of interest and
limitations on its exercise by these courts—for instance, the federal question must appear on the face of the well-pleaded complaint, and raising the federal question by anticipating a defense or in an answer does not constitute a basis for the exercise of original or removal federal-question jurisdiction. However, the basic elements of what constitutes a federal question are common to original, removal and appellate jurisdiction.

The difference between the code provision concerning a writ of certiorari and the provision conferring original jurisdiction on the district courts is that in the former the federal question “may be set up at any stage in the litigation whereas in the latter the case must ‘arise’, that is, the plaintiff’s case must be founded on a right under the Constitution or laws.”

What constitutes a federal question is, of course, a tremendous subject in itself. In most cases, numerically speaking, it is clear enough; but there are enough penumbral situations to justify very extensive studies. This, however, is beyond the function of this particular article. Once the presence of a federal question is determined, it must also be ascertained (1) that the federal question is substantial; (2) that it was timely raised; and (3) that it is decisive of the case.

(1) Substantiality

The requirement of substantiality is common to all federal-question jurisdiction, whether it is original, removal or appellate. It is a wholly logical requirement. In most situations it should be obvious that no court, and particularly the Supreme Court of the United States, should

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43 The removal statute, 28 U.S.C. § 1441 (1958), is geared to original jurisdiction which cannot be based on the allegations of an answer. Joy v. City of St. Louis, 201 U.S. 332 (1906). See also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).
46 Doucette v. Vincent, 194 F.2d 834, 846 (1st Cir. 1952) (concurring opinion).
be placed in the position of having to spend its valuable time restating principles of law which have already been conclusively determined. *Zucht v. King* illustrates the point. Plaintiffs had challenged the validity of a city ordinance which provided that no child or other person should attend a public school or other place of education without having first presented a certificate of vaccination. The state courts held the statute constitutional as not violative of due process or equal protection under the fourteenth amendment. This obviously met the statutory grounds for review as a matter of right. However, the Supreme Court dismissed on jurisdictional grounds, saying that it had long before settled the question of the validity of a state’s exercise of its police power in this matter and that the record presented no “substantial” question as to the validity of the ordinance.

Unhappily, no matter how theoretically sound the principle is, in practice counsel cannot be certain that the Supreme Court is not willing to reverse itself. It happens frequently enough to cause the Chief Justices’ committee to comment that it is “strange” that under a doctrine which “requires all to recognize the Supreme Court’s rulings on constitutional questions as binding adjudications . . . the Court itself has so frequently overturned its own decisions . . .”

One illustration will make the point. In the late 1930’s, in a series of “flag salute” cases, the Court at first declined to review them for lack of a substantial federal question. When, however, the Third Circuit in *Minersville School Dist. v. Gobitis* disregarded the per curiam dismissals and affirmed an injunctive order, the Court granted certiorari and subsequently held that the constitutional objection was unsound. Two years later, a three-judge court in the Fourth Circuit disregarded this specific opinion, and the Supreme Court on appeal affirmed the judgment below that compulsory flag saluting in schools was unconstitutional. The trial court opinion did not expressly discuss the issue of substantiality but did indicate that four members of the

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49 260 U.S. 174 (1922).
50 Id. at 176.
53 108 F.2d 683 (3d Cir. 1939).
54 310 U.S. 586 (1940).
56 319 U.S. 624 (1943).
Supreme Court had "given public expression to the view that . . . [the Gobitis decision was] unsound." This presumably made the question a substantial one, and the Supreme Court confirmed this position by specifically overruling Gobitis.\textsuperscript{58}

This is not to say, however, that the requirement of substantiality no longer has vitality. In two notable cases this term,\textsuperscript{69} the Supreme Court has taken the path of insubstantiability to confirm the results achieved in the lower courts. One of these actions\textsuperscript{60} involved a challenge to a Kansas statute which had been construed to require that a Kansas attorney who regularly practiced law in another state must nevertheless be associated with local counsel before he could appear in a Kansas state court. It was held below that this did not violate the fourteenth amendment to the federal constitution, and the Supreme Court dismissed the appeal for want of a substantial federal question. In the other, the Court vacated and remanded on the grounds of insubstantiability, saying that it had "settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. . . . The question is no longer open, it is foreclosed as a litigable issue."\textsuperscript{61}

There seem to be two obvious conclusions. The first is that even though there appears to be abundant or perhaps overwhelming support for the result below, the Court may determine nevertheless that a substantial question remains. The demonstrated willingness of the Court to disregard on occasion the principles of stare decisis\textsuperscript{62} suggests that in most instances an attempt to obtain review is in order. The second conclusion is that although the attempt may be in order, success is not assured. It still is incumbent upon the appellant or petitioner to convince the Court in all instances that a substantial federal question is involved, and in those cases where a writ of certiorari must be procured, the Court must also be persuaded that the question is of sufficient national importance to warrant expending a portion of the Court's extremely valuable time on it.\textsuperscript{63}

\textsuperscript{57} 47 F. Supp. at 253.
\textsuperscript{58} 319 U.S. at 642.
\textsuperscript{59} October Term, 1961.
\textsuperscript{60} Martin v. Walton, 368 U.S. 25 (1961).
\textsuperscript{62} See Douglas, Stare Decisis, 49 Colum. L. Rev. 735 (1949).
\textsuperscript{63} See U.S. Sup. Ct. R. 15 1(e), 16 1(b), 19 1(a).
(2) Timeliness

The second limitation is that the federal question asserted as the basis of jurisdiction must have been raised in timely fashion in the courts below. This requirement is eminently sound and perhaps demanded by the circumstances. Obviously it is in the interest of sound judicial administration that no appellate court be asked to consider a question which the court below has not had a reasonable opportunity to consider. And where, as here, the appellate jurisdiction is based on subject matter—a federal question—the requirement takes on jurisdictional overtones.

Normally state practice determines when and how federal claims are to be presented and preserved in state judicial systems.\textsuperscript{64} Where the federal claim has not been presented in accordance with state procedure and has not been considered by the state courts, it is appropriate to take the position that the federal question is not in the case and that Supreme Court review is precluded.\textsuperscript{65} If, however, the federal claim, although not presented in accordance with state procedure, is nevertheless considered and determined by the state court, it is appropriate to consider the matter to have been timely raised for purposes of Supreme Court review.\textsuperscript{66} Where the federal issue is first raised by an unanticipated result in a final judgment rendered by the highest court of the state in which a decision could be had and such a ruling could not have been anticipated, raising the issue in the petition for rehearing is properly deemed to be timely.\textsuperscript{67} The question is, of course, whether or not there was adequate notice of the potential ruling to the person allegedly hurt thereby.

Where the state procedural requirements are deemed to be unfair, they may be disregarded by the Supreme Court;\textsuperscript{68} and even though technically fair, the Court may nevertheless vacate the judgment below in the interest of justice. Thus in\textit{ Patterson v. Alabama}\textsuperscript{69} it was held that vacation of a state court rape conviction was not precluded by the fact that the federal question concerning systematic exclusion of Negroes was not timely raised. The Court felt that the case contained certain

\textsuperscript{64} See Herndon v. Georgia, 295 U.S. 441 (1935).
\textsuperscript{65} See Tidal Oil Co. v. Flanagan, 263 U.S. 444, 455 (1924), and cases cited therein.
\textsuperscript{66} See Whitfield v. Ohio, 297 U.S. 431, 436 (1936), and cases cited therein.
\textsuperscript{68} See Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932).
\textsuperscript{69} 294 U.S. 600 (1935).
“exceptional features,” one being the fact that the Court in a separate decision had already reversed the conviction of a codefendant on the identical federal question.

Normally, whether or not the federal question was properly presented is not a difficult question. But where a more or less general objection on federal grounds is presented, the problem of whether a specific question has been timely raised can be troublesome. In *Terminiello v. City of Chicago*\(^7\) the defendant was tried and convicted of disorderly conduct in violation of a city ordinance. Throughout the proceedings he contended that the ordinance as applied to his conduct violated his right of free speech under the federal constitution. He did not specifically except to the court’s construction of the statute, but a majority of the Supreme Court reversed the conviction, holding that on the record it was clear that the defendant at all times had challenged the constitutionality of the ordinance as construed and applied to him. In a strongly worded dissent, Mr. Justice Frankfurter argued that the majority, in upsetting a conviction sustained by three Illinois courts, had arrived at a decision by considering an “objection, not raised by counsel in the Illinois courts, not made the basis of a petition for certiorari here—not included in the ‘Questions Presented,’ nor in the ‘Reasons Relied On for the Allowance of the Writ’—and explicitly disavowed at the bar of this Court . . .”\(^7\) Chief Justice Vinson added that he thought the basis used for reversal did “not accord with any principle governing review of state court decisions.”\(^7\)

The conclusion to be drawn is that while the Court continues to pay lip service at least to the principle of timeliness, there is sharp cleavage as to how specific the challenge must be. A litigant is obviously well advised to be precise in raising a federal question in accordance with state procedure; but if thereafter it develops that there may have been other federal questions involved, some general objection or some general claim may be a sufficient handle to permit the Court to find that the issue was timely raised.

(3) Decisiveness

Finally, the federal question asserted as a basis of appellate jurisdiction must be decisive of the result, for it is judgments or decrees which are reviewed and not the legal grounds which support them. Accordingly,

\(^7\) 337 U.S. 1 (1949).
\(^7\) Id. at 9.
\(^7\) Id. at 7 (dissenting opinion).
where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, the Supreme Court’s appellate jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.73 By way of illustration, in *Central Sav. Bank v. City of New York*,74 the state legislature had enacted legislation authorizing the city to make repairs on certain old buildings and to assess the costs as liens with priority over existing mortgages. Certain mortgagees whose priority would thereby be impaired sued for a declaration of unconstitutionality, alleging that the statute violated the due process clauses of both federal and state constitutions. The New York Court of Appeals sustained these positions and declared the act unconstitutional. Certiorari was denied "for the reason that the judgment sought to be reviewed rests upon a nonfederal ground adequate to support it."75 Obviously a federal question was involved; it was presumably substantial and had been timely raised. But the state court’s holding on the federal question was immaterial to the result since its ruling that the statute violated the state’s concepts of due process was adequate to support the actual judgment. Similarly, in *Almond v. Day*,76 where the Supreme Court of Appeals of Virginia had been asked to find unconstitutional the payment of school tuition grants to war orphans on the grounds that the grants violated provisions of both the federal and state constitutions, its judgment of unconstitutionality was not reviewable in the Supreme Court of the United States since the decision on the federal question was not decisive of the outcome.

Occasionally, of course, it is not clear whether a federal question is decisive or not, and under such circumstances clarification is in order. In *Herb v. Pitcairn*77 an action originally filed in a state court under the Federal Employer’s Liability Act was dismissed, and on appeal the dismissal was affirmed without a clear holding as to what law, state, federal or both, had been applied by the state court.78 Review was sought, but a majority of the Court felt that the principle of decisiveness demanded that the case be held pending application by petitioner to the state court for clarification. Mr. Justice Black, relying upon the state court’s statement to the effect that the material point for con-

73 See Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).
74 279 N.Y. 266, 18 N.E.2d 151 (1938), modified on reargument, 280 N.Y. 9, 19 N.E.2d 659 (1939).
75 306 U.S. 661 (1939).
76 197 Va. 419, 89 S.E.2d 851 (1955).
77 324 U.S. 117 (1945).
78 384 Ill. 237, 51 N.E.2d 277 (1943).
Consideration was whether the requirements of a federal statute had been met, was of the opinion that the decisiveness of the federal question was apparent, and he was prepared to proceed to a decision. His position was, in effect, sustained when after state court clarification the Supreme Court granted the writ and reversed the judgment below.

In Williams v. Kaiser the Court had before it an affirmance of a denial of a petition for a writ of habeas corpus. There was a possible state ground to support the result, but much of the opinion of the court below was devoted to the federal question. The Supreme Court, in considering the hazy state of the record, conceded that where a state court decision might have been made on either state or federal grounds, there would be no review if the state ground was sufficient to sustain the judgment. But the court found it equally "well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.'" The Court then reversed the judgment below in the face of Mr. Justice Frankfurter’s objection that the record did not preclude "the assumption that ... a local inadequacy in the petition for a writ of habeas corpus" had been the foundation of the decision.

While theoretically the Supreme Court has the final word on whether or not there is an independent state ground, the practicalities of the matter often leave the decision in the hands of the state courts. For instance, in Hawke v. Olson the Supreme Court reversed a state court's dismissal of a petition for a writ of habeas corpus on the ground that under the federal constitution the petitioner was entitled to a hearing. The state court then declined to comply with the mandate of the Supreme Court on the theory that there was an adequate and independent state ground, procedural in character, which justified the result.

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79 324 U.S. at 128-35 (dissenting opinion).
81 323 U.S. 471 (1945).
82 Id. at 477-78.
83 Id. at 483 (dissenting opinion).
84 326 U.S. 271 (1945).
85 146 Neb. 875, 22 N.W.2d 136 (1946). On occasion it is suspected that state courts evade the mandates of the Supreme Court by the assertion of an independent state ground adequate to support the judgment, but this aspect of the problem seems not to be out of hand. See generally Note, State Court Evasion of United States Supreme Court Mandates, 56 Yale L.J. 574 (1947).
The second statutory limitation is that of finality, a condition of review which is an historic characteristic of federal appellate procedure. Authorizing appellate review only of "final judgments and decrees" is generally justified on the grounds that a conservation of judicial energy is accomplished thereby, an extremely important point where the Supreme Court of the United States is concerned, and that failure to require it weakens judicial administration, a significant point where federal review of state judgments is involved. A futile appeal ought never to be authorized where it can be avoided, and failure to require finality would in many instances produce such a result. For instance, in a particular case a state court might rule that a state statute violated the federal constitution, a decision which could by statute be made reviewable. But if in the same case, after federal review, the state court went on to rule that the state statute also violated the state constitution, the prior federal review would have been futile since the ultimate judgment would be one of invalidity, regardless of the Supreme Court's judgment on the federal question. Such a situation is undesirable under any circumstance; it is particularly to be avoided in federal-state situations. Be that as it may, finality is a condition of Supreme Court review of state court decisions, although in particular cases there may be doubt as to what is and what is not final for appellate review purposes.

The rule has been criticized as lacking both "finality" and "certainty," and with respect to the appellate jurisdiction of the federal courts, it has been suggested that the rule ought to be simplified and made more flexible. Perhaps it ought to be simplified and clarified, but relaxation of the principle of finality with respect to the appellate jurisdiction of the Supreme Court would have the serious consequence of overburdening even more an already overburdened Court and would

86 Cobbledick v. United States, 309 U.S. 323, 324 (1940).
87 6 Moore, Federal Practice ¶ 54.11 (2d ed. 1953).
88 U.S. Const. art. III, § 2, authorizes appellate review where, inter alia, a case arises under the "Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." Since finality is not constitutionally required, Congress should have the power to grant to the Supreme Court the right of appellate review whenever a federal question has emerged in a state action. There is a statutory power to review certain nonfinal orders of other courts. See 28 U.S.C. §§ 1252-53 (1958).
89 See pp. 743-45 supra.
90 6 Moore, op. cit. supra note 87, ¶ 54.43(2), at 282.
91 Id. ¶ 54.43(3), at 286.
increase unnecessarily the federal-state frictions which exist in this area of appellate review.

The most recent attempt at a statement of the principle of finality is contained in Republic Natural Gas Co. v. Oklahoma.92

No self-enforcing formula defining when a judgment is "final" can be devised. Tests have been indicated which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. . . . On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. . . .

One thing is clear. The considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.93

In this particular case the Court, by a five to four vote, held that the state court decision was not "final" within the meaning of the statute because matters left for subsequent determination might raise additional federal questions.94 Since review of state court decisions is based exclusively on federal-question jurisdiction, the possibility of the emergence of additional reviewable decisions would seem to be an appropriate basis for the determination of a lack of finality. The dissenting Justices did not find fault with the principle. Instead, they challenged its application, contending that a decision would have settled every "substantial" phase of the controversy and only a "minor consequential and separable aspect would remain for remotely possible further action in the state tribunals."998

If there is one thread which ties the decision together, it is an attempt by the court to conserve judicial energy and at the same time to protect the rights of the litigants.96 Perhaps in some instances the characterization as final or nonfinal is confusing, but there is no faulting the attempt to meet as many conflicting needs as can be met.

93 Id. at 67-68.
94 Id. at 71-72.
95 Id. at 87.
96 See also Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Colum. L. Rev. 1002 (1943); Note, Finality of Decree for Purposes of Review in the Supreme Court, 48 Harv. L. Rev. 302 (1934). See generally 6 Moore, op. cit. supra note 87, ¶ 54.12(1), at 113.
C. HIGHEST STATE COURT

The final "statutory" requirement of review is that the judgment be that of the highest court of a state in which a decision could be had. In most instances this is the court of last resort, but in a particular case the "highest court" may be a city police court or a judge in chambers. The test is whether or not any further appellate review is available in the state judicial system, but the fact that successive applications for relief may be made to other courts, including superior courts, does not make a particular denial any less a judgment of the "highest court," although it may be a ground for denial of a writ of certiorari in the exercise of the Court's sound discretion.

Where there remains a possibility of review by writ of certiorari or by other discretionary technique, the judgment is not "final" within the meaning of the statute, even though an alleged absolute right of review was denied on the ground that the question concerned was frivolous. Where review has been denied, it is normally the judgment of the lower court which is final and as to which review should be sought. But there may be times when the denial is in effect an affirmance of the judgment of the court below, and therefore the denial is the final judgment which is itself reviewable.

II

INJUNCTIVE PROCEEDINGS

With respect to the power of a court to entertain an independent proceeding in equity to prevent the enforcement of a judgment of another court, the Restatement of Judgments states quite baldly that a "court exercising equitable jurisdiction may properly grant relief

97 A traditional judgment or decree of the court is normally involved. However, the "judgment" may be an order of a judge in chambers, Betts v. Brady, 316 U.S. 455 (1942), or a letter of a clerk refusing to accept appeal papers unless accompanied by appropriate fees pursuant to a general policy of the court concerned. Burns v. Ohio, 360 U.S. 252 (1959).
from any kind of judgment and against the judgment of any court.\footnote{106} With respect to the federal-state problem, it suggests that aside from statute, either a state or federal court can give equitable relief against the effects of a judgment rendered by the other. The Restatement, however, declines to comment on the effect of state or federal statutes designed to give similar relief or to enjoin a person from bringing or maintaining suit.\footnote{107} Assuming that there is in general a power in the federal courts to stay the enforcement of state judgments,\footnote{108} the question is whether or not sections 1738 and 2283 of title 28 limit this power. The former is designed to require of the federal courts the full faith and credit obligations of the states under the federal constitution.\footnote{109} The latter prohibits federal courts from enjoining state court proceedings with certain stated exceptions not relevant to this discussion.

1. Effect of Section 2283\footnote{110}

There are three possible arguments against the applicability of the prohibition against enjoining state court proceedings which should be disposed of preliminarily. Two were raised in \textit{Wells Fargo \& Co. v. Taylor},\footnote{111} wherein the Supreme Court suggested that inasmuch as a decree enjoining the enforcement of a judgment would run against one of the parties directly and would not require any action on the part of any state official, the decree would not constitute a stay of proceedings in a state court within the meaning of the statute. In addition, it was suggested that since the proceedings were at an end, except for enforcement, the philosophy behind the statute did not preclude an injunction.

However, to suggest that the predecessor of section 2283\footnote{112} was inapplicable to those situations where a litigant was enjoined is to misunderstand the realities of the situation. In this type of action it is

\footnote{106} Restatement, Judgments § 114 (1942).
\footnote{107} Id. § 114(e).
\footnote{108} The federal courts have from the beginning exercised a general equity jurisdiction. See generally 2 Moore, op. cit. supra note 87, §§ 2.03, 2.08.
\footnote{110} 28 U.S.C. § 2283 (1958) provides: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”
\footnote{111} 254 U.S. 175 (1920).
\footnote{112} Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162.
virtually never contemplated that an injunction will issue against a judicial officer. The standard practice is to enjoin litigants. Consequently, a construction which eliminated from its coverage all cases where litigants would be enjoined would emasculate the statute. Fortunately, there is no real support for this position.

The second proposition, that the words "state proceedings" do not include enforcement proceedings after judgment, although not wholly inconsistent with the philosophy behind the statute, does not jibe with other authority which states that the prohibition against a stay of proceedings includes "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." The third possible explanation is that suits of this type are simply exceptions to the statute. The Wells Fargo opinion itself offers some support to such a justification in that the Court attempted to list the exceptions to the predecessor statute and included this type of equitable proceeding.

Thereafter, in Toucey v. New York Life Ins. Co., Mr. Justice Frankfurter, in analyzing former section 265, acknowledged that there were certain statutory and nonstatutory exceptions to the language of the act. In his discussion of the nonstatutory exceptions, he included cases where federal courts had enjoined litigants from enforcing judgments fraudulently obtained in state courts. But after analyzing these cases he concluded that their foundation was "very doubtful." In Toucey the Supreme Court held that the nonstatutory exceptions to former section 265 did not include a "relitigation" exception, that is, a power to enjoin the relitigation in a state court of matters already determined in a federal court. To correct this, that section was amended for the purpose of restoring "the basic law as generally understood and interpreted prior to the Toucey decision." However, no specific mention of the Wells Fargo exception was made in the Reviser's Note, and there are at least two possible and conflicting implications. One is that since the Reviser did not specifically include that exception in his discussion,

115 254 U.S. at 183.
116 314 U.S. 118 (1941).
117 Id. at 136.
118 Ibid.
it is not now law whether or not it ever had been. The second possibility is that since it was the legislative intent to restore the law as it was prior to the Toucey decision, the doctrine of Wells Fargo, whatever it may be, is confirmed. The question is not an easy one to solve in any completely satisfactory manner; but there is persuasive academic support for the existence of the power. And there are post-amendment cases wherein the question was raised and in which the courts have claimed the inherent right. For instance, in Griffith v. Bank of New York the United States Court of Appeals for the Second Circuit found it "well settled that the federal courts may exercise their equity power so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud." The same general position was taken in Mortensen v. Alcoa S.S. Co. The fact that in neither of these actions was an injunction sought reduces their value with respect to section 2283. It is predictable, however, that until the Supreme Court directs otherwise, some courts will continue to exercise the power when petitioned to do so in an appropriate case.

2. Effect of Section 1738

As suggested above, section 1738 and its predecessors were enacted to require of the federal courts the same faith and credit with respect to judgments of courts in the United States as is required of the state courts

120 No attempt is made here to suggest the circumstances under which it is appropriate for one court to enjoin litigants from enforcing judgments entered by another court. See generally 7 Moore, op. cit. supra note 87, §§ 60.37(3), 60.39.

121 See id. § 60.39.

122 Note, Relief in Federal Courts Against State Judgments Obtained by Fraud, 54 Yale L.J. 687 (1945).

123 147 F.2d 899, 901 (2d Cir.), cert. denied, 325 U.S. 874 (1945).


125 In Nongard v. Burlington County Bridge Comm'n, 229 F.2d 622 (3d Cir. 1956), Judge Hastie construes Amalgamated Clothing Workers v. Richman, 348 U.S. 511 (1955), as precluding any judicial exceptions to 28 U.S.C. § 2283. However, see Leiter Minerals v. United States, 352 U.S. 220 (1957), wherein a nonstatutory exception is recognized.

126 28 U.S.C. § 1738 (1958) provides:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.
by the Constitution in interstate situations. 127 Theoretically, the constitutional obligations of the state courts should determine the statutory obligations of the federal courts, making an examination of constitutional authorities virtually mandatory. However, with respect to the question of the faith and credit owed judgments fraudulently obtained, there is a lack of constitutional interpretation which is surprising in view of the generally full development of the law of full faith and credit to judgments. Insofar as the Supreme Court of the United States is concerned, there are conflicting dicta and apparently no specific holding. 128 However, there is state support for the proposition that one state court may decline full faith and credit to a fraudulently obtained judgment of a second state where that judgment is attackable in the state of rendition. 129 For instance, in Levin v. Gladstein 130 the Supreme Court of North Carolina took the position that it could disregard the judgment of a Maryland court where the judgment was capable of being attacked in Maryland, the state of rendition.

Such a conclusion is theoretically sound inasmuch as North Carolina was giving to the Maryland judgment the same faith and credit it would receive in Maryland—no more and no less. And if this is the extent of the constitutional limitation, then section 1738 would not constitute a bar to a federal court proceeding in the same manner. Obviously the Wells Fargo line of cases 131 assumed that the predecessors of section 1738 did not command full faith and credit to a judgment fraudulently obtained, and Griffith and Mortensen clearly proceed under the same assumption. It seems appropriate to conclude that the power exists but is rarely exercised.

CONCLUSION

The federal courts have power to "interfere" with the finality of state judicial proceedings both by direct review and by independent proceedings in equity. Although the word "interfere" has unfortunate connotations and perhaps, therefore, ought not to be used, both types of "interference" are entirely normal and routine when courts of a single judicial hierarchy are concerned. The difficulty here is caused by the outdated feeling that the federal courts are of a different system, ignoring

127 See cases cited note 109 supra.
130 142 N.C. 385, 55 S.E. 371 (1906).
131 See pp. 749-51 supra.
the Supreme Court's counsel that the two sets of courts "are not foreign to each other . . . [but are] courts of the same country having jurisdiction partly different and partly concurrent."\textsuperscript{132} Regrettably, there are those today who still regard the federal judiciary with suspicion, considering it somehow alien in character. Such a feeling is a throwback to that of Judge Cabell, a member of the Virginia Court of Appeals at the time of Martin v. Hunter's Lessee,\textsuperscript{133} who, in commenting upon the Supreme Court's asserted power of appellate review, said:

\begin{quote}
[B]efore one Court can dictate to another, the judgment it shall pronounce, it must bear, to that other, the relation of an appellate Court. The term appellate, however, necessarily includes the idea of superiority. But one Court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty. . . . The Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty—and, of course, their commands or instructions impose no obligations.\textsuperscript{134}
\end{quote}

Since the remnants of this position still exist, it is important that every effort be made to minimize objections to the exercise of the right to "interfere," so long as the effort to minimize does not imperil or impair the interests which the federal judicial power was designed to protect.

In very general terms, the federal courts exist to determine federal questions and to protect litigants from alleged bias in the state courts.\textsuperscript{135} With respect to an independent proceeding in equity to enjoin the enforcement of a state court judgment, either federal question or bias or both may be involved. However, federal-state frictions ought to be at a minimum in these situations because (1) only the litigants are enjoined and the state court judgment, as such, remains intact, and (2) the federal court called upon to act will do nothing that could not be done in the state where the judgment was rendered. Moreover, since there is a certain amount of doubt that such injunctions can be issued in the face of section 2283, since the number of times such relief is sought is exceedingly small in any event, and since the federal courts in the exercise of their equitable discretion may leave the matter of relief to the state courts, this type of "interference" does not seem to be a major problem of federal-state relations.

\textsuperscript{132} Claflin v. Houseman, 93 U.S. 130, 137 (1876).
\textsuperscript{133} 14 U.S. (1 Wheat.) 304 (1816).
\textsuperscript{134} Hunter v. Martin, 18 Va. (4 Munf.) 1, 12 (1815).
\textsuperscript{135} The alleged prejudice of state courts with respect to out-of-state litigants is traditionally considered the basis of diversity jurisdiction. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).
With respect to direct review, only the federal-question interest is involved. In this area the Court is criticized for unpredictability and impetuousness, for failure to heed the requirements of substantiality, timeliness and decisiveness. The charges are at best only partially true. But since the state courts have the same constitutional obligation with respect to federal questions as do the federal courts, they ought to be given a full and complete opportunity to meet that obligation before Supreme Court review is undertaken. The demonstration of confidence inherent in stricter adherence to the principles of substantiality, timeliness and decisiveness would inevitably ease the frictions which exist. Mutual confidence would also be improved if the Congress would join in the effort to ease conflict by repealing the statutory provisions for appeal of right, leaving the discretionary writ of certiorari as the sole method for procuring Supreme Court review of state court judgments.

FEDERAL HABEAS CORPUS REVIEW OF
STATE COURT CONVICTIONS

CHARLES S. DESMOND*

"... call it res judicata or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. ... The writ has no enemy so deadly as those who sanction the abuse of it, whatever their intent." —Robert H. Jackson

Judge Simon E. Sobeloff of the United States Court of Appeals for the Fourth Circuit, in a speech to the North Carolina Bar Association in June 1961, discussed the use of federal habeas corpus as applied to claims by state court prisoners that they had been denied their federal constitutional rights: "It is true that the Great Writ has been frequently abused by the filing of many frivolous petitions, but in order to be sure that no meritorious claim is slighted, a patient examination must be made of all." He also reminded his audience that of all habeas corpus cases brought in the federal courts by state prisoners, only about three per cent have been heard, the others being dismissed, presumably for patent insufficiency of the moving papers. It was Judge Sobeloff's opinion that "the discovery and correction of an occasional miscarriage of justice makes the entire labor worthwhile" and that "the realization that close scrutiny will be given in each case promotes care and fairness in the administration of the criminal law."2

The judges and law officers of the states, however, take a less sanguine view of the present position. Striking attitudes ranging from rage and horror to dignified regret, they express hostility toward federal habeas corpus review of state convictions. The opposition of the Conference of Chief Justices has been consistent and vociferous, sometimes strident, for the past ten years.3 Speaking in more measured terms, the National Association of Attorneys General, at its meeting in New York City two weeks before Judge Sobeloff's speech, urged federal legislation to provide "a res judicata effect to state criminal court determinations of fact relevant to the elements of the crime charged"4 and state legislation for post-conviction procedures "pursuant to which federal constitutional

* Chief Judge, New York Court of Appeals; Chairman, New York State Judicial Conference.
1 10 Bar Notes, N.C.B.A. No. 4, at 19 (July 1961).
2 Id. at 19-20.
issues cognizable by the federal courts in habeas corpus proceedings can be determined in the state courts as an integral part of the state remedy."5 Mr. Justice Frankfurter, in a dissenting opinion in 1950, spoke of the intensification during the last twenty years of a conflict between the state and federal authorities in relation to the administration of criminal justice "because of the increasing subjection of State convictions to federal judicial review through the expanded concept of due process."6

The expansion of the concept and the resulting intensification of this federal-state conflict took some sixty years to become significant. It commenced with the Habeas Corpus Act,7 enacted in 1867 to aid in the enforcement of "due process" and "equal protection."8 The statute, of course, enlarged the scope of the writ which at common law afforded no more than collateral inquiry into jurisdiction of the court under whose mandate the petitioner was confined.9 The federal version made it available in any case where a state held a person "in violation of the constitution, or of any treaty or law of the United States."10 "Due process" was thus expanded in meaning, more state court activities were found deficient, state court convictions were upset in federal courts at all levels, sensibilities were offended, and Congress was petitioned (so far unsuccessfully) to stop the assaults on the integrity of state courts. Bills now pending propose to tighten the present procedure for issuance of the writ by requiring: (1) when release from state custody has been denied to an applicant in one federal habeas corpus proceeding, no subsequent application shall be entertained by a federal court except on new facts;11 (2) in any such proceedings a prior decision of the United States Supreme Court shall be conclusive except on a new factual showing;12 (3) whenever a district judge after preliminary examination issues a writ, the question of whether the state prisoner is to be released must be heard by a three-judge district court;13 and

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5 Ibid.
9 Frank v. Mangum, 237 U.S. 309, 327 (1915); Ex parte Yarbrough, 110 U.S. 651, 653 (1884).
11 H.R. 2788, 87th Cong., 1st Sess. § 1(b) (1961); H.R. 466, 87th Cong., 1st Sess. § 1(b) (1961).
12 H.R. 2788, 87th Cong., 1st Sess. § 1(c) (1961); H.R. 466, 87th Cong., 1st Sess. § 1(c) (1961).
(4) denial of habeas corpus relief shall be reviewable only by certiorari to the Supreme Court.\textsuperscript{14} A fifth suggestion, the most sweeping of all, would preclude application to any federal judge or Justice except

on a ground which presents a substantial Federal constitutional question (1) which was not theretofore raised and determined, (2) which there was no fair and adequate opportunity theretofore to raise and have determined, and (3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari.\textsuperscript{15}

This article is not just another cry of anguish. I am not joining either the viewers-with-alarm or the pointers-with-pride, nor am I associating myself with those who demand instantaneous and complete reform or the smug ones who say that everything is all right as is. There has been too much ranting by those, sometimes in the judiciary, who regard every such activity of a federal court as a mortal affront to a state, and by those, sometimes with business addresses in academies, who ascribe eternal and absolute verity to anything alleged in a habeas corpus plea and credit correctness only to those decisions which turn prisoners loose. I will present two case histories from the files of my own court. Atypical they may possibly be, they are real and recent. The two cases have these points of similarity: in each there was a federal question as to a coerced confession which was heard exhaustively in the state courts, decided at each state level adversely to the defendant, and followed by a denial of certiorari; years later there occurred a successful resort to federal habeas corpus, followed by a denial of certiorari and the release of the prisoner.

First, there is the case of People v. Caminito,\textsuperscript{16} who, so a jury found, was one of three who killed Murray Hammeroff on a Brooklyn street on the evening of February 15, 1941. On May 11, 1941, at 5 p.m., three months after the fatal assault on Hammeroff, Caminito and two men named Bonino and Noia were picked up by the police and questioned separately at a police station from about 9 p.m. until about 2 a.m., with a midnight interruption for coffee and sandwiches. Following breakfast Caminito and Bonino were again questioned separately for several hours, during which period the police successfully deceived


them and Noia into believing that all three had been identified by witnesses as participants in the homicide. Noia, according to the police, then said that he was willing to talk but did not want the others to think he would "rat" on them. The three suspects were allowed to talk together, apart from the police, for some forty-five minutes, after which each gave a question-and-answer confession to a stenographer. This latter process lasted from about 6 p.m. until 11:30 p.m. on May 12. At around midnight pictures of all three were taken by a newspaper photographer. Exhibited at the trial, the pictures revealed no signs that any beating had been administered to the men. At the time the pictures were taken, an assistant prosecutor arrived and again confessions were taken down stenographically, in the course of which each man said in response to questions that he had been treated "all right" and that he was making the confession of his own free will and not because of force or promises. The confessions admitted the holdup of Hammeroff, that Caminito had stayed in a car while Bonino and Noia accosted the victim, that Noia shot Hammeroff, and that Caminito then drove the other two away from the scene. On May 13, the day after the confessions, the three defendants were arraigned in a magistrate's court. There they made no complaint as to beatings. They stated in court that they had no marks or injuries and felt all right, repeating these statements when they got to jail. The next day each was examined by a jail physician who, called as a trial witness by the defendants, said nothing as to any evidence or claim of injury to Caminito or Bonino, though he did find some injury to Noia, who neither testified nor took an appeal from the conviction. Caminito and Bonino both testified to beatings by policemen, but the officers denied it. The issue was given by the trial judge to the jury as one of fact, and the jury obviously believed the police testimony. Caminito was then sentenced in the Kings County court to life imprisonment.

On appeal to the Appellate Division, Caminito argued, as he did at the trial, that the confessions were inadmissible because taken during a delayed detention which was illegal under New York statutes. The trial court had charged the jury in accordance with New York decisional law that such a delay in arraignment, while illegal, did not destroy a confession but was a fact or circumstance to be taken into account on

17 Although Noia did not pursue his state court remedies, he too has now been granted habeas corpus relief. United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).
the issue of voluntariness, and that a confession was to be credited by the jury only if found to have been in fact voluntary.\textsuperscript{20} The Appellate Division unanimously affirmed,\textsuperscript{21} and the late Chief Judge Irving Lehman granted to Caminito and Bonino leave to appeal to the New York Court of Appeals, which unanimously and without opinion affirmed the conviction on July 20, 1943.\textsuperscript{22}

About five years after the affirmance, Caminito, relying on People v. Malinski,\textsuperscript{23} wherein the United States Supreme Court held that a state conviction obtained by a coerced confession was violative of due process under the fourteenth amendment, made a motion to the New York Court of Appeals for reargument, raising for the first time the issue of deprivation of a federal constitutional right to due process. The motion was denied after consideration.\textsuperscript{24} In 1954 a second motion for reargument on the same ground was denied,\textsuperscript{25} and after the Supreme Court denied certiorari,\textsuperscript{26} Caminito tried federal habeas corpus, which, though denied by the district court,\textsuperscript{27} was granted by the United States Court of Appeals for the Second Circuit,\textsuperscript{28} some fourteen years after the crime. The lapse of time made it impossible to retry Caminito and he was released.

\textsuperscript{20} Id. at 397, 180 N.E. at 95.
\textsuperscript{22} People v. Bonino, 291 N.Y. 541, 50 N.E.2d 654 (1943) (memorandum decision). Some commentators and others jump to wholly erroneous conclusions as to the import of affirming "without opinion" and even suspect or infer that it somehow means either that the court has failed to consider the appellant's contentions or that it is impossible to find out whether the court did or did not give them attention. This amounts to a complete misunderstanding of procedures which are necessary, customary and easy to understand. The New York Court of Appeals hears and decides approximately 400 appeals and 700 motions each year. 1961 N.Y. Judicial Conference Ann. Rep. 206. This court, sitting not in divisions but en banc, finds it impossible, in keeping itself up to date, to write an opinion in each case. For many years it has been its custom in most unanimous affirmances to dispense with an opinion. This does not mean that issues and arguments go unconsidered, for each appeal is the subject of a thorough report which goes into the court files. Today, but not in 1943, the state reporter, when there is no opinion, publishes in the official reports a summary of the points argued and passed upon. Finally, the court, on request after decision, certifies to the United States Supreme Court as to presentation, consideration and decision of alleged federal questions.
\textsuperscript{23} 324 U.S. 401 (1944).
\textsuperscript{24} People v. Caminito, 297 N.Y. 882, 79 N.E.2d 277 (1948).
\textsuperscript{25} 307 N.Y. 686, 120 N.E.2d 857 (1954).
\textsuperscript{27} United States ex rel. Caminito v. Murphy, 127 F. Supp. 689 (N.D.N.Y. 1955).
\textsuperscript{28} 222 F.2d 698 (2d Cir.), cert. denied, 350 U.S. 896 (1955).
Relying on what it considered to be undisputed facts, the Second Circuit held that the confessions of Caminito had been obtained as the result of violations of his constitutional rights. Among those undisputed facts were the questioning by various police officers during the twenty-seven hours which elapsed between his being taken into custody and his first confession, the fact that he was locked in his cell without "bed, blankets, spring or mattress," that he was held incommunicado until his arraignment, and that the arraignment itself was not held until forty hours after the beginning of his custody, although magistrates' courts were open and available. The federal court went so far as to hold that all these facts together justified a conclusion that "the police, in effect, kidnapped him . . . ."29 Admitting that there was no physical brutality, it found psychological torture which was much more cruel. "Any member of this or any other court, to escape such anguish, would admit to almost any crime."30

Judge Clark concurred in the result because, so he said, the coercion against Caminito was much more direct and extensive than that in Leyra v. Deuno,31 where a confession extracted by skillful and suggestive questioning, threats and promises to a defendant, unprotected by counsel, was held a violation of due process. Judge Clark, however, was obviously distressed by the strong and sweeping language of the majority opinion and made it clear that he was voting for reversal solely because of the undisputed proof of coercion, and that he did not believe that effective law enforcement required the "review and overturn by any federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals."32 He pointed out that the supervisory duty of federal courts of appeals over district courts did not extend to state police activities, and he thought that there should exist no federal supervision over state courts beyond holding them "subject . . . to certiorari by the Supreme Court in the few cases where needed."33 He recommended legislation to that end but it has never been passed.

Our second case in point is People v. Wade,34 who on July 31, 1958, eighteen years after the killing of a Sing Sing prison guard, was ordered released by the Westchester County court after a federal court in

29 Id. at 701.
30 Ibid.
32 222 F.2d at 706.
33 Ibid.
habeas corpus proceedings had directed a new trial which could not be held because the witnesses were no longer available. A strange crime and a strange denouement!

Wade and one Kiernan, according to the prosecution's proof, were the "outside men" who did part of the planning which resulted in the escape of three convicts from Sing Sing prison. During the escape one of the convicts killed a prison guard, and it was for this killing that four were later tried for felony murder. While Wade and codefendant Kiernan were waiting in the nearby village of Ossining with an escape car and a machine gun, the fleeing convicts were accosted by village policemen, and in a resulting affray convict Waters and a police officer were killed. The other two convicts and Wade and Kiernan were captured soon afterwards, went to trial and were convicted of murder in the first degree. Wade and Kiernan were given life sentences; the other two were executed.

At the trial the prosecution put into evidence two statements taken from Wade, and although they contradicted each other as to certain details, they were both incriminating. He repudiated those confessions and gave an innocent version of his trip to Ossining. He also testified to protracted and unmerciful beatings by state troopers before he confessed, insisting that his incriminating statements to the officers were entirely untrue and dictated by the policemen. The officers denied they had used physical force, and an assistant district attorney who came in during the questioning said that he saw no one beating Wade or any injuries or marks on him. Evidence showed that on the day after he confessed Wade had written his mother that he was feeling fine, but in another letter had told her of a "punching." Doctors called to the stand described rather minor bruises on his body. Some point was made at the trial that the People had failed, despite requests, to produce for inspection the "bloodstained" clothing taken from Wade during his interrogation. It appeared that about twenty-four hours elapsed between the time of Wade's arrest and his arraignment in court but that the arraignment took place only about a half hour after he confessed. All these matters were extensively briefed and argued both in the Appellate Division and on the appeal-by-permission to the Court of Appeals. Nevertheless, both courts affirmed unanimously and without opinion, and in 1943 Wade's petition for certiorari was denied by the Supreme Court. In 1955 he brought coram nobis proceedings

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35 Ibid.
in a state court without result, and as to this denial of relief, the Supreme Court denied certiorari because of untimeliness.

Wade then took the habeas corpus road. After denial by the district court, he was successful in the federal court of appeals and was awarded a new trial which was never held. The Supreme Court denied certiorari and Wade went free after an eighteen-year confinement.

The Second Circuit pointed out that the federal courts, while assigning appropriate weight to decisions of the state courts, have a duty "to make their own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim." The opinion noted that Wade's claim of coercion "was first made when he testified [at his trial] and is repeated in his petition." Here again, as in United States ex rel. Caminito v. Murphy, the court of appeals placed much emphasis on the fact that Wade was supposed to have been held incommunicado for many hours, given no food and only two glasses of liquid, and subjected to constant questioning by numerous police officers. Significance was also attached to the scars and abrasions found on his body and to the failure of the People to produce the clothing worn by Wade at the time of his arrest. Of course, as I have tried to show above, there were explanations in the trial record as to these matters. The federal court concluded, however, that the undisputed facts proved unconstitutional coercion of the confession and that the writ had to issue.

Over the years the federal courts have fashioned certain restrictive rules as to habeas corpus coverage and use. The writ is an extraordinary one for extraordinary situations with "exceptional circumstances of peculiar urgency." Since it is a discretionary remedy, comity and the delicacy of interjurisdictional relationships are factors. The writ is not a substitute for an appeal nor is it to be used for re-litigation of questions argued or available on earlier appeals. State

39 256 F.2d 7 (2d Cir. 1958).
41 256 F.2d at 9.
42 Id. at 10.
44 Hawk v. Olson, 130 F.2d 910, 913 (8th Cir. 1942), cert. denied, 317 U.S. 697 (1943); accord, Frank v. Mangum, 237 U.S. 309 (1914).
46 In re Belt, 159 U.S. 95 (1895).
remedies must first be exhausted.\textsuperscript{47} Nor is it a mere device for federal court review of state court judgments.\textsuperscript{48} Finally, and most importantly, it is or was the rule that habeas corpus is not to be available when the Supreme Court, by denial of certiorari, has previously refused to pass on the same question.\textsuperscript{49} While realizing that these are approaches or general guide lines rather than fixed rules, one may still suggest that some or all of them were overlooked in \textit{Caminito} and \textit{Wade}.

Voluntariness is logically and traditionally the only test for admissibility of a confession.\textsuperscript{50} That a confession is made during detention and under police questioning does not in law or in common sense make it involuntary,\textsuperscript{51} since that circumstance can do no more than raise a question of fact as to whether the admissions were voluntary.\textsuperscript{52} New York and most other states\textsuperscript{53} have statutes, not part of the law of evidence and not regulating the admissibility of confessions, requiring that an arrested citizen be brought without unnecessary delay before a court. New York\textsuperscript{54} and many other states\textsuperscript{55} have held consistently for many years that violation of these prompt arraignment statutes will not bar from evidence a confession shown to have been voluntarily made. In 1943 in \textit{McNabb v. United States},\textsuperscript{56} the Supreme Court, in overruling earlier authority,\textsuperscript{57} "drew upon its supervisory authority over the administration of criminal justice"\textsuperscript{58} in the federal system to set up \textit{only} for the federal courts an exclusionary practice whereby those courts were thenceforth to keep out of the evidence "any confession made during illegal detention due to failure to carry a prisoner before

\textsuperscript{48} People ex rel. Carr v. Martin, 172 F.2d 519 (2d Cir. 1949).
\textsuperscript{49} Ex parte Hawk, 321 U.S. 114, 118 (1944); Markuson v. Boucher, 175 U.S. 184 (1899).
\textsuperscript{50} E.g., Powers v. United States, 223 U.S. 303 (1912); Kent v. Porto Rico, 207 U.S. 113 (1907); Wilson v. United States, 162 U.S. 613 (1896).
\textsuperscript{51} Gallegos v. Nebraska, 342 U.S. 55 (1951); United States v. Carrignan, 342 U.S. 36 (1951); People v. Perez, 300 N.Y. 208, 90 N.E.2d 40 (1949); Murphy v. People, 63 N.Y. 590 (1876).
\textsuperscript{52} Stein v. New York, 346 U.S. 156, 187 (1953).
\textsuperscript{53} These states are listed in McNabb v. United States, 318 U.S. 332, 342 n.7 (1942).
\textsuperscript{54} People v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934); People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932); People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916); Balbo v. People, 80 N.Y. 484 (1880).
\textsuperscript{56} 318 U.S. 332 (1943).
\textsuperscript{57} Wilson v. United States, 162 U.S. 613 (1896).
a committing magistrate . . . "59 Repeatedly the Court has told us that this rule, solely an exercise of the Supreme Court's power to supervise the federal courts, is procedural and evidentiary only, and is neither required for constitutional due process nor made applicable to the states by the fourteenth amendment.60 From all this it would seem to follow that when, as in Caminito and Wade, the facts as to the confession are in dispute at the state court trial and no undisputed facts point necessarily to involuntariness, the federal courts, while bound to entertain a habeas corpus petition, should dismiss it rather than reexamine the essentially factual controversy already decided by a jury under proper instructions and affirmed by the state's appellate tribunals.

59 Upshaw v. United States, 335 U.S. 410, 413 (1948).
OUR SOMETIMES INJUDICIOUS REVIEW

Chester J. Antieau*

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism."

—David J. Brewer

It should be proper at least once a generation to look questioningly at judicial review as performed by our courts, and especially by the United States Supreme Court. Herein will be particularized a number of instances in which constitutional review by that tribunal, or judicial review generally, is not fully serving the needs of our society. This is not a condemnation of judicial review which has, except for probably de-emphasizing the concern of the legislative and executive with constitutional values, served America rather well. Nor is this to be an ad personam criticism or condemnation of individual Justices. Accordingly, it may well contribute to impersonal objectivity to leave unnamed the present Justices of the Court who, in the conclusion of the author, have fallen victim to some of the indicated shortcomings. Furthermore, no complaint is here mentioned when it is the failing of but one Justice; the discussion concerns those frequent and in some cases general imperfections over a period of time, often going back to the time of Marshall. Many of the inadequacies pointed out deserve much more study before remedial courses of conduct can be recommended. The cause of progress can be served in ample measure if the Court rethinks its methods and appoints committees of professors, judges and lawyers to explore further the possibilities of remedying the graver inadequacies.

1. Judicial review of the constitutionality of acts of Congress and the state legislatures takes far too long

Frequently it is years before the Supreme Court declares unconstitutional an act of Congress or a state legislature. In 1945 a capable scholar, Professor Field, presented evidence that the length of time elapsing between passage of a congressional act and its judicial invalidation was over ten years, and his sampling of ten states showed that state

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statutes remained on the books an average of seven years and six months before they were declared invalid.¹ Members of the Court have themselves noted the delays in constitutional adjudication. Mr. Justice Jackson, for instance, wrote that "often it is years after a statute is put upon the books and begins to take effect before a decision on a constitutional question can be heard by the Supreme Court," noting by way of illustration that the Smith Act of 1940 was passed upon for the first time by the Supreme Court in 1951 and the Alien Registration Act of 1940 was not passed upon until 1952.² Such a delay is one of the altogether unnecessary prices we pay for allowing constitutional review to be controlled by private parties. Australia has found completely satisfactory its procedure of allowing the federal law officer to attack the constitutionality of state statutes³ while permitting the principal law officer of the states to have standing to attack the constitutionality of federal enactments.⁴ Furthermore, advisory opinions have been used in the American states and elsewhere for accelerated judicial review of such constitutional issues.⁵ The Supreme Court should be encouraged to explore the propriety of the former and to reexamine its views on the latter.

Of course, it is realized that the constitutionality of the application of a statute to a certain factual situation does not come into issue until the fact pattern arises; every time, however, that the United States Supreme Court has ruled that a statute is void on its face and hence unconstitutional, this decision could—and should—have been made within a month after the enactment of the legislation. These in effect are rulings that under no conceivable set of facts could the statute be constitutional. This situation exists, it is suggested, far more frequently than the fact-exaggerating theorists have recognized. To illustrate, it occurs every time an act of Congress, of a state legislature or of a municipal governing body is so vague as not to give reasonable guidance to one who would be law abiding; every time a legislative body unconstitutionally delegates power; every time a state act or municipal regulation in the field of interstate commerce clashes with an existing act of Congress or federal rule; every

time Congress has already occupied a field of federal paramountcy; every
time an act of the Congress or Executive order is beyond federal
power. The extensive confusion in the business community and in the
lives of our citizens resulting from their reliance upon statutes unconsti-
tutional *ab initio* and their subsequent readjustments following belated
adjudications of unconstitutionality need not and should not continue.

2. *Judicial decisions holding criminal convictions to be
unconstitutional are too long delayed*

What can be said for the justice of a method of judicial review that
takes twenty-five years for the United States Supreme Court to in-
validate a conviction that has been unconstitutional during the entire
period? This is exactly what happened in *Reck v. Pate* in 1961. On
March 25, 1936, Reck was arrested by the Chicago police. He was
then nineteen years of age, was mentally retarded, and at one time
had been committed to an institution for the feebleminded. He was never
able to complete the seventh grade in school and had the intelligence of
a child of ten or eleven. According to corroborated testimony he was
questioned for four days and subjected to police beatings to obtain a
confession. He was convicted on the basis of such confessions, to remain
in the penitentiary for twenty-five years before the Supreme Court could
do justice. His legal steps are worth noting. He appealed through the
Illinois courts to the state supreme court which affirmed the conviction.

The United States Supreme Court denied certiorari. In 1952, after the
passage of the Illinois Post-Conviction Act, he again went through the
Illinois courts with the same result, and the United States Supreme Court
again denied certiorari, this time without prejudice to apply for habeas
corpus. His application for such relief was refused by a federal district
court, and the denial was affirmed by the federal court of appeals.
This time his petition for certiorari was granted. Thus in 1961 this
victim of an unconstitutional conviction at last secured justice. Cases
such as this provide gruesome verification of the pessimistic forecast of

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7 People v. Reck, 392 Ill. 311, 64 N.E.2d 526 (1946).  
9 Reck v. People, 7 Ill. 2d 261, 130 N.E.2d 200 (1955).  
12 274 F.2d 250 (1960).  
one of our American Founding Fathers that federal judicial review "would make legal actions tedious, intricate and expensive."14

How many other tragic delays in judicial review of convictions occur in the federal system is unknown because of inadequate reporting and statistics. The Chief Justice of the United States should see that such figures are assembled and made available to the legal profession. We do know that there are other cases such as Moore v. Michigan15 where nineteen years elapsed between an unconstitutional conviction of a seventeen year old youth and his successful judicial review by the United States Supreme Court. The greatest delays are, of course, in state criminal convictions. However, preliminary figures for 1961 indicate that two circuits are taking over twenty-six months before a criminal conviction is decided by the court of appeals after initial docketing in the district court.16 The average may well be over three years by the time the Supreme Court reverses unconstitutional convictions by federal courts.

State supreme courts must be encouraged to assume responsibility for the delays in rectifying unconstitutional convictions in their lower courts. They must be urged to explore the feasibility of automatic judicial review in convictions resulting in death penalties or the other graver punishments. In lesser cases they must see that review is expedited. Next, the Supreme Court must reexamine its policy of certiorari denial in favor of habeas corpus review. One is entitled to question the propriety of a single federal judge passing judgment upon the propriety of a procedure found satisfactory by a state trial judge, intermediate appellate judges and a state supreme court. More importantly, however, as Reck and dozens of other cases well illustrate, this is an exhausting, time-consuming process, utterly unjust to an individual in a state penitentiary under an unconstitutional conviction. The United States Supreme Court must find the method of hearing these cases on their merits within a few weeks after the state supreme court has acted. Furthermore, if study shows that tragic delays are occurring between trial and state supreme court action, the United States Supreme Court will have to devise and authorize judicial rectification in the federal courts within a year's time after the conviction if the state courts have not then acted. It is imperative that the state supreme courts provide data on the length of time taken by state procedures, and the Chief Justice of the United States is urged to see that these figures are available in all cases ultimately

coming to the Supreme Court, as well as those in which the lower federal courts grant habeas corpus to a person unconstitutionally convicted by a state court. Figures should additionally be available showing the time lapsing between unconstitutional convictions in the federal courts and ultimate reversal by the United States Supreme Court.

3. The United States Supreme Court has too often denied judicial review in deference to the executive and legislative branches of the federal and state governments

If there is a legitimate situation in which a constitutional court in a federalist society can refuse to exercise judicial review, it is not because the area involves "politics." The life process of a democracy continually embraces political judgments by the executive and legislature, and the adjustment of competitive social interests implicit in the "political" label obviously has many applications by any court. Resolutions of controversies between the Executive and Congress and between the federal government and the states are as "political" as anything can be, and yet they are the frequent chaff of the judicial mill. Even though Justice Jackson usually defended the Supreme Court's record of abstention, he was frank to admit that much of that Court's business is "political." "Any decision," he wrote, "which confirms, allocates, or shifts power as between different branches of the Federal Government or between it and a constituent state is equally political, no matter whether the decision be reached by a legislative or a judicial process." And Justice Cardozo is reported to have told Justice Jackson that "the Supreme Court is occupied chiefly with statutory construction—which no man can make interesting—and with politics." A capable student of the Court, Mr. John Frank, has concluded that "the Supreme Court has undesirably expanded the rule" under which they refuse to review "political questions." He has urged that the Court reverse its policies and give judicial review of political reapportionment cases, orders of the Civil Aeronautics Board relative to foreign air transportation, and questions involving the point of time at which war begins or ends for domestic purposes. The first of his recommendations

17 Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Hughes, The Supreme Court of the United States 95-96 (1928).
18 Jackson, op. cit. supra note 2, at 55.
19 Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945).
20 Frank, Political Questions, in Supreme Court and Supreme Law 36, 40 (Cahn ed. 1954).
21 Id. at 40-41.
may have been satisfied by the decision in *Baker v. Carr*, in which the Court has at least opened the door to an examination of its "political question" inhibition in this area. It should be urged to recognize openly that other political matters are beyond neither its concern nor its competence and strongly invited to share in these inevitable adjustments of a separation-of-powers federalism.

4. *The United States Supreme Court has adopted too many policies denying judicial review to too many people*

Under its *Massachusetts v. Mellon* decision, the Court refuses to permit federal taxpayers the opportunity to attack the constitutionality of federal spending acts. This, it is suggested, is ill-advised. State court practice almost universally permits such attack upon state laws, and the record is clear that no state supreme court has been swamped by this litigation. There is every assurance that such litigation can be contoured through class suits or otherwise so as to make minimal the extra amount of work upon the Court. Nor does such judicial review constitute any improper invasion of legislative omnicompetence. By way of illustration, if and when the Congress enacts legislation providing funds to private schools or children attending the same, there should be a right to judicial review by a protesting taxpayer.

Further, the Supreme Court follows the unfortunate practice of many state courts in denying to those who have received benefits under statutes and ordinances the opportunity to attack the constitutionality of the enactment. The Court has said:

> It is well settled as a general proposition . . . that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.

Similarly, parties have been estopped by the Court when they have relied upon the statute as the basis of legal right. This doctrine of judicial refusal is customarily unfair in practice, as can be seen, for example, in the case of a businessman who is exposed to a licensing statute with penalties of $1,000 a day for violations. There is here really no reasonable alternative to taking out the license and making judicial attack

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23 262 U.S. 447 (1923).  
later. To estop such a person from making the attack because he has accepted "license-benefits" is totally unjust.

A number of sober, capable students of the Court have called upon that tribunal to reexamine its rulings on lack of standing. Typically, Professor Ralph F. Bischoff writes: "The Court's conception of litgable standing needs to be reformed."26 At least in the aforementioned instances the Court might well permit standing to sue with greater generosity.

5. The Supreme Court's policy of postponing constitutional adjudication as long as possible too frequently produces undesirable results

Presently the Court refuses to resolve a constitutional issue before it if there is any other basis for disposing of the litigation. Two recent cases fairly well demonstrate the undesirability of stubborn adherence to this doctrine. When a number of persons were convicted in Louisiana for breach of the peace during a "sit-in" demonstration, the Supreme Court reversed on the ground that there was not sufficient evidence to support the convictions.27 Squarely presented and fully argued to the Court was the question whether such convictions constituted state enforcement of racial segregation as forbidden by the fourteenth amendment. Canting its ritualistic formula, the Court declined to pass upon the constitutional problem, preferring, apparently, to face it some other day, possibly after a great many other persons have been prosecuted and convicted of the "crime" of eating at a Caucasian lunch counter. The constitutionality of such convictions is a matter of individual, national and international concern, and each such "sit-in" conviction hereafter is an unnecessary infringement of individual liberty. The constitutionality of these questions must be resolved as soon as possible by the Court and not postponed in the vain hope that somehow they will disappear.

The other instance that would appear to be a questionable refusal to face constitutional issues is Poe v. Ullman.28 Here the Court refused to decide whether a married woman could be forbidden the use of contraceptive devices by the State of Connecticut. The majority avoided the determination because they felt sure the lady was in no danger of being prosecuted under the challenged statute. The four dissenting Justices

urged their colleagues to meet the constitutional problem, as is evidenced by the words of Justice Douglas:

What are these people . . . to do? Flout the law and go to prison? Violate the law surreptitiously and hope that they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. . . . We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. 29

An obvious and unnecessary disadvantage flowing from application of the Court's policy to avoid constitutional review is seen in the two Spector Motor cases. In 1944 the Court refused to determine the validity of a Connecticut taxing statute under the commerce clause on the ground that the statute had not yet been fully interpreted by the local courts. 30 The taxpayer then applied to the state courts where it was ruled that the statute meant exactly what it said on its face. Finally, the Supreme Court saw its way free to constitutional adjudication and invalidated the statute, some seven years and more after its original opportunity to exercise judicial review. 31 It is an unfortunate combination of misguided deference to state legislatures and a vain hope that somehow the state courts will do the work for the Supreme Court if presented with sufficient hints and opportunities that occasions these unjustifiable years of confusion and expense to private persons subjected to unconstitutional statutes.

Fortunately, there have been departures from the Court's self-inflicted restriction on its power of judicial review. Notable among these are two decisions nearly one hundred years apart, Ex parte Milligan 32 and Torcaso v. Watkins. 33 Although the concurring minority in Milligan insisted that the petitioner's release from a sentence imposed by a military court-martial should have been based solely on the innocuous basis of statutory interpretation, 34 the majority faced and settled the real issue, namely, whether the trial of a civilian by a military tribunal when the civil courts were functioning was constitutional. And in Torcaso, where the Court could have dismissed the action on the ground that the controversy had become moot (a fact not revealed in the opinion), it faced the constitu-

29 Id. at 513.
32 71 U.S. (4 Wall.) 2 (1867).
34 71 U.S. (4 Wall.) at 132.
tional issue and invalidated a Maryland constitutional clause as violative of the federal constitution.

Another unfortunate aspect of the same judicial policy of avoiding constitutional adjudication stems from the 1953 ruling of the Court in *Poulos v. New Hampshire*, holding in effect that a citizen exposed to a clearly unconstitutional state statute or local ordinance must first exhaust all local administrative remedies, then all state judicial remedies, before daring to raise the constitutionality of the restraint in a federal court following conviction in a state tribunal. It is expensive enough for a poor person to come to the United States Supreme Court to vindicate his clear constitutional rights without imposing this onerous additional burden, justified only by the fervent hope that some state official will do the work for the Supreme Court. The financial aspects alone make it a good guess that many individuals will never survive until they reach the Supreme Court and will fall victims to unconstitutional restraints upon their liberties and their property. Furthermore, many individuals subjected to unconstitutional restraints by local authorities, such as candidates for local elections, may well find that the election has been over with for years by the time the Supreme Court is willing to play its ordained role.

In all these instances, and more, the Supreme Court must abandon its present policy of avoiding and postponing constitutional review. Abdication of its function results not only in a plethora of personal injustices, but confusion and conflicting decisions in the lower courts. The community can no longer rationally or conscientiously be asked to wait years for the definitive constitutional answer that can come only from the tribunal that feels itself bound to avoid such tasks. In a number of situations the state supreme courts have shown that the traditional confusion, uncertainty and unfairness of delayed constitutional adjudication is entirely unnecessary. For example, under the older practice municipal bond issues were often invalidated years after the bonds had been underwritten and purchased, many times with great injustice to investors who had committed their funds to some municipality. Today, in many of the states, preissuance validation procedures ensuring a definitive decision by the state supreme court permit expeditious decision by the state high court with resulting greater fairness, certainty and economic well-being. For too long the federal Court has assumed without justification that it is good to postpone rather than face constitutional issues.

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85 345 U.S. 395 (1953).
6. Justices of the Supreme Court have at times lacked either willingness or fortitude to deal effectively with the executive, the legislature or state officials.

Very little that is favorable can be said of the Court’s willingness to allow a state governor to violate the clear constitutional provision that persons charged with crime who flee the state “shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”36 The Founding Fathers did all they could to inform reluctant governors and timid jurists exactly what was intended. Long ago we should have realized that we chose one nation in matters like this rather than balkanized animosity and recrimination.

Again, the record of the federal judiciary during the Civil War, always excepting such rare individuals as Roger Taney, showed an amazing deference to executive wishes in denying civil trials to individuals seized by the military. It is interesting to note that the judiciary of the South quite generally preserved the precious writ of habeas corpus in seeing that justice was done in proper tribunals, so much so that in the conclusion of one writer the judiciary was seriously to blame for some of the troubles of the South.37 More recently, the record of the Supreme Court in adjudicating the rights of Americans of Japanese ancestry,38 whose record of valor in defense of our nation and its ideals is unmatched by any other group, is shameful and indefensible in its abdication to the judgment of executive officials. It is not to the great glory of the Court that it condoned military men operating on purely racist and national bases at a time when we were as a nation dedicated to fighting the bestiality of racism.39

Furthermore, the Court must be encouraged to reexamine the propriety of a presumption of constitutionality that it customarily accords to legislative action. Is it wise to give to state legislatures and even threeman unicameral local councils the same deference it gives to acts of Congress approved by the President? Again, when a legislative enactment, such as a general zoning ordinance, is repudiated by the local legislature in part by an amendment a few weeks later, which enactment

properly deserves the presumption of validity? All too often the basic premises of greater information and ability to weigh objectively competing societal interests in the light of our heritage and dedication to personal values do not exist in legislative chambers. Contrast the deference of our Supreme Court to the response of the Australian Supreme Court when passing upon the Communist Party Dissolution Act of 1950. Said the latter: "[T]here can be no presumption of the validity [of this act]..."40 The Supreme Court should soon make it clear that there is no presumption of constitutionality in any legislative negation of fundamental rights or impositions of hardship and disqualification because of race, color, religion or national origin.

7. The participation of the bar in the task of judicial review, and the judicial function itself, are both obscured by the Supreme Court concocting and advancing vague formulae without value judgment content or guide to the intelligent weighing of opposed societal interests

With all deference to capable Justices who have verbalized as a norm "the concept of ordered liberty," it must be said that it adds absolutely nothing as a guide or a determinant above and beyond the basic demands of due process of law. Nor do the words of a modern jurist, "the notions of justice of English-speaking peoples,"41 have any guidance to bench or bar as a determination of either procedural or substantive due process, if by any stretch of the imagination this should be a proper criterion. These are indeed meaningless indulgences in words. A capable Canadian scholar who has looked hard at our judicial methodologies has concluded: "Concepts such as these, indeed, are so vaguely and loosely worded as to allow almost any content to be poured into them."42 It is time that individual Justices on the Court indicate clearly their system or hierarchy of values and frankly acknowledge that their judicial responses are mirrors of their own value judgments. This is nothing to be ashamed of. The bar can work on this aboveboard basis far more effectively than by pursuing the nonsensical quest for the Anglo-Saxon volksgeist, and it would, of course, make Justices think out their own hierarchy of values.

8. Too often there have been judges charged with judicial review who look upon parts of the Constitution as platitudinal rather than normative

The Bill of Rights of the United States Constitution is not simply "a moral adjuration" to the legislature and executive, and any judge inclined to deny the constitutional significance of these ten amendments ought not to be trusted by our society with the task of judicial review. Yet there are eminent jurists today who oppose the use of the Bill of Rights in examining into the constitutionality of legislative enactments—who would, in effect, for these purposes carve the Bill of Rights out of our Constitution. With the right to own private property understood since the formation of our nation as a constitutional right, it is nothing less than judicial abdication for a supreme court to refuse to review legislative attempts to take away private property through confiscatory taxation. Yet listen to what the United States Supreme Court has announced: "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."43 There is no need for judicial review if the courts will not hold the legislature and executive to constitutional standards. It is a fair surmise that there are members presently in the federal judiciary who think no more of the Bill of Rights than the foregoing would indicate.

Every member of the federal judiciary should constantly recall the faith, the hopes and the efforts of our Founding Fathers who insisted upon the inclusion of the Bill of Rights in our Constitution. Their views were captured well by James Madison when he introduced the amendments at the first Congress:

"[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every encroachment of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights."44

If the Court is not going to provide effective review of executive and legislative restraints upon our fundamental rights protected by the Bill of Rights, "the time employed in framing a bill of rights and form of government was merely thrown away," as Gouverneur Morris feared in 1785.45

43 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869).
44 Warren, Congress, the Constitution and the Supreme Court 93 (1925).
45 3 Sparks, The Life of Gouverneur Morris 438 (1832).
9. There has been an unwillingness of many members of the Supreme Court to appreciate the judicial reactions of other countries of the western world, even on purely methodological levels

Conceptualistic mechanical transplantation of particular decisions from another law culture, even Canada's, to our own is not called for. And so to constitutionalize for America only the "notions . . . of English-speaking peoples" is both jejune and fatuous. However, without blindly falling down the stairs of eclecticism, the Supreme Court might well be more alert to norms and methods of judicial review found satisfactory by other high constitutional courts in lands having a rather common heritage and comparable value systems. All too typical has been the deprecatory remark of one Justice in 1939 about the views "of English speaking judges in foreign countries."

This judicial parochialism may well be responsible for the fact that there has been but one noteworthy advance in the machinery of constitutional adjudication by the federal courts in this century. To mention but a few of the dozens of judicial methods lurking in comparative judicial review, the Court could well explore the merits of the earlier discussed Australian practice permitting state officials standing to contest the constitutionality of federal statutes and the federal attorney general standing to contest the constitutionality of state enactments, the practice of direct constitutional reference by the government to the Canadian Supreme Court, the Verfassungsbeschwerde and the immediate and direct review and resolution of constitutional issues by the German Bundesverfassungsgericht. Surely only we are the losers by our refusal to investigate the norms and methods of other constitutional courts, especially those in federalisms.

10. Too often the Supreme Court has fallen victim to a jurisprudence of labels

Too many rights and opportunities in American life have been labelled "privileges" and much of this is due to the unfortunate approach of

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51 Freund, A Supreme Court in a Federation: Some Lessons From Legal History, 53 Colum. L. Rev. 597, 617 (1953).
52 Gesetz über das Bundesverfassungsgericht vom 12 März 1951, § 90 (Bundesgesetzblatt Teil I, s. 252).
Mr. Justice Holmes when he was on the Massachusetts court. In denying communicative freedom to a policeman, Holmes glibly explained: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\textsuperscript{58} Under this, the courts, including the United States Supreme Court, rather than weighing intelligently the opposed social interests, have succumbed to the privilege notion in a number of situations, including denying citizens opportunities to use the mails\textsuperscript{54} and denying persons the opportunity of taking advantage of federal labor laws.\textsuperscript{55} Not much better are the cases in which the Court has invalidated state controls over interstate commerce because they were "direct" and not simply "indirect" interferences with such commerce.\textsuperscript{56} And what can be said for a decision invalidating a state tax because it is denominated a "sales" tax when there is universal acknowledgment that the same levy would have been sustained if it only had been labelled a "use" tax?\textsuperscript{57} Similarly, there is no greater merit in invalidating state taxes affecting the federal government when they are "upon" that Government by name, while upholding such taxes which in effect are paid by the federal government so long as they are nominally imposed "upon" a private contractor.\textsuperscript{58}

Sometimes, too, there is an inclination on the part of Supreme Court Justices to indulge in superficial clichés rather than recalling our system of values and weighing the opposed social interests. When a good and a humane Justice can defend the federal government's inhumanity against individuals on the basis of their parents' national origin with the trite phrase "Hardships are a part of war, and war is an aggregation of hardships,"\textsuperscript{59} there may not be too much hope for judicial review in time of real crisis. And when a Chief Justice speaking for the Court can defend the denial of associational and communicative rights to individuals because the statute "touches only a relative handful of persons,"\textsuperscript{60} our trustees of judicial review have lost sight of the basic principle that the constitutional rights of just one person are entitled to the same protection as those of thousands. Of even lesser value to the profession, of

\textsuperscript{53} McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517 (1892).
\textsuperscript{54} United States v. Burleson, 255 U.S. 407 (1921).
\textsuperscript{55} American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
\textsuperscript{56} Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 308-09 (1924); Hall v. DeCuir, 95 U.S. 485, 488 (1878).
\textsuperscript{57} McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).
\textsuperscript{59} Korematsu v. United States, 323 U.S. 214, 219 (1944).
\textsuperscript{60} American Communications Ass'n v. Douds, 339 U.S. 382, 404 (1950) (Vinson, C.J.).
course, are the occasional "judicial" indulgences in pique, as, for instance, the conclusion of a dissenter that "today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."61

11. Too readily the Supreme Court Justices have dealt with constitutional issues on the basis of absolutes

There is no room in constitutional adjudication for indulgence in absolutes. Professor Braden has aptly pointed out: "Every constitutional question involves a weighing of competing values."62 The absolute nonsense of an "absolute wall of separation of church and state" illustrates well the unfortunate consequences flowing from attempts to encyst meaningless metaphors into rigid rules of constitutional law. Equally unfortunate are the attempts to constitutionalize an absolute freedom of speech. Even the natural-right jurists understand well that the first amendment freedoms are not absolute in the sense of being beyond legitimate social control necessary to protect the common good.

The quest for absolutes in constitutional law is understandably triggered at times by the peremptory language of certain constitutional clauses, such as the first amendment or the contract clause, but it does the memory of the draftsmen no honor to operate on a level of literalism in disregard of legitimate opposed social interests that properly demand reconciliation and adjustment.

12. Out of a distorted respect for the Founding Fathers, some Justices have at times attempted to encyst constitutional protections into only those forms known by the Fathers while they were alive

For a Justice to suggest that only human speech is protected by the first amendment and that no mechanically amplified communications are entitled to that protection63 does a grave injustice to those who drafted a Constitution for perpetuity. Nor can any greater justification be found for those Justices who refuse to see that today's scientific intrusions into privacy can be just as effective and fully as improper as the breaking-in known to the Founding Fathers.64 No better is the

suggestion that constitutional jury trials are to be limited to the suits known to the framers of the Constitution.65

Constitutional norms must inevitably be expressed in general language to have lasting significance and to allow for decisions to reflect societal maturation. It is a crude and cruel insult to the intelligence of the American Founding Fathers to debase their principles for eternity into rules illustrative only of cases decided in their time. Perhaps constitutional review should not be trusted to judges who so completely misconceive the role of a Constitution.

13. There is an inclination for Supreme Court Justices to talk too much beyond the needs of the occasion

John Marshall set an unfortunate precedent in lecturing the bar and advising the community beyond the needs of judicial decision. Illustrative is his opinion in Brown v. Maryland66 involving, of course, only imports from a foreign country. "It may be proper," gratuitously added Marshall, "to add that we suppose the principles laid down in this case to apply equally to importations from a sister State."67 It was altogether improper to make this statement, and furthermore, it was improper law. Clearly, as later Courts have seen, the import-export clause largely responsible for the original-package doctrine in foreign commerce has no application to interstate transactions.

Present Justices, too, succumb to the temptation to teach and preach from the bench, lecturing counsel, clients and legislatures on what might be constitutional.68 It is interesting but sad to find the same Justices who most vigorously oppose advisory opinions leading in this deceptive and unnecessary habit. Here there is every need for the Justices, including the speaker, to follow the admonition one Justice suggested in 1952 that it is incumbent "upon this Court to avoid putting fetters upon the future by needless pronouncements today."69

67 Id. at 449.
69 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).
14. To the unfair disadvantage of counsel and clients, the Court has taken judicial notice to sustain criminal convictions and the denial of fundamental rights

Listen to a Justice of the Court talking in *Dennis v. United States* to sustain a conviction for crime:

But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge.\(^7^0\)

Contemplate the plight of defense counsel who at trial must now guess what the Supreme Court will judicially notice on appeal of his case! Is he now to have to read all evidence “elsewhere” presented? And what has happened to the constitutional right of trial by jury when the Court can sustain convictions on the basis of judicial notice of materials never presented to the jury? By now the bar and bench should have learned of the dangers of taking judicial notice of facts necessary to sustain a conviction for crime. This practice is bad enough when done by a trial court. Even here fairness demands that counsel be informed of what is being judicially noticed before counsel closes at the trial, so that the impropriety of this “evidence-avoiding” technique can be urged upon the court, evidence to offset it be produced for the triers of fact, and error urged on appeal. But where this is done by the highest appellate court in the land, without counsel even being informed of what the Justices are reading in secret, and without any opportunity to convince the Court that this is not at all “common knowledge,” it is a gross injustice and must be stopped.\(^7^1\)

The same practice of taking judicial notice by the Court is manifest in cases other than criminal convictions.\(^7^2\) The degree of injustice may be less, but no person should be deprived of liberty or property on the basis of what the Justices read while pondering the appeal.

\(^7^0\) 341 U.S. 494, 547 (1951) (concurring opinion). (Emphasis added.)

\(^7^1\) Wormuth, The Impact of Economic Legislation Upon the Supreme Court, 6 J. Pub. L. 296, 315 (1957).

15. Too much of the time of the Supreme Court is presently spent on matters on which it has no special competence.

In the words of Mr. Justice Cardozo, noted earlier, “the Supreme Court is occupied chiefly with statutory construction . . . .” To the great number of cases every year involving purely statutory construction must inevitably be added—under the Court’s present policy—the cases in which the Court avoids constitutional adjudication by “interpreting” acts of Congress so as to save them. In this totality of cases the Court has lesser abilities and means of arriving at the intent of the lawmakers than would the Congress itself. In the days ahead we should explore fully the propriety and possibility of having Congress through a select body make the interpretations of its own enactments. Indeed, it is worth recalling that some of our American Founding Fathers thought in terms of “a Supreme Court of Congress,” possibly anticipating that the work of a high federal tribunal might well be spent on such searches.

16. Once the Supreme Court has established constitutional norms, it should generally leave application of the norm to the state and lower federal courts.

Having announced constitutional principles and norms, the Court should share with greater finality the application of these norms with the state and lower federal courts. This is especially so where the norm announced by the Court takes into consideration local or community standards. For example, having announced that obscene books and materials are beyond the pale of constitutional protection and that community standards control, the Court can surely spend its time more profitably than in viewing hundreds of films and reading thousands of pieces of “literature” to see if the test is satisfied. Parenthetically, if the Court intended local or community standards to govern, one must question if the Court has competence here beyond that of the local courts.

The best interests of the Court and our society are not served by having the tribunal review each of the three thousand released-time school programs. Further, the Court at the last term in Garner v. Louisiana, 77

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73 Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 Colum. L. Rev. 1 (1945).
74 United States v. CIO, 335 U.S. 106 (1948).
75 Silverman, William Paca, Signer, Governor, Jurist, 37 Md. Historical Magazine 1, 24 (1942).
instead of deciding the constitutional question, insisted upon reviewing the evidence to see if a conviction was justified. This the Court should understand can not profitably go on and on with hundreds of convictions in sight and each defendant being entitled to individual justice as fully as Garner.

If some state courts have been slow in learning in certain areas, the record quite satisfactorily shows the federal courts of appeals to be mature for this task. Of course, the Supreme Court has the obligation, to an extent not as yet fully evidenced, of helping the lower federal and state courts by adequate guidance and statement of principles expressed in language a well-meaning court can follow.

**Conclusion**

We do not, of course, ask that human institutions be staffed by gods, but our society has a legitimate right to ask that those who profess to be mountain climbers at least aspire to Olympus, and that they manifest a willingness to review the wisdom of their paths and to read the markers blazed by those who have succeeded in the climb. Pathmarkers are here, emblazoned by Justices such as Harlan, Brandeis and Stone, who saw the role of the Court in a constitutional society, who recognized and honored the values to which our society is dedicated, and who understood the judicial function to be an aboveboard weighing, reconciliation and adjustment of ever-competing societal interests. Like all human institutions, both judicial review and the Supreme Court might well be regularly exposed to scrutiny by those friends who still believe it possible for a society to remove nine men from the pressures, passions and prejudices of the moment, that they might hold the temporal trustees of power to the lasting ideals of our culture.
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NOTES

THE CASE FOR AN ADVISORY FUNCTION IN THE FEDERAL JUDICIARY

INTRODUCTION

Historians have traced the origin of legal procedure to the concept of vindictive justice.¹ From this beginning, society’s legal machinery has developed into a complex and sophisticated system governing man’s relationship with his fellows and with the state. In the course of this evolution, much of what was once rigidly formalistic has been rejected and the system generally streamlined to facilitate the redress of recognized wrongs and to introduce the availability of legal redress into areas clearly forbidden to an earlier jurisprudence. Despite innovations, the legal machinery has retained its ancient design; it remains, as history fashioned it, a fundamentally remedial device which must lie dormant until activated by the commission of a legal wrong. This remedial concept of law was crystalized in the phrase “judicial power” by the United States Constitution and has severely limited judicial exploration of the uncharted areas of what may be called preventive law. Indeed, it was not until 1934 that the common sense device of the declaratory judgment was accepted by the federal judiciary.² This and other preventive measures have been confined to the redress of individual wrongs; and while their operation in this area is encouraged, it is submitted that a measure of preventive jurisprudence is needed in the area of judicial review, where public rather than private rights are involved. The Supreme Court has recognized the existence of a “general” or “public” right to constitutional administration of government,³ but because of the limitations placed upon the judicial power, there is often no protection from invasion of this right. It is submitted that the traditional remedial concept of law which forces the judiciary to stand mute in the face of an unconstitutional statute, ignoring its possible harm until a justiciable issue is presented, has proved inadequate as an exclusive safeguard against infringement of this right.

¹ Holmes, The Common Law 2 (1881).
In several countries and in a number of the states, this inadequacy has been met by allowing the justices of the highest court to advise the legislature and/or the executive upon the constitutionality of their proposed action. These advisory opinions minimize the danger that citizens will be subjected to laws which conflict with the constitution by allowing those branches of government, whose duty it is to create the law, to seek the assistance of the individual members of the judiciary in the resolution of doubts as to constitutionality before the proposed act becomes law. Thus, while the court itself is reserved for the exercise of judicial power, the lacuna created by the traditional limitations upon that power is filled by the cooperation of the individual justices with the people's elected representatives in a purely advisory capacity.

This study will explore the need for this form of preventive jurisprudence in the federal system. The nature of the device will be shown through a brief examination of its history and use in England and in the states. A study of the acts of Congress declared unconstitutional will show that there is a need in the federal system for a method of minimizing the danger of unconstitutional legislation. Analysis of the constitutional requirement of a case or controversy as a prerequisite of judicial action and a discussion of the doctrine of separation of powers will indicate that the Court's longstanding opposition to an advisory function is not supported by any fundamental constitutional prohibition. It is the purpose of this note to suggest that in light of the existing need for greater protection from unconstitutional legislation and the lack of any absolute constitutional prohibition against an advisory function, the voluntary acceptance by the Justices of the Supreme Court of this method of intergovernmental cooperation is justified and indicated.

I

ENGLISH PRECEDENT AND STATE USE OF THE ADVISORY OPINION

The advisory opinion has its roots in the English usage by which the King and the House of Lords had the right to demand the opinions of

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4 Since this study is necessarily confined to the operation of the advisory opinion in the states and its adaptability to the federal system, no discussion of the area is attempted. For a discussion of the advisory opinion in foreign countries, see generally Wagner, Advisory Opinions in the Federal Judiciary, 27 U. of Kan. City L. Rev. 86, 90-99 (1958).

5 Note 23 infra.

6 The International Court of Justice also has an advisory function. See generally Hudson, The Effect of Advisory Opinions of the World Court, 42 Am. J. Int'l L. 630 (1948); Comment, 47 Mich. L. Rev. 1192 (1949).
the twelve judges of England. This practice, a holdover from the pre-Magna Carta concept of the Crown as the sole developer of the law and the historical association of the House of Lords with the King’s Council, generally came to be regarded with aversion by the judges, and though the right still exists, it has fallen into disuse in modern England.

The royal prerogative to demand extrajudicial opinions was incorporated into a statutory oath of the judges in 1334, requiring the judges to counsel the King in his business. Hargrave states that the right contained many exceptions and viewed it as a threat to the rigid impartiality so essential to the judicial function. Its exercise was opposed on these grounds in the reign of James I by Lord Coke and others, but the approval of the King’s command by the Privy Council and the subsequent recantation of their error by the judges is evidence that no discretion was vested in the judges to refuse compliance. Perhaps because the judges were obliged to obey these commands, the prerogative was frequently abused, especially when advice was sought on criminal matters. In at least one instance the judges who were to try the prisoner were called by the attorney general to assist the Crown, not only in framing the indictment, but in considering the overt acts and in preparing the evidence. By mid-eighteenth century the criticism and judicial aversion began to have a telling effect, and after the opinion given in Lord George Sackville’s Case, the practice lapsed into obsolescence.

In its early history the House of Lords summoned the judges at the beginning of each Parliament for assistance in the solution of legal questions. The assistance thus given was not binding upon the Lords,

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7 For a comprehensive examination of this practice, see Ellingwood, Departmental Cooperation in State Government 1-30 (1918).
9 Attorney Gen. for the Province of Ontario v. Attorney Gen. for the Dominion of Canada, [1912] A.C. 571, 585-86 (Can.). Veeder, Advisory Opinions of the Judges of England, 13 Harv. L. Rev. 358, 368 (1900), states that since the Judicature Act the judges have been assembled only four times. There is evidence as early as 1485 of a general aversion to giving advisory opinions on criminal matters which might later come before them. Hugh Stafford’s Case, noted in Precedence &c. of the Judges, Fortescue 382, 389, 92 Eng. Rep. 901, 904-05 (K.B. 1748).
10 See 3 Coke, Institutes of the Laws of England 224 (1797).
11 1 Coke, Commentary Upon Littleton 110. a. n.5 (19th ed. Hargrave & Butler 1853).
15 Veeder, supra note 9, at 358.
taking rather the form of advice which could be accepted or rejected.\textsuperscript{18} As a practical matter, however, these opinions were, with rare exceptions, followed by the Lords.\textsuperscript{17} While the extent of this right to request advice has not been ascertained with any degree of exactitude, the limits that did exist appear to have been matters for the determination of the judges, for instances are recorded in which they refused to answer the questions proposed to them.\textsuperscript{18} The general framework of the right was articulated by Lord Coke in his conclusion that while the judges were legal assistants to the Lords to inform them of the common law, they should not be called upon to give opinions on any law, custom or privilege of Parliament.\textsuperscript{19}

Massachusetts, in its constitution of 1780, adopted the nation's first advisory opinion provision.\textsuperscript{20} It shows the influence of English experience\textsuperscript{21} and gives the Governor, the council and the legislature the authority to "require the opinion of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."\textsuperscript{22} This article and the body of opinions and cases which have construed it provided the pattern for the other states in which advisory opinions have been given.

At present the justices of the highest court in eleven states have some form of advisory function,\textsuperscript{23} and it has either existed or been attempted

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  \item \textsuperscript{18} Burdett v. Spilsbury, 10 Cl. & Fin. 340, 415, 8 Eng. Rep. 772, 800 (H.L. 1843); Mirehouse v. Rennell, 1 Cl. & Fin. 527, 603-04, 6 Eng. Rep. 1015, 1044 (H.L. 1833).
  \item \textsuperscript{17} Veeder, supra note 9, at 360, lists only five instances in which the advice was not followed. See Attorney Gen. v. Winstanley, 5 Bligh 130, 147, 5 Eng. Rep. 261, 267 (H.L. 1831).
  \item \textsuperscript{18} 1 Coke, Commentary Upon Littleton 110. a. n.5 (19th ed. Hargrave & Butler 1953).
  \item \textsuperscript{19} 4 Coke, Institutes of the Laws of England 49 (1797).
  \item \textsuperscript{20} Mass. Const. ch. III, art. 2. This was not, however, the first instance of judicial "preview." Article 3 of the New York constitution of 1777 established a council of revision, consisting of the Governor, the chancellor, and the justices of the state supreme court, which exercised a veto power over all legislation. A two-thirds vote of the legislature was required to override this veto. In the forty years of its existence, the council considered 6590 bills and vetoed 128. Of this number only 17 became law. 1 Willoughby, The Constitutional Law of the United States 29 (2d ed. 1929).
  \item \textsuperscript{21} Opinion of the Justices, 126 Mass. 557, 561 (1878).
  \item \textsuperscript{22} Mass. Const. ch. III, art. 2.
  \item \textsuperscript{23} Ala. Code tit. 13, §§ 34-36 (1958); Colo. Const. art. VI, § 3 (1886); Del. Code Ann. tit. 10, § 141 (1953); Fla. Const. art. IV, § 13 (1875); Me. Const. art. VI, § 3 (1820); Mass. Const. ch. III, art. 2 (1780); N.H. Const. pt. II, art. 74 (1874); Okla. Stat. Ann. tit. 22, §§ 1002-03 (1951); R.I. Const. amend. XII, § 2 (1903); S.D. Const. art. V, § 13 (1889). North Carolina practice was initiated without statutory or constitutional authority by Waddell v. Berry, 31 N.C. 361 (1849).
\end{itemize}
in several others.24 Space limitations preclude any detailed examination of these latter experiments. Suffice it to say that the courts of those states have either considered such a function repugnant to their constitution or, as with the Missouri experiment of 1865-1870, have so thoroughly emasculated it that the provision became unworkable and was abandoned.28

Generally, the request may originate from either the executive or the legislature, although in Delaware, Florida, South Dakota and Oklahoma, it is expressly confined to the Governor. The nature of the subjects upon which advice can be given is in most of the states covered by the broad mandate "important questions of law and solemn occasions,"27 although in four the statutory or constitutional provision specifies precise limits.28 Allowing for these and other individual differences among the states, however, a broad pattern is easily discernible. Thus the function has been judicially limited to pending legislation in a number of states,29 and every state which has passed upon the question has agreed that no authority exists for an opinion on abstract questions of law, unrelated to any present executive or legislative duty,30 or on matters which might

24 Ellingwood, op. cit. supra note 7, at 43-46, 64-76 (Connecticut, Kentucky, Minnesota, Missouri, Nebraska, New York, Pennsylvania, Vermont).

25 In re Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692 (1936); In the Matter of the Application of the Senate, 10 Minn. 56 (1865); In re Constitutionality of House Bill 88, 115 Vt. 524, 64 A.2d 169 (1949).

26 Mo. Const. art. II, § 11 (1865), contained an advisory provision similar to the one presently contained in the Colorado constitution. Severe restriction by judicial construction, Answer to Questions by Senate, 37 Mo. 135 (1865), and a disinclination to answer pronounced questions made it essentially unworkable. It was omitted from the Constitution of 1875. Ellingwood, op. cit. supra note 7, at 46.

27 Colorado, Maine, Massachusetts, New Hampshire and South Dakota constitutions cited note 23 supra.

28 In re Opinion of the Justices, 254 Ala. 177, 178, 47 So. 2d 655, 656 (1950) (constitutional questions); Opinions of the Justices, 47 Del. (8 Terry) 117, 121, 88 A.2d 128, 130 (1952) (proper construction of constitution or statute when required to aid the Governor in the discharge of his duties); In re Advisory Opinion to the Governor, 151 Fla. 44, 50, 9 So. 2d 172, 174 (1942) (interpretation of constitution upon questions affecting executive duties); In re Opinion of the Judges, 55 Okla. Crim. 381, 36 P.2d 310 (1934) (opinion upon the record of a criminal case involving the death sentence where no appeal has been taken).


directly affect private rather than public rights. Consequently, the justices require the question to be explicitly stated so that the point of difficulty is particularized. And although the article or statute is usually framed in terms of an absolute grant of power to require opinions, it is universally agreed that it is for the justices to decide whether the questions submitted are within their power to answer. In fact, they have not only the power, but the duty to refuse to render an opinion on a question that is inherently, or because of its form, beyond the power of the requesting branch to require.

With the exception of Colorado, where the constitution expressly gives the function to the court *ex nomine*, advisory opinions are not judicial decisions of the court but, as the name implies, collective opinions of the individual justices acting in their extrajudicial capacity as constitutional advisors to the other departments. Consequently, they are not considered binding authority within the doctrine of stare decisis. Language is occasionally found to the effect that such opinions should not be used

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31 In re Opinions of the Justices, 209 Ala. 593, 594, 96 So. 487, 489 (1923); In the Matter of Constitutionality of Senate Bill No. 65, 12 Colo. 466, 471-72, 21 Pac. 478, 480 (1886); Answer of the Justices to the House of Representatives, 150 Mass. 598, 601, 24 N.E. 1086, 1087 (1890); Opinion of the Justices, 76 N.H. 597, 600, 79 Atl. 490, 492 (1911); In re Chapter 6, Session Laws of 1890, 8 S.D. 274, 276, 66 N.W. 310, 311 (1896).

32 In re Opinion of the Justices, 254 Ala. 177, 178, 47 So. 2d 655, 656 (1950); In re Loan of School Fund, 18 Colo. 195, 196, 32 Pac. 273 (1897); Answer of the Justices to the Senate, 299 Mass. 617, 619, 13 N.E.2d 787, 788 (1938); see To Certain Members of the Senate in the General Assembly, 58 R.I. 142, 145, 191 Atl. 518, 520 (1937).

33 E.g., Opinions of the Justices, 95 Me. 564, 566, 51 Atl. 224, 225 (1901); Opinion of the Justices, 96 N.H. 513, 516, 68 A.2d 859, 861 (1949); In re Opinion of the Judges, 34 S.D. 650, 147 N.W. 729 (1914). See also In re Opinion of the Justices, supra note 32, at 178, 47 So. 2d at 656 (complete discretion to refuse to answer).

34 Opinions of the Justices, supra note 33, at 566, 51 Atl. at 225; Answer of the Justices to the House of Representatives, 319 Mass. 731, 733-34, 66 N.E.2d 358, 359 (1946).

35 Colo. Const. art. VI, § 3 (1886).

36 Opinions of the Justices, 47 Del. (8 Terry) 117, 88 A.2d 128 (1952); Loring v. Young, 239 Mass. 349, 361, 132 N.E. 65, 68 (1921); Opinion of the Court, 60 N.H. 585 (1881).

37 In re Opinion of the Justices, 254 Ala. 177, 178, 47 So. 2d 655, 656 (1950); State ex rel. Satterthwaite v. Highfield, 34 Del. (4 Harr.) 272, 279, 152 Atl. 45, 48 (1930); Lee v. Dowda, 155 Fla. 68, 73, 19 So. 2d 570, 572 (1944); Mayor of Somerville v. District Ct., 317 Mass. 106, 115, 57 N.E.2d 1, 6 (1944); Opinion of the Justices, 25 N.H. 537, 538 (1852); Opinion to the Governor, 88 R.I. 892, 149 A.2d 341, 342 (1959); Torigian v. Saunders, 77 S.D. 610, 617, 97 N.W.2d 586, 590 (1959). Contra, In the Matter of Constitutionality of Senate Bill No. 65, 12 Colo. 466, 469, 21 Pac. 478, 479 (1889) (binding on all branches by reason of the constitution); see Statement & Questions Submitted With Answers of the Justices, 70 Me. 570, 583 (1880) (binding on Governor and council in performance of their ministerial duties).
as precedent, but this is obviously only an empty tribute to their theoretical lack of authority: state decisions frequently cite the opinions, even in those states which pay lip service to the converse idea.\textsuperscript{38} The courts have scrupulously pointed out that the only weight to be given the opinions is that derived from the fact that the subjects to which they relate have been judicially examined by the highest court of the state, and that courts subsequently examining the same question in litigation must "sedulously ... guard against any influence which might flow from ... [the] previous consideration."\textsuperscript{39} It is obvious, however, that the practical significance of an advisory opinion is much greater than the theorists would have us believe. The advisory opinion becomes public property, and in the case of pending legislation, it may lend the color of judicial approval to the statute when passed, in reliance on which individual action is often based. Legislative and executive action is almost certain to be based on it.\textsuperscript{40} Under such circumstances it is natural that great weight is given to the opinions and that the justices, when confronted with the same question in litigation, are inclined to follow their earlier pronouncements.\textsuperscript{41} On the other hand, should the advisory opinion prove erroneous or a case be presented on facts in which adherence to the opinion would work an unconstitutional result, the court, by falling back on theory, is free to decide the case without disrupting the doctrine of stare decisis.

Although briefs have been received on some occasions,\textsuperscript{42} the advisory opinion has been traditionally given without the aid of briefs or argument.

\textsuperscript{38} Field, The Advisory Opinion — An Analysis, 24 Ind. L.J. 203, 216 (1949), states that each opinion given has been cited an average of six times. See Lowell Co-op Bank v. Cooperative Cent. Bank, 287 Mass. 338, 345, 347, 191 N.E. 921, 925 (1934), where the court, after stating that an advisory opinion has no binding effect, proceeded to cite one as authority for the application of a United States Supreme Court opinion.

\textsuperscript{39} Green v. Commonwealth, 94 Mass. 155, 164 (1866).

\textsuperscript{40} Ellingwood, op. cit. supra note 7, at 153-59; Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297, 331 (1949); Sands, Government by Judiciary—Advisory Opinions in Alabama, 4 Ala. L. Rev. 1, 27 (1951). For examples of legislative action taken contrary to the opinion, see In re Morgan, 26 Colo. 415, 417-18, 58 Pac. 1071, 1072 (1899); Statement & Questions Submitted With Answers of the Justices, 70 Me. 600, 610 (1880).

\textsuperscript{41} See In re Morgan, 26 Colo. 415, 58 Pac. 1071 (1899); Perkins v. Inhabitants of Westwood, 226 Mass. 268, 115 N.E. 411 (1917); Young v. Duncan, 218 Mass. 346, 106 N.E. 1 (1914).

\textsuperscript{42} Ellingwood, op. cit. supra note 7, at 205-06. Field, supra note 38, at 214, states that as of 1949 briefs had been filed in 21 instances in Colorado, 2 in Massachusetts, and 13 in New Hampshire. Since that time briefs have been filed on 2 occasions in Colorado and 33 in New Hampshire. This list represents only a cross section and does not purport to be exhaustive.
With the exception of New Hampshire, where oral argument has apparently become commonplace in recent years, its use in the advisory function is rare.\(^{43}\) This is, however, a court-made rule, for nothing in the constitutions or statutes prevents the justices from serving notice upon interested groups that briefs may be filed. In one state, Alabama, the statute specifically provides that briefs may be required from the attorney general and from other attorneys as amici curiae.\(^{44}\)

The advisory opinion as it exists in the states has never been considered a vehicle for determining the effect of pending legislation upon individual rights, but is a method of promoting governmental efficiency through interdepartmental cooperation. A 1949 study revealed that the subjects most frequently presented to the justices are all questions of intergovernmental relations, structure of government, taxation and finance, and other phases of public policy, rather than questions or issues directly related to police, property rights, or personal liberties.\(^{45}\) It has the advantage of allowing a proposed course of governmental action to be examined by the most authoritative legal group in the state and questions thereon answered before the public is exposed to and consequently affected by it. It has proved itself an effective companion to judicial review by minimizing the uncertainty, the expense and the delay\(^{46}\) which are the inevitable progeny of a statute carried through the courts to a final authoritative test.

II

UNCONSTITUTIONAL LEGISLATION IN THE FEDERAL SYSTEM

The strongest argument for an advisory function of the Justices of the United States Supreme Court is that it would facilitate the accomplish-

\(^{43}\) An examination of the opinions given since 1949 indicates that oral argument has been heard in the following instances: Opinion of the Justices, 98 N.H. 527, 530, 96 A.2d 733 (1953); Opinion of the Justices, 97 N.H. 546, 81 A.2d 853, 854 (1951); Opinion of the Justices, 97 N.H. 543, 81 A.2d 851, 852 (1951); Opinion of the Justices, 97 N.H. 541, 543, 81 A.2d 306 (1951); Opinion of the Justices, 97 N.H. 533, 540, 81 A.2d 845, 847 (1951); Opinion of the Justices, 96 N.H. 517, 523, 83 A.2d 738, 742 (1950); Opinion of the Justices, 96 N.H. 513, 515, 68 A.2d 859, 861 (1949).

\(^{44}\) Ala. Code tit. 13, § 36 (1958). Even with the express authority the justices have seldom requested assistance. A recent analysis of 127 Alabama opinions revealed that in only 18 instances briefs had been submitted, and in at least 8 of those only one side was represented. Sands, supra note 40, at 40-43.

\(^{45}\) Field, supra note 38, at 210-11.

\(^{46}\) The average time lapse between enactment of a statute and a decision thereon in the states has been reported as 7.5 years, while the average lapse between request and opinion is 29.8 days. Advisory opinions have been obtained in less than the average time consumed in litigation in the trial court. Id. at 207.
ment of a legislative purpose without burdening the public with a law of dubious constitutionality. Legislation in the gray areas of constitutional law is at best a hazardous affair; despite the great body of case law describing the limits of federal power and the abundance of legal talent available to advise and assist the Congress, resolution of doubts as to the constitutionality of a statute must await the time-honored and time-consuming machinery of judicial review. Even then the Court-established rules of standing, strict necessity and statutory construction can further postpone a decision on the constitutional issue. Despite the once popular rationalization that an unconstitutional statute is void ab initio, in the interim between the passage and the decision such legislation exists as operative law; individual as well as public action is planned or executed in reliance on it; taxes are collected and moneys spent under its authority. In the broad area of statutes affecting individual rights, opportunity for personal injustice and deprivation of rights is present. In some instances the effect of such a statute is de minimis, but in others it is of almost immeasurable proportions.

All legislation involving difficult and unsettled questions of constitutional law is a congressional gamble that the means chosen to effect the legislative purpose will fall within the limits of constitutionality, with the interests of the public as the stakes. The right of the majority to enact their will into law, within the bounds prescribed by the Constitution, is

50 For recent examples of the Court's avoidance of the constitutional issue raised by a state statute, see Garner v. Louisiana, 368 U.S. 157 (1961); Poe v. Ullman, 367 U.S. 497 (1961).
52 See Coyle v. Smith, 221 U.S. 559 (1911) (provision of the Oklahoma enabling act restricting relocation of the state capital); Jones v. Meehan, 175 U.S. 1 (1899) (joint resolution authorizing Secretary of Interior to approve a second lease of land by an Indian chief); Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868) (statute providing for a board of revision with power to nullify titles confirmed many years before by authorized agents of the Government).
basic to our system of government. Equally basic is the right of the public to live under laws made in accordance with the Constitution. These rights require that the best method devisable be available to Congress for the attainment of its goal of constitutional law. The mechanics used to attain this end should also minimize the danger that legislative experimentation might result in unconstitutional law. The shaping of this method to attain the ideal must, however, be cautiously pursued, lest the delicate and essential balance of powers which inheres in and accounts for the success of the American form of government be disrupted. Yet fear of disrupting this balance should not lead to an unquestioning acceptance of tradition and the status quo. The fact that unconstitutional legislation and its accompanying detriment to the public are not guarded against by the present system argues the necessity of some change in the existing relationship between the judiciary and Congress. It is suggested that this change take the form of the use of the advisory opinion.

The practical end to be achieved by the advisory opinion is not the avoidance of all unconstitutional legislation by judging in advance the compatibility of every act of Congress with the Constitution. The advisory opinion as developed and practiced in the states and in many other countries has as its practical result the guiding and assisting of the legislative and executive branches in solving difficult constitutional questions which, if wrongly resolved and subsequently enacted into law, would work hardship upon the public or hamper the operation of constitutional government. Those questions inherent in any legislation which directly concerns individuals and gives them standing to sue for their rights are not the type at which the advisory opinion is primarily directed. The mechanics of trial and appeal should adequately protect individual rights. But the public at large, or any large segment of the population which is caused to pay a tax levied under an unconstitutional statute, or which is forced to watch the Government labor under some obstacle imposed by an unconstitutional law, often has no effective method of vindicating its rights. It is submitted that the availability of the advisory opinion to the public's elected representatives would greatly inhibit the enactment of such laws and their consequent harm to the public.

Statutes concerned with individual rights generally fall beyond the scope of this study. As a rule, decisions testing their validity depend upon unique fact patterns, and it is not suggested that such evils as their examination might evidence are to be corrected by any form of judicial preview. If corrections are to be made in this area, they must come through methods of accelerating the existing machinery. Even though
some of the more obvious applications of a statute to particular factual patterns could certainly be anticipated and corrected through the use of the advisory opinion, the recognized fact that judges are not omniscient, coupled with the great weight traditionally given to advisory opinions, have led the states to avoid their use in this area. It is felt that this is a wise practice and that discussion of such cases is better left to other studies.

It approaches a truism to say that the accomplishment of a legislative purpose, especially in an unsettled area of constitutional law, is seldom confined to the exercise of only one of the enumerated powers of Congress. This overlapping of means, while it offers greater legislative flexibility, has at times proved dangerous; a study of the statutes declared unconstitutional reveals many instances in which the statute was struck down, not because the purpose it manifested was inherently unconstitutional, but because Congress sought its accomplishment under the wrong power. In such cases new attempts based on the adverse decision have generally proved successful. An early example is found in the Act of May 31, 1870 53 which provided that all citizens of the United States who were otherwise qualified should be allowed to vote at any election without distinction of race, color or previous condition of servitude, and by separate sections imposed penal sanctions upon officials who interfered with either the qualifying or the voting. A divided Court in United States v. Reese 54 held that the broad language of the penal sections would apply to any wrongful interference with suffrage, thus exceeding the power of Congress under the fifteenth amendment. After argument of Reese but before decision, these sections were reenacted 55 and all connecting words between the act and the fifteenth amendment were dropped. When this version was challenged in United States v. Munford, 56 the revision was construed as having made the act a general one within the power of Congress under article I, section 4.

The development of the Grain Futures Act 57 is a more striking illustration of congressional invocation of the wrong power and is also an example of how the Court has often provided guidance for future legislation through dicta. The original version of this act was a tax measure 58 designed to discourage speculation in options for future grain

53 Ch. 114, 16 Stat. 140.  
54 92 U.S. 214 (1875).  
57 Ch. 369, 42 Stat. 998 (1922).  
delivery. This, the Court decided in *Hill v. Wallace*, the subsequent Dagenhart. In response to the *Hill* decision, Congress enacted the Grain Futures Act which prohibited the use of the mails or interstate commerce to certain offers for the sale of grain futures. With these changes the act was upheld in *Board of Trade v. Olsen*.

Other instances of attempts to salvage a judicially obstructed legislative purpose deserve briefer mention. The "gold clause" provision of the Joint Resolution of June 5, 1933, invalidated by the decision in *Perry v. United States*, was corrected by withdrawing the consent of the United States to be sued upon its currency or securities. An unsuccessful attempt is represented by the efforts to legislate against child labor. The original Child Labor Act was declared an unconstitutional extension of the power to regulate commerce by the decision in *Hammer v. Dagenhart*. The same result was attempted the following year under the taxing power but was killed by the decision in the *Child Labor Tax Case*. A determined Congress then attempted to amend the Constitution, and at this point this attempt at social legislation passes beyond the scope of this note.

It becomes apparent from these examples that a determined legislative purpose is seldom destroyed by a single adverse opinion. If essentially the same result can be achieved under another section of the Constitution, the second attempt—especially when the Court itself has pointed out how corrections could be made—is often constitutional. In other instances such statutes can be redrafted and the objectionable portions removed. Here again there is abundant evidence that the Court, no

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59 259 U.S. 44 (1922).
60 See id. at 69.
61 262 U.S. 1 (1923).
62 Ch. 48, 48 Stat. 112.
66 247 U.S. 251 (1918). The rationale of this case was subsequently overruled in United States v. Darby, 312 U.S. 100, 116 (1941).
68 259 U.S. 20 (1922) (Bailey v. Drexel Furniture Co.).
doubt realizing that its opinion will be relied upon in future attempts at the same result, has frequently pointed out how the defect might be corrected. The efforts of Congress to curtail the white slave traffic in alien women reveal a direct connection between the Court's decision and subsequent legislation which, through redrafting, was brought within the ambit of federal authority. Section 3 of the Immigration Act of 1907\(^6\) was declared an unconstitutional encroachment upon state power in *Keller v. United States.*\(^7\) The Court there recognized that the Congress had the power to control the coming in and removal of aliens but found no connection between this power and the offense defined in the statute. Less than a year later the section was amended\(^71\) to impose the penal sanctions only when the keeping for prostitution was in pursuance of an illegal importation. Debate in the House of Representatives makes it clear that *Keller* was regarded as virtually admitting that if the importation were part of a preconceived plan, the statute would be good.\(^72\) This amended section was upheld by a lower court in *Ex parte Szumrak.*\(^73\)

The history of the gift tax provisions of the Revenue Act of 1932\(^74\) is also illustrative of a correction through redrafting. The original provision appeared in the Revenue Act of 1924,\(^75\) passed in early June of that year, and imposed a tax on property transfers within the United States during the calendar year and each year thereafter. *Untermyer v. Anderson*\(^76\) construed this provision as imposing a tax on gifts made before the statute was enacted and consequently invalid as a violation of the due process clause of the fifth amendment. When subsequently reenacted, the obnoxious "calendar year" provision was clarified and the committee's explanation\(^77\) that the tax cannot apply to gifts made prior to the act imposing the tax indicates the influence of *Untermyer."

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\(^6\) Ch. 1134, 34 Stat. 899. This section provided in part that

whoever shall keep, maintain, control, support, or harbor, in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case be deemed guilty of a felony . . . .

\(^7\) 213 U.S. 138 (1909).

\(^71\) Immigration Act of 1910, ch. 128, § 3, 36 Stat. 264.

\(^72\) 45 Cong. Rec. 549 (1910) (remarks of Representative Hayes).


\(^74\) Ch. 209, § 501(b), 47 Stat. 245.

\(^75\) Ch. 234, § 319, 43 Stat. 313.

\(^76\) 276 U.S. 440 (1928). In Blodgett v. Holden, 275 U.S. 142 (1927), the Court had divided evenly over the same problem.

The most striking examples of a determined congressional purpose accomplished with the advice of the Court are found in the field of workmen's compensation. The first Federal Employers' Liability Act imposed upon every common carrier liability for negligence in causing the death or injury of employees without regard to the common law defenses of contributory negligence or the fellow-servant doctrine. The Employers' Liability Cases declared this act beyond the power granted by the commerce clause and void as to its application in the states. The bill was immediately redrafted to limit its application to situations in which the injury occurred on carriers engaged in interstate commerce. This revised bill was enacted 2.5 months after the decision and was found constitutional in the Second Employers' Liability Cases. Similarly, the Act of October 6, 1917, which amended the sections of the Judicial Code granting jurisdiction of admiralty and maritime causes to the United States District Courts, saved for claimants the rights and remedies under the workmen's compensation law of any state. This was declared an unconstitutional delegation of exclusive federal power to the states in Knickerbocker Ice Co. v. Stewart. Two years later Congress attempted to overcome this objection by a second amendment which limited the saving clause to longshoremen and purported to make state compensation laws their exclusive remedy. This amendment was tested in Washington v. W. C. Dawson & Co., where the Court, finding that the work of a stevedore was maritime in nature, held the act still an unconstitutional delegation of power. The Court, however, by way of dicta, suggested that Congress could enact a general employers' liability law or a general provision for compensating injured workers. Heeding the Court's advice, Congress passed the Longshoremen's and Harborworkers' Act which provided for absolute liability of employers.

78 Ch. 3073, 34 Stat. 232 (1906).
79 207 U.S. 463 (1908).
80 The act was upheld as applicable to the territories. El Paso & N.R.R. v. Gutierrez, 215 U.S. 87 (1909).
81 Act of April 22, 1908, ch. 149, 35 Stat. 65.
82 223 U.S. 1 (1912).
83 Ch. 97, 40 Stat. 395.
84 253 U.S. 149 (1920).
85 Act of June 10, 1922, ch. 216, 42 Stat. 634. The committee report shows that this act was specifically designed to avoid the barriers of Knickerbocker. Senate Comm. on the Judiciary, Extension of Benefits of the State Workmen's Compensation Act to Seamen, etc., S. Rep. No. 94, 67th Cong., 1st Sess. 2 (1921).
86 264 U.S. 219 (1924).
87 Id. at 227.
for injuries or death of local harborworkers when recovery was unavailable under state law. This act was subsequently approved by the Court in Crowell v. Benson.

It should also be noted in this connection that the defects of the "hot oil" section of the National Industrial Recovery Act were corrected through redrafting within seven weeks of the decision in the so-called Hot Oil Cases, and the essential effects of the Railroad Retirement Act of 1934, which met with disaster in Railroad Retirement Bd. v. Alton R.R., were achieved by a substitute measure passed within three months of that decision. Also, an income tax bill in substantially the same form as the one killed in Pollock v. Farmers' Loan & Trust Co. was considered, but at the suggestion of the President, Congress instead sought to have the Constitution amended.

These cases illustrate both the existence of a fertile field for a sensible use of the advisory opinion in the federal system and the existence of conditions which justify its adoption. This is not to indulge in the retrospective prophecy that its use in the situations discussed would have resulted in a constitutionally acceptable statute at the initial enactment; it is not pretended that the advisory opinion is a jurisprudential wonder. These cases are, however, evidence that past legislative programs frustrated by an adverse opinion have often been salvaged once the constitutional pitfalls were mapped by the Court. The Court itself has recognized these facts and often furnished explicit advice for the anticipated second attempt. Thus an established advisory practice within the framework of judicial review already exists, a practice which reaches beyond the inherent effect of any negative decision and into the realm of consciously expressed, direct advice in the form of judicial dicta. The price paid for even the indirect advice was, however, an unconstitutional statute, and in most of the instances cited, a statute which, by the nature of its

88 Ch. 509, 44 Stat. 1424 (1927).
89 285 U.S. 22 (1932). For a more detailed examination of the law's development in this area, see generally 24 Ill. L. Rev. 807 (1930).
90 Ch. 90, § 9, 48 Stat. 200 (1933).
93 Ch. 868, 48 Stat. 1283.
97 15 Messages and Papers of the Presidents 7389-90.
98 For a thorough discussion of this existing advisory function, see generally Albertsworth, Advisory Functions in Federal Supreme Court, 23 Georgetown L.J. 643, 646-67 (1935).
subject matter, affected a large segment of the public. It is inevitable
that this will recur. It is just as certain that even the most comprehensive
use of the advisory opinion would not completely rid the land of un-
constitutional legislation. It is submitted, however, that its proper use
in the federal system, by resolving particularized constitutional questions
before rather than after enactment, would substantially decrease the
chances that such bills would become law.

The average lapse of time between enactment of the statute and the
Court's nullifying decision has been 8.7 years.\(^9\) Although the lapse of
time is not per se a major detriment, the opportunity for harm which an
unconstitutional statute may present over an extended period of time is
an undesirable and dangerous condition. Although the evidence clearly
demonstrates that a statute which directly affects a large segment of the
population will usually be challenged more quickly and consequently
come before the Court in much less than this average, the actual effect
in the brief period of its existence might well be immeasurable. This
existing potential, when considered in the light of the effect upon the
public of even short-lived statutes, makes the time lapse strong argument
for the adoption of the advisory opinion.

Admittedly, adverse opinions on federal statutes have been rare. Of
the thousands of acts passed by Congress, only 71 have been declared
unconstitutional in whole or in part by 79 cases.\(^10\) This statistic has
been used to rebut any need for a modification of the existing system.\(^11\)
But the argument is, at best, weak; it is not the number of such statutes
that is important, but their potential effect. A cursory examination of the
unconstitutional legislative programs of the New Deal period is graphi-
cally illustrative of the far-reaching effect which an unconstitutional
statute may have. Whether this particular effect was for good or ill
depends upon the political perspective from which it is viewed and is of
no consequence here. The fact that the effect came from unconstitutional
statutes and its magnitude are our only concern.

Between the Economy Act of 1933\(^12\) and the Bituminous Coal

\(^9\) This average was computed by the authors.

\(^10\) A list of the statutes and the cases holding them unconstitutional is found in Corwin,
170, 82d Cong., 2d Sess. 1241-54 (1953). To this list must be added the Uniform Code of
Military Justice art. 2(11), ch. 169, 64 Stat. 109 (1950), declared unconstitutional in part
by Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960), and Reid v. Covert,


\(^12\) Ch. 3, 48 Stat. 8. Section 17 of this act was declared unconstitutional in part by
Conservation Act of 1935,103 eleven separate acts of Congress were passed which were declared unconstitutional in whole or in part by twelve Court decisions.104 The history of these statutes covered a total period of three years and two months and their average life was one year and three months, but in that brief period they spawned almost one hundred cases in the federal courts.105 More than one thousand national and regional authorities106 established under the authority of the National Industrial Recovery Act107 were killed by the decision in A. L. A. Schechter Poultry Corp. v. United States.108 These offices and the codes which they administered touched at every level of the economy and in some way affected practically every segment of society. William Green, then president of the AFL, reported to President Roosevelt that the Schechter decision affected at least 4,576,501 workers and had deprived 839,123 wage earners of possible reemployment.109

The effect of this statute cannot begin to be measured only by its effect on labor. In fiscal years 1934 and 1935, the agencies established by the Agriculture Adjustment Act110 spent a total of $1.033 billion111 and collected $874 million in processing taxes.112 By the time most of the act had been declared unconstitutional in United States v. Butler,113 an estimated $1.2 billion had been collected in processing taxes.114 When Rickert Rice Mills, Inc. v. Fontenot115 necessitated the refund of these taxes, the fact that many of the processors had passed the cost along to the consumer, so that any refund would be a windfall to them, forced the Government to take difficult and complicated measures to decrease the risk of an inequitable redistribution.116 Placed in their proper economic

104 For a list of these acts and the decisions striking them down, see Corwin, op. cit. supra note 100, at 1252-54.
105 See generally Frease, The Judicial Aftermath of a Political Paradox (1935), which purports to discuss the first 100 cases on New Deal legislation. The table of cases, however, lists only 79.
107 Ch. 90, § 3, 48 Stat. 198 (1933).
110 Ch. 25, 48 Stat. 31 (1933).
111 81 Cong. Rec. 115, 118 (1937) (President's budget message).
112 Ibid.
113 297 U.S. 1 (1936).
114 Time, January 20, 1936, p. 18.
perspective, these collections and expenditures take on a significance far greater than is implied by their mention in the present economy.

The total effect of these statutes defies measurement, but their lesson is readily apparent. An unconstitutional statute is more than an abstract legal problem; it is, during its lifetime, an existing condition which may directly affect the lives, the purses, or both, of vast segments of the population, indeed, the entire population. This is a problem with which the existing system of judicial review cannot adequately cope; the machinery is too slow, too cumbersome, and the remedy of merely declaring the statute void, while it provides future protection against a similar situation, cannot restore the disrupted status quo. To say that such statutes are rare is to beg the question. Some unconstitutional statutes are inevitable under any system, but one that can be avoided without excessive risk is intolerable.

III

THE CONSTITUTION AND THE ADVISORY OPINION

Since 1793 the Supreme Court has considered the advisory opinion incompatible with its function and with the Constitution. This first and, for all practical purposes, final consideration of the advisory opinion was occasioned by a request for advice addressed to Chief Justice Jay by President Washington. In attempting to steer a course of neutrality in the war between France and Great Britain, Washington issued the Neutrality Proclamation of 1793. Neutrality presented novel and difficult questions of international law and treaty obligations which Washington, at the suggestion of Jefferson, sought to answer with the aid of the Supreme Court Justices. In June of 1793 the President drafted twenty-nine questions relating to international law, neutrality and the French and British treaties, and these questions were submitted to the Chief Justice. On August 8, 1793, Jay replied that he was unable to give the advice requested on the grounds that such an advisory opinion was inconsistent with the judicial function and violative of the separation of powers. Though most apologetic for his failure to give the advice requested, Jay further suggested that it was improper for the judiciary to

117 5 Marshall, Life of Washington 14 (1926); 1 Warren, The Supreme Court in United States History 105 (1924) [hereinafter cited as Warren]. The Proclamation is reprinted in 1 Lowrie & Clark, American State Papers 140 (1832).

118 1 Warren 108-09.


120 Id. at 77.
give such advice in the light of "the power given by the Constitution to the President, of calling on the heads of departments for opinions . . . ."\textsuperscript{121} This device, however, had already failed to produce the desired guidance necessary for formulating executive policy to face the difficult situation. On April 18, 1793, Washington had sent a letter containing thirteen questions\textsuperscript{122} on the subject of neutrality to the heads of departments. Though the exact contents of the replies to these queries are not known, it is reported that the opponents to Washington’s plan of neutrality seized upon the questions as a political issue, alleging that the questions indicated a policy unfriendly towards France.\textsuperscript{123} Despite the political repercussions, it may be assumed that if Washington had received illuminating answers from his Cabinet heads, the need for seeking the advice of the judiciary would not have arisen a few months later.

Though Jay’s refusal to answer the twenty-nine questions has become the foundation of the Court’s opposition to an advisory function,\textsuperscript{124} it could have very easily been otherwise. If the questions had been less entwined with a pressing political problem, if the Court had been less fearful for its own position in the scheme of government and less timid of seeing its opinion become the basis of national policy, the belief prevalent in 1793 that the President had the right to seek the opinion of the Justices\textsuperscript{125} might well have become an institution of American government.\textsuperscript{126} Regardless of its foundation, this refusal established a tradition so firmly engrained in our constitutional law that the Court has never questioned and seldom bothered to discuss it in any detail. But what is more important, it discouraged any other attempts to obtain advice through the medium of direct questions. This distinction is vital. The twenty-nine questions of 1793 represent a \textit{request} by the Chief Executive for extrajudicial advice from the Justices, while all subsequent judicial discussion has arisen in a context in which Congress, through statute, has attempted to \textit{impose} upon the Court the duty of utilizing the judicial power itself in an advisory capacity.

In such a context the Supreme Court finds the advisory opinion alien to its function by reason of its interpretation of the Constitution.\textsuperscript{127}

\textsuperscript{121} 1 Warren 111.
\textsuperscript{123} 1 Warren 109-10.
\textsuperscript{125} 1 Warren 109.
\textsuperscript{126} Thayer, Legal Essays 54 (1908).
\textsuperscript{127} Cases cited note 124 supra.
Section 2 of article III provides that "the judicial power" is to "extend" to cases or controversies. The judicial power has been described as "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." The operation of this power is held to be restricted to cases and controversies. A case or controversy is said to exist only where there are adverse litigants with a substantial interest in the outcome of the litigation which must be concerned with a real rather than a speculative issue. No mere "declaration in the air" may be sought of the Court. As the advisory opinion does not present an issue clothed with the requisites of case or controversy, it has been concluded by the Court that the judicial power does not extend to the granting of an advisory opinion. The Court has long held that the ambit of its judicial power is fixed by the Constitution and that the Congress may not enlarge it. Under this traditional and oft-repeated interpretation of article III, the advisory opinion in the constitutional courts appears to be fundamentally unconstitutional.

The only full discussion of the Court's position on this type of judicial advice is contained in Muskrat v. United States. In Muskrat the Court was faced with a statute which conferred jurisdiction upon the Court of Claims to determine the validity of certain other acts of Congress and provided for an appeal from that decision to the Supreme Court. This act was declared an unconstitutional attempt to extend the judicial power beyond its constitutionally defined limits by authorizing litigation which would amount to "no more than an expression of opinion upon the validity of the acts in question."

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133 E.g., Muskrat v. United States, 219 U.S. 346 (1911); Gordon v. United States, 117 U.S. 697 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
134 219 U.S. 346 (1911).
135 Act of March 1, 1907, ch. 2285, 34 Stat. 1015.
136 219 U.S. at 362.
To arrive at its conclusion the *Muskrat* Court begins with a discussion of the notes appended to *Hayburn's Case.* That case arose under a statute conferring upon the circuit courts a duty to adjust certain pension claims but leaving final determination of payment to the Secretary of War. The act was repealed before *Hayburn* was decided, but it had been construed by the Justices of the Supreme Court while on circuit; their comments make up the note. The Justices, sitting in three districts, refused to accept the duty imposed upon them by the statute. Chief Justice Jay, writing from the New York district, expressed the majority opinion in his declaration that the constitutional separation of powers precluded the assignment of nonjudicial duties to the judiciary, and that any duty not capable of being performed with finality was beyond the judicial power. However, the *Muskrat* opinion, in discussing *Hayburn's Case,* fails to point out that of the five Justices who were faced with the statute demanding extrajudicial opinions, three of them were willing to accomplish the same result by acting as commissioners, and Jay and Cushing went so far as to construe the statute as granting them this authority. The *Muskrat* Court concludes, on the basis of these early cases, that "the power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

It is important to note that *Muskrat* is not concerned with an advisory opinion in the classical sense. Rather, it was an attempt to impose upon the judicial power the duty of passing upon the constitutionality of an existent statute without the requisite case or controversy. It is admittedly repugnant to the Constitution to demand advice from the judicial power. But it is inaccurate to throw the full weight of the opposition in *Muskrat* against a request for an advisory opinion which would not seek to force the Court into applying the judicial power as such, but would request only extrajudicial advice. Thus it can be seen that the thoroughgoing opposition of the Court voiced in *Muskrat* is aimed at a situation somewhat different from the true advisory opinion, as

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137 2 U.S. (2 Dall.) 409 (1792).
139 2 U.S. (2 Dall.) at 411 n.(a).
140 Id. at 410-13 n.(a).
141 Id. at 410 n.(a). In United States v. Todd, an unreported case discussed in Chief Justice Taney's notes, 54 U.S. (13 How.) 52 (1851), Jay and Cushing apparently repudiated their earlier construction of the statute. Id. at 53. But nothing in the case denies to the Justices the power of accepting extrajudicial functions when offered.
143 219 U.S. at 350-51.
exemplified by Washington's twenty-nine questions. Muskrat is more concerned with protecting the Court against the incursions of Congress than with prohibiting extrajudicial functions to the Justices.\footnote{144}

Thus judicial aversion to rendering an advisory opinion, a function by its nature external to the judicial power, achieved the status of a constitutional prohibition only after Jay's refusal to answer the twenty-nine questions. As has been pointed out, it was generally believed in 1793 that the President had the right to seek the advice of the judiciary.\footnote{145} English judicial history indicates that the advisory opinion was traditionally included within the scope of the judges' duties.\footnote{146} It had received serious consideration at the Constitutional Convention; on August 20, 1787, a proposal patterned after the Massachusetts constitution\footnote{147} was submitted for consideration to a committee of five and provided that "each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions."\footnote{148} Although this provision was not incorporated into the Constitution, it may be noted that such an authority as Hamilton found no constitutional objections to seeking advice from the Supreme Court. Before Washington drafted the twenty-nine questions, Hamilton himself had sought advice from Jay on the problems of neutrality.\footnote{149} Even after the twenty-nine questions had been refused, Hamilton requested advice from Jay on the necessity of issuing a Presidential proclamation concerning the Whiskey Rebellion.\footnote{150} In light of these facts it is not unreasonable to conclude that Jay's refusal to grant an advisory opinion was more the product of political considerations than of constitutional limitations.

Although the advisory function has been rejected, its near cousin, judicial review, has become firmly entrenched in constitutional law. Yet the power of the Court to declare an act of Congress unconstitutional,

\footnote{144} Id. at 362-63 (semble).
\footnote{145} 1 Warren 109. "The Court considers the practice of King's Bench and Chancery in England, as affording outlines for the practice of this Court . . . ." Hayburn's Case, 2 U.S. (2 Dall.) 409, 414 (1792).
\footnote{147} Mass. Const. ch. III, art. II (1780). The Massachusetts justices had given two advisory opinions prior to the date of the Convention. Opinion of the Justices, 14 Mass. 470 (1784); Opinion of the Justices, 126 Mass. 547 (1781). There is also evidence in a memorandum from the French consul of a refusal in 1787 to grant an advisory opinion. Ellingwood, Departmental Cooperation in State Government 34 (1918).
\footnote{148} 1 Elliot's Debates on the Federal Constitution 249 (1907).
\footnote{149} 1 Warren 109 n.1.
\footnote{150} Ibid.
and therefore null and void, is nowhere expressly granted by the Constitution. Such a power was unknown in England, as Blackstone observed:

But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

Although this power was considered proper by some at the Constitutional Convention, it was opposed by others and never explicitly granted to the Supreme Court. Hamilton argues the necessity of judicial review in The Federalist No. 78, but no direct resolution on the point was ever made at the Convention. The nearest approach occurred on May 29, 1787, when Randolph of Virginia made a number of resolutions to the Convention, the eighth of which proposed a Council of Revision composed of the Executive and the national judiciary, whose function and authority would be to examine every act of the legislature and negative any found unsatisfactory. Though more closely akin to the concept of judicial preview and the advisory opinion than to judicial review, the resolution did direct the attention of the Convention to the right of the judiciary to control legislative acts. The wisdom of such control was debated, but the resolution was finally dropped. The resolution appeared three more

152 Ralston, Judicial Control Over Legislatures as to Constitutional Questions, 54 Am. L. Rev. 1, 7 (1920).
153 1 Blackstone, Commentaries *91.
154 Corwin, op. cit. supra note 151, at 556 n.1. But see Warren, The Making of the Constitution 187 (1928), which indicates that the reported views of the delegates on judicial review may not be an altogether accurate evaluation of their feelings on that subject, since the views were expressed in connection with a proposal of judicial veto power rather than judicial negation of enacted laws.
156 Corwin, op. cit. supra note 151, at 556.
158 Morison, Sources and Documents Illustrating the American Revolution 233, 236 (2d ed. 1929).
160 Id. at 187.
times in the course of the Convention but was defeated each time.\textsuperscript{161}

Not until Chief Justice John Marshall’s politic decision in \textit{Marbury v. Madison}\textsuperscript{162} did judicial review take a part in the operation of American government. Upon considering the mosaic of facts leading up to \textit{Marbury} and judicial review, it is questionable whether the doctrine of judicial review is an element of judicial power or an acquired trait of that power. This question is suggested by the fact that \textit{Marbury v. Madison} is clearly a decision dominated by political considerations;\textsuperscript{163} by the fact that \textit{Marbury} could have been decided without striking down the Judiciary Act;\textsuperscript{164} by the fact that the delegates to the Constitutional Convention had ample opportunity to debate the issue and incorporate judicial review into the Constitution and yet did not do so;\textsuperscript{165} and finally, the testament of history that the power of judicial review was unknown in England and anything but universally accepted in pre-Convention America. All this suggests that although the practical necessity of judicial review in a constitutional government may be unassailable, the concept of “judicial power,” as incorporated into the Constitution, cannot be understood as including within it the power of judicial review.\textsuperscript{166}

And yet judicial review is a firmly established fact of American

\textsuperscript{161} Ibid.

\textsuperscript{162} S. U.S. (1 Cranch) 137 (1803).

\textsuperscript{163} See 3 Beveridge, \textit{The Life of John Marshall} 80-82, 104-14 (1919); McCloskey, op. cit. supra note 151, at 41-42. The political tone of \textit{Marbury} stems from the very source of the case; Marbury was a partisan appointee of President Adams, made in the last day of his term, in an effort to preserve the waning light of Federalism. Great political pressures were upon the Court and Chief Justice Marshall at that time. The Republican attack upon the judiciary prior to \textit{Marbury} had resulted in the abolishment of the June term of the Supreme Court out of fear that Marshall would annul the Republican repeal of the Federalist Judiciary Act of 1801, ch. IV, 2 Stat. 89. The impeachment by newly elected Republicans of Judges John Pickering and Alexander Addison, as well as rumors of the plan to impeach Mr. Justice Chase and Marshall himself were further reasons causing Marshall to assert the power of the Court by establishing the doctrine of judicial review in \textit{Marbury}. Beveridge, op. cit. supra at 94, 110-14.

\textsuperscript{164} Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Marshall could have avoided the constitutional question in \textit{Marbury} by interpreting section 13 of the act as granting the power to issue mandamus when the Court already had jurisdiction by reason of the nature of the case. Therefore, he could have dismissed \textit{Marbury} for lack of jurisdiction on the grounds that section 13 operated not for the purpose of acquiring jurisdiction, but only for the exercise of the power to issue writs of mandamus when jurisdiction, as described by the Constitution, was already present. Corwin, op. cit. supra note 151, at 560; Gartner, When Should the Constitutionality of Acts of Congress Be Judicially Determined, During Enactment or Years Afterward?, 24 Georgetown L.J. 98, 107 n.12 (1935).

\textsuperscript{165} McCloskey, op. cit. supra note 151, at 7-8; Meyer, supra note 157, at 175.

\textsuperscript{166} Ralston, supra note 152, at 10.
government. Marbury v. Madison has never been disturbed. Nor is the intent of this analysis to criticize the necessity or the constitutionality of this doctrine. Rather, it is intended to show that in the exercise of judicial review the Court performs a function which is not, strictly speaking, within the concept of "judicial power." Judicial review is an appendage of the traditional notion of judicial power. It is a post-Constitution grafting onto the power of the Court, added in order to insure the harmony of legislative acts with the Constitution. As such, it is a "parajudicial" function of the Court and not an element of judicial power as understood by the Framers.

A reexamination of the advisory opinion in the light of its relationship to judicial review and the relationship of both to "judicial power" reveals that the birth of judicial review was as contrary to the historical notion of the judiciary's duties as the death of the advisory opinion. Both the acceptance of judicial review and the rejection of the advisory opinion stemmed more from the pressure of politics than from a close interpretation of the Constitution. Neither is contained within the traditional concept of judicial power. And yet the motive force and end of both are basically similar: both seek to insure the constitutionality of legislation. The distinctions between the two lie chiefly in the time when scrutiny is brought to bear upon the questioned legislative act; the advisory opinion is given in advance of legislation in order to guide it to constitutionality, while judicial review operates only after enactment of the law with resultant harm. The two are also distinct in that the advisory opinion is simply a nonbinding answer to particularized constitutional questions, offered as a guide to legislation, while judicial review culminates in a binding declaration of an act's compatibility with the Constitution.

These distinctions arise from the different means employed. Judicial review has been exercised only through the existing machinery of the judicial power, and therefore the limitations of case or controversy have been made applicable to it. The advisory opinion, on the other hand, by its nature is precluded from operating through the medium of judicial power and is therefore a distinctly extrajudicial function. While it is apparent that the limitations of case or controversy—limitations applied to judicial review only because of the channel through which it operates—preclude the use of judicial power in an advisory capacity, those limitations cannot legitimately be extended to deny the constitutionality of an extrajudicial advisory function.

167 Corwin, op. cit. supra note 151, at 560.
168 See Ralston, supra note 152, at 7-8; 1 Warren 109.
It has long been held that unless the Court can render a binding and final decision upon the matter before it, its power cannot be invoked since the very nature of that power is to render final and binding adjudication. The requirement of finality is a logical requisite of the adjudicative process of the judicial power and should not be raised as an objection to the advisory opinion. Concededly, analysis of the advisory practice reveals that the opinions are seldom rejected when the same question is subsequently litigated, but such a fact cannot support a conclusion that the advisory opinion is so related to the adjudicative process that it should be limited by the principle of finality.

Jay rationalized his objection to an advisory opinion on the grounds of the separation of powers, and this rationale has formed the fundamental constitutional objection to a federal advisory function. Indeed, it is this doctrine which underlies the Court’s insistence that it be preserved exclusively for the exercise of the judicial power. Separation of powers should not, however, be considered a constitutional absolute. As Justice Chase pointed out in *Cooper v. Telfair*:

> The general principles contained in the constitution are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory: for even in the constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive and judicial powers should be kept separate and distinct.

The reports corroborate this statement, for many instances are recorded in which common sense and practical efficiency have resulted in judicial justification of encroachments upon the separation of departments effected

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169 E.g., ICC v. Brimson, 154 U.S. 447, 483 (1894); In re Sanborn, 148 U.S. 22, 226 (1893); Gordon v. United States, 117 U.S. 697 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40, 50-51 (1852); Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792). Although the basic requirement of finality is still existent, its principal element—award of execution—is no longer considered necessary to the judicial function. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725 (1929). In Fidelity Nat’l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927), it was declared that an award of execution was not indispensable to the judicial process. This cleared the way for the declaratory judgment, finally accepted in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). The inroads made into the doctrine of finality by the declaratory judgment suggest that the doctrine is not as robust as it once was.


by the Constitution. In fact, it is not altogether accurate to speak of separation of powers; to call this doctrine a balance of powers is perhaps more accurate.

If the advisory opinion were regarded as judicially binding, a charge that its use would create a judicial dictatorship would be meritorious. Similarly, in the absence of a discretion vested in the Justices to determine when they should give an advisory opinion, there exists a danger that they would become subordinated to the Congress. Such a subordination of the members of the Supreme Court would inevitably have an adverse effect upon the operation of the Court by posing a serious threat to judicial independence. It was a recognition of the necessity of judicial independence that early gave rise to the fundamental rule that the constitutional balance of powers precludes the assignment to the judiciary of duties other than those enumerated in the Constitution.

Properly employed, the advisory opinion would not disturb this balance of the tripartite government. Even in the states where the wording of the enabling statute or article is compulsory, care has been taken to preserve this balance. Thus an opinion may be required only upon a limited range of subjects, and the questions must be framed to particularize the point of difficulty. Since it is for the Justices themselves to ultimately decide whether the opinion should be given, an almost unlimited discretion to refuse is vested in them. It is difficult to see how the judiciary can subsume the legislature under an arrangement where the legislature must petition for the advice; nor does the judiciary surrender its independence since it is protected by a vast measure of discretion in granting the opinion. In the federal system there is even less danger, for, as we have seen, in the absence of a constitutional amendment, no power exists in either the Congress or the Executive to require an advisory opinion of the Justices. Thus rather than destroying the delicate balance, the advisory opinion would tend to perfect that condition. The advice of the Justices would better enable the Congress to draft sound laws

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which would be less likely to be later subjected to judicial supremacy in the form of judicial review.

Another frequently voiced objection to the advisory opinion is based upon the maxim *ex facto ius oritur*. It is objected that the advisory opinion is an improper arena for the determination of legal questions since the issues presented are abstracted from their factual bases and the result can be no more than a postulate of legal theory.\(^{177}\) It is admittedly true that the advisory opinion operates in the absence of facts, but this objection is not as important as it first appears. A study of the cases reveals that the objection has often been overemphasized. Although decisions declaring acts of Congress unconstitutional do not admit of precise classification, they can be cautiously placed into six general categories according to their major holding. Thus, seven cases represent a refusal to accept jurisdiction conferred by Congress and found not to be within the judicial power;\(^{178}\) twenty-one held that the statute under consideration encroached upon the reserved powers of the states;\(^{179}\) nineteen declared the statute beyond the taxing power;\(^{180}\) twenty-two


struck down encroachments upon individual rights;181 four were based upon unconstitutional delegation of power;182 and six do not fit clearly into any of the above.183 A realistic evaluation of these decisions indicates that, with the exception of the twenty-eight per cent184 based on deprivation of individual rights, the determination of the constitutional issue is infrequently dependent upon the factual pattern. Indeed, in more than one instance the question would probably have been decided in the same way under any fact pattern which would have placed the statute before the Court.185 This is not to imply that judicial review can operate without regard to the factual context of the constitutional issue. An historic characteristic of our judicial system is, as de Tocqueville observed, that it "pronounces on special cases, and not upon general


183 Perry v. United States, 294 U.S. 330 (1935) (repudiation of the pledge implicit in the power to borrow money); Booth v. United States, 291 U.S. 339 (1934) (violation of guaranty of salary to federal judges); Myers v. United States, 272 U.S. 52 (1926) (infringement of the Executive power); Jones v. Meehan, 175 U.S. 1 (1899) (interference with judicial interpretation of a treaty); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (statute making United States notes legal tender in payment of all debts not within expressed or implied powers of Congress); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (Missouri Compromise not authorized as a regulation of United States territory).

184 This figure was computed by the authors.

principles." At first blush, the most practical objection to the use of the advisory opinion is that it would overburden the already clogged Supreme Court docket. The danger of this eventuality is more apparent than real. The number of times an advisory opinion might be sought in a term of Court is, of course, speculative, but few constitutional questions of a sort warranting an advisory opinion normally occur in a year. Besides the discretion to be exercised by the Justices, an intelligent use of the advisory function presupposes a degree of congressional self-restraint which will sufficiently insulate the docket from overcrowding.

The fact that the advisory opinion involves no parties gives rise to another objection; the lack of parties means that there will be no briefs or counsel to argue them. It is debatable whether this is a disadvantage, at least one writer feeling that the absence of briefs and oral argument encourages the Justices to frame the constitutional issue more accurately and to write a shorter opinion. Briefs have occasionally been received in aid of advisory opinions in the states. None of the states specifically prohibit the filing of briefs, though it is usually not done. Only Alabama

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186 Id. de Tocqueville, Democracy in America 103 (Vintage Books ed. 1957).
187 See cases cited note 32 supra.
188 But see Frankfurter, Advisory Opinions, 1 Encyc. Soc. Sci. 475 (1937); Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924).
190 Field, supra note 176, at 220.
191 Id. at 220-21.
specifies that briefs may be required. In the federal system, it is suggested that the use of the advisory opinion should be accompanied by a provision giving the Justices discretion to call for briefs amici curiae and giving to the various interested factions of Congress the right to file briefs. Under such a system, constitutional questions could receive a more thorough consideration than is usual in judicial review, the Congress being able to call upon the finest constitutional lawyers to present their questions.

It is also feared that should the question passed upon in the abstract by an advisory opinion later find its way into the factual context of a case or controversy, the Justices will be constrained by their earlier advisory opinion. In theory this is a groundless fear. As has been pointed out, the advisory opinion is judicially binding on neither the judiciary nor Congress. As a practical matter, however, the experience in the states indicates that the advisory opinion is accorded such respect as to make its effect tantamount to that of stare decisis. This, however, need not stand as an obstacle to the advisory opinion for two reasons; first, should the identical matter passed upon in an advisory opinion come before the Court in a case or controversy, and should the Justices feel it necessary to decide the issue thus presented differently than was done in the advisory opinion, they may fall back upon the nonjudicial character of their earlier opinion and reverse it without embarrassment; second, the doctrine of stare decisis has not been considered so important in its application to judicial review as it is in litigation not involving a constitutional issue. Justice Brandeis has noted that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." Thus, since the advisory opinion is not in theory binding upon the Court, and since the Court is predisposed to minimize the effect of stare decisis in constitutional cases, the doctrine proves no major impediment to the advisory opinion.

Earlier portions of this study have described the concept of "judicial power" and pointed out through an examination of the doctrine of judicial review—a function termed "parajudicial" because, while extrinsic to the judicial power, it operates exclusively through that medium—that even the Court qua Court should not be considered constitutionally re-

194 Field, supra note 176, at 216.
stricted to the narrow confines of the term "judicial power." It follows, then, that there is no prohibition against the acceptance of extrajudicial or nonjudicial duties by members of the constitutional judiciary, either individually or collectively. History substantiates this; from the time of *Hayburn's Case*\(^\text{196}\) such a tradition has quietly grown, a tradition which in a few instances has produced what closely resembles an advisory opinion.\(^\text{197}\) The notes appended to that case indicate that three Justices of the first Court found no objection to accomplishing, in an individual and extrajudicial capacity, duties forbidden them by the Constitution when acting as a constitutional court. Even Chief Justice Taney, whose posthumously published opinion on *Gordon v. United States*\(^\text{198}\) is generally credited with erecting finality of judgment into a judicial absolute,\(^\text{199}\) found no objection to a statute granting authority to a United States District Court judge to act as a commissioner for claims adjustment in *United States v. Ferreira*.\(^\text{200}\) It is significant that while these acts were condoned because of their nonjudicial nature, they amounted to little more than advice to a member of the executive department on the validity and amount of claims against the Government.

A striking semblance of an advisory opinion was rendered to the President in 1822.\(^\text{201}\) Monroe had vetoed a Cumberland Road bill which sought to extend federal power over the turnpikes within the boundaries of the states. His reasons were embodied in a pamphlet which was submitted to each of the Justices. Marshall replied in general terms; Story refused to express an opinion; but Johnson gathered the views of the remaining Justices and replied in a letter to Monroe which briefly expressed their opinions on each point of the President's argument and in the process indicated to him the broad and theretofore unarticulated extent to which they believed the federal power could be applied.\(^\text{202}\) Such a reply differs only slightly from an advisory opinion.

In the early 1920's the Court made an even more radical departure from their traditional opposition to extrajudicial advice. The legal profession and the Congress desired to reduce the work of the Supreme Court. In response to this desire, the Justices not only advised the Con-

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196 2 U.S. (2 Dall.) 409 (1792).
198 117 U.S. 697 (1864).
199 Corwin, op. cit. supra note 151, at 513.
200 54 U.S. (13 How.) 40, 51 (1851).
201 2 Warren 55-57.
202 Id. at 56.
gress on the problem, but went to the extent of drafting their own bill. In the words of Chief Justice Taft:

The members of the Supreme Court have become so anxious to avoid another congestion like that of the decade before 1891, that they have deemed it proper themselves to prepare a new bill amending the jurisdiction of the Supreme Court and to urge its passage.\textsuperscript{203}

The precedent thus established was repeated in 1935 when Chief Justice Hughes, Mr. Justice Van Devanter, and Mr. Justice Brandeis represented the Court before the Senate Judiciary Committee to oppose a bill which would have increased the number of direct appeals allowable from the district courts.\textsuperscript{204} Granting the practical soundness of such a practice, and conceding a distinction from the classical advisory opinion, the fact remains that in so doing the Justices stepped outside the limits of the judicial power and assisted the Congress in the performance of its legislative function.

Acceptance of other duties, less directly related to the judicial function, have been commonplace since Jay went to England to negotiate a treaty and Marshall served concurrently as Chief Justice and Secretary of State. No apparent restrictions have been placed on the nature of such duties save the combined discretion of the Justices and the Executive, for the activities have ranged from serving on a committee for determining the result of the presidential election of 1876\textsuperscript{205} to investigating the Pearl Harbor disaster.\textsuperscript{206}

Since no power exists by which to force the acceptance of extra-judicial duties upon the Justices, objections to the practice have not generally been placed on constitutional grounds.\textsuperscript{207} Although the practice has been deplored in some quarters,\textsuperscript{208} its continued existence stands as a refutation of the applicability of the constitutional prohibition against extending constitutional limitations of the judicial power to cooperative endeavors of the individual Justices. However, where such duties are attempted to be forced either upon the Court as such or the Justices

\textsuperscript{203} Taft, Possible and Needed Reforms in the Administration of Justice in the Federal Courts, 47 A.B.A. Rep. 250, 254 (1922).

\textsuperscript{204} Albertsworth, supra note 197, at 647.


\textsuperscript{207} See id. at 793.

\textsuperscript{208} Ibid.
acting in an individual capacity, the limitations articulated in *Muskrat*
are properly applicable.\(^{209}\)

**CONCLUSION**

The right of the majority to enact their will into law within constitutional limits and the right of the public to live under constitutional laws are basic to our system of government. We have seen that the existing judicial system does not provide an adequate method for the vindication of these rights. The doctrine of judicial review, because its exercise has been strictly confined to the traditional vehicle of the judicial power, is inadequate protection against unconstitutional legislation in those broad areas where public rather than individual rights are endangered. Yet it is in those areas that the potential effect of an unconstitutional statute is greatest. The national losses occasioned by unconstitutional statutes, as well as the demonstrable danger of the effects of future unconstitutional legislation, argue strongly for an intelligent use of the advisory opinion by the federal government. The success of the advisory opinion in those states where it has been properly employed indicate that it is an effective device for minimizing the danger of unconstitutional legislation.

It is anachronistic that in an era in which the powers of the federal government have been expanded to reach almost every crevice of society, the most effective weapon against the threat of unconstitutional laws should lie in the necessary but incomplete system of judicial review. It is paradoxical that while the emphasis in other areas of endeavor has only recently shifted from the remedial to the preventive, constitutional jurisprudence early rejected the effective preventive device of the advisory opinion to become entirely devoted to the ancient remedial concepts. This is not to suggest that the emphasis should be completely shifted to preventive methods, nor is it suggested that the doctrine of judicial review be radically revised. Its unimpaired operation is essential to the preservation of constitutional government. But it is suggested that judicial review has not proved itself sufficient judicial protection against unconstitutional laws, that the fact of unconstitutional legislation justifies some judicial preventive measures, and that the need demonstrated by scrutiny of past unconstitutional laws urges the adoption of the advisory opinion.

\(^{209}\) The distinction between the imposition of duties upon the Court eo nomine and upon the Justices of the Court is drawn by Chief Justice Taney in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 50-51 (1851).
Furthermore, this study has suggested that there is no fundamental constitutional objection to the members of the constitutional courts lending their aid to the other branches of the Government in an advisory capacity. Extrajudicial activities of the Justices, while not frequent in our history, are not unusual and have never been construed as prohibited by the Constitution. On occasions these activities have resulted in direct judicial advice to the other branches.

There is, however, a fundamental tenet of constitutional law which, while not prohibitive of an advisory function, permits the Court and its members to reject direct requests from Congress or the Executive on the grounds that no duty not expressed in the Constitution can be imposed upon the judicial branch. This rule is justified by the essential balance of governmental powers and the absolute necessity for judicial independence. Radical disruption of this balance and any encroachment upon this independence are justifiable, if at all, only by a demonstration of pressing need. But no such innovation is here suggested. Even a constitutional mandate cannot guarantee effective operation of an advisory function. Rather, its success depends entirely upon judicial recognition that advisory opinions are neither undesirable to nor incompatible with effective constitutional government. Such a recognition, when accompanied by a demonstration that a legitimate need for it exists, should lead to the voluntary acceptance of a sensibly limited and intelligently administered advisory function. No more is suggested by this study.

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REMAND TO STATE COURTS AND ITS EFFECT ON THE DUAL-SOVEREIGN SYSTEM

Since Martin v. Hunters' Lessee,1 the United States Supreme Court appellate jurisdiction of state decisions involving federal statutory or constitutional issues has not been seriously questioned.2 Foreclosure of the question of authority to review, however, has failed to remove the underlying problem—the interjudicial and intergovernmental jealousies of a large diverse federalist nation.3 Recognition of the problems

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2 See Note, 56 Yale L.J. 574, 575 n.7 (1947).
3 See generally Bloch, States' Rights: The Law of the Land 254-312 (1958); Dethmers,
which inhere in a system of dual sovereignty is quite simple; adequate solutions, however, can be extremely difficult. Although Chief Justice Taft correctly stated that a system of rules must be utilized and respected in order to limit the jurisdiction of the courts of each sovereign, a necessary concomitant before the judiciaries can coexist is a willingness on the part of each to foster a working relationship. The Supreme Court has declared that
discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that these relations be not disturbed by unnecessary conflict between the courts equally bound to guard and protect rights secured by the Constitution.

However, even with an honest effort to eliminate friction, it would be unrealistic to expect or demand two judicial systems to function without expression of sometimes adverse attitudes. Unfortunately, these expressions may often be mistaken for hostility. The mere fact that the decisions of the federal judiciary constitute a portion of the "supreme Law of the Land" and that the states must be subjected to this ultimate authority breeds resentment and accusations of infringement on states' rights. As a result, federal supremacy must be cushioned in order to preserve the dignity of the other system, a dignity necessary to its proper judicial function and necessary to the exercise of that residuum of power left in the states. The Court has made an admirable attempt


4 We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions, without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same person and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedures.


5 Ex parte Royall, 117 U.S. 241, 251 (1886).

6 U.S. Const. art. VI.

7 Black, The People and the Court 120-21 (1960).

8 See Dethmers, supra note 3, at 2-3.

9 The federal power is and must be supreme . . . . But the supremacy is a measured supremacy . . . . a supremacy which asserts itself when it must, but without obliterating or wishing to obliterate. And the reciprocal subjection of the states is a subjection within metes and bounds, a subjection with dignity retained, a subjection with reserved independence.

Black, op. cit. supra note 7, at 155.
by way of "judicial self-restraint."\textsuperscript{10} However, the necessity for uniformity in construction of the provisions of the federal constitution, the "supreme Law," remains the prevalent consideration.\textsuperscript{11}

It has been pointed out that the federal courts, epitomized by the United States Supreme Court, are unlike most courts in that they also perform a political function,\textsuperscript{12} \textit{i.e.}, they are the means "for achieving the adjustments upon which the life of a federated nation rests."\textsuperscript{13} The task of the supreme judicial authority thus becomes more than overseeing the technical internal functioning of a system; rather, it is one of balancing the political difficulties of the interfunctioning of \textit{two} systems. Such a balancing is originally a duty of the legislature, perfunctorily performed by legislative definition of jurisdiction.\textsuperscript{14} "But," as Justice Frankfurter has said, "the details of jurisdiction are, after all, details. As such, their specific function ought to submit to the judgment of appropriateness to the needs and sentiments of the time."\textsuperscript{15}

In protecting constitutional rights, the quality of the Court's effort depends quite often on the wisdom of taking or not taking jurisdiction of a given question at a given time.\textsuperscript{16} Wise employment of judicial power depends upon the nature of issues;\textsuperscript{17} some rights may involve no local interests, while others "are heavily enmeshed in conflicts between state and national authority."\textsuperscript{18} In the latter case, wisdom may dictate that once such a question is answered and rights defined, the matter be given back to local courts in order to eliminate state and national conflict to whatever degree possible.

\textsuperscript{10} One of the basic reasons for the harmonious operation of our dual system is the deference which the federal judiciary has shown to the judicial systems of the States. This deference has resulted in part from statutory provisions; but judge-made rules have also played an important role.\textsuperscript{11} Black, op. cit. supra note 7, at 125-26.

\textsuperscript{12} "This Court is . . . the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity." Address to the Court by Mr. Attorney General Jackson, 309 U.S. viii (1940); see Warren, The Supreme Court and the Sovereign States 32 (1924).

\textsuperscript{13} Frankfurter, Distribution of Power Between United States and State Courts, 13 Cornell L.Q. 499, 500 (1928); see Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

\textsuperscript{14} See Essanay Film Mfg. Co. v. Kane, 258 U.S. 358, 361 (1922).

\textsuperscript{15} Frankfurter, supra note 13, at 505.


\textsuperscript{17} See Meador, Alabama Cases in the Supreme Court of the United States—1925-1953, 16 Ala. Law. 341, 344-45 (1955).

\textsuperscript{18} Frankfurter, supra note 13, at 515.
In spite of the ultimate authority of the United States Supreme Court, it is still possible for the state courts to give expression and effect to local interests, notwithstanding the fact that the Court might have conclusively ruled on a given point. An unqualified reversal or affirmance by the Court effectively terminates a particular case, but a remand provides the state court with an opportunity to make a further disposition. And although the decision of the state court on remand is required to be in strict harmony with the Supreme Court’s opinion, this is not always the fact. Regular documentation of the developments of a case after remand would be beneficial if the system is not working, reassuring if it is. This note seeks to provide such documentation through an examination of such cases during the last eight years, a period paralleling in time the interest in and litigation of the civil rights issues generated by the decision in Brown v. Board of Educ. However, the nature of the issues involved in these cases has not defined the scope of this study; rather, all cases remanded to a state court during the period are included.

Conduct of this study raised serious research problems. Many cases were not to be found in the various reports subsequent to the remand, and as a result much of the research was done by means of correspondence with the attorneys who were connected with the cases in the Supreme Court. The results of this correspondence were particularly gratifying; replies were received from approximately ninety per cent of the persons contacted. With respect to the cases which did have subsequent history, analysis, of course, was possible through the state and Supreme Court reports.

Of the 101 remanded cases included in this study, seventy-seven raised no question of noncompliance in the period after remand. Of

20 Studies of this type have been made previously. See Note, 67 Harv. L. Rev. 1251 (1954); Note, 55 Harv. L. Rev. 1357 (1942); Note, 95 U. Pa. L. Rev. 764 (1947); Note, 56 Yale L.J. 574 (1947).
23 Letters received from attorneys will hereinafter be cited as “communications from counsel for petitioner (or respondent).” These letters are on file in the office of the Georgetown Law Journal.
the twenty-four remaining cases, eleven were vacated and remanded “in light of” a prior decision,\textsuperscript{25} and three had become moot before the Supreme Court rendered its decision.\textsuperscript{26} Therefore, only twelve cases were disposed of in such a manner as to raise questions of good faith or compliance. A great majority of the courts, then, attempt to keep their disposition after remand consistent with the opinion of the Supreme Court. Many merely filed the mandate without further reconsideration of the case. This practice vitiates the original opinion of the state court and in effect substitutes the mandate for their decision. Ofttimes this “substitution” is not reported, although some courts do note, usually in a per curiam opinion, that the mandate has been entered and that it is considered the ultimate decision of that court. Widespread use of this procedure by state courts magnifies its significance since it evidences absolute compliance with the mandate.

A few remanded cases were settled prior to redissipation by the state court, both in civil suits\textsuperscript{27} and criminal suits.\textsuperscript{28} The Federal Employers’ Liability Act\textsuperscript{29} and the Jones Act\textsuperscript{30} cases, of course, lend themselves to settlement before the advent of a new trial.\textsuperscript{31} In such cases the Supreme Court.\


\textsuperscript{26} NAACP v. Committee on Offenses Against the Administration of Justice, 358 U.S. 40 (1958); Allen v. Merrill, 353 U.S. 932 (1957); Chaisson v. South Coast Corp., 350 U.S. 899 (1955).

\textsuperscript{27} E.g., Grocery Drivers Union v. Seven Up Bottling Co., 359 U.S. 434 (1959), vacating 49 Cal. 2d 645, 320 P.2d 492 (1958) (communication from counsel for petitioner).


Court primarily reverses a dismissal and remands on the ground that evidence of employer negligence was sufficient to send the case to the jury. Subsequent settlements are both expected and desirable. The large number of cases covered by this survey renders impossible an extensive analysis of each. Furthermore, analysis of those cases evidencing no evasion is unnecessary. For these reasons the authors have limited the cases reported in detail to those in which the action taken by the state courts on remand raises questions of compliance and good faith.\textsuperscript{32}

At the outset, the effect of certain procedural devices employed by the Court should be delineated. When a case is reversed and remanded, the state court decision is set aside as soon as the mandate is filed in the state court. Consequently, the original decision is erased and the parties are not bound until the state court again disposes of the case.\textsuperscript{33} In one instance the Court remanded a case for reconsideration without reversing or affirming.\textsuperscript{34} In this event the original state decision remains in effect, but the state court must take another look at its first opinion to determine its validity.

The distinguishing feature of a vacate and remand is that it is directory but not mandatory. Generally, a case will be vacated and remanded "in light of" a prior decision of the Court. However, the cited case is not binding; rather, the state court has a duty only to reconsider the instant case with special consideration given to the cited case. If, in the opinion of the state court, a valid distinction may be drawn between the two, the cited case may be considered as having no effect.\textsuperscript{35} There is no question of disobedience of a mandate.

It is worth noting that the Court has at its disposal all writs necessary to enforce its mandate.\textsuperscript{36} Mandamus, although an inappropriate remedy where an appeal is adequate,\textsuperscript{37} appears to be available when appeal is not permitted and the state court has disobeyed the mandate.\textsuperscript{38}

\textsuperscript{32} See appendix for pertinent information on each of the cases included in this study.
\textsuperscript{33} But see note 69 infra.
\textsuperscript{34} Williams v. Georgia, 349 U.S. 375 (1955).
\textsuperscript{36} The courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1958).
\textsuperscript{37} See In re Blake, 175 U.S. 114, 118 (1899).
\textsuperscript{38} See Ex parte Texas, 314 U.S. 579 (1941), where the Court issued an order to show cause why leave to file a petition for mandamus should not be granted against the justices.
However, if the mandate permits the exercise of discretion by the lower court by leaving a question open, the decision of the latter cannot be reached by mandamus. And since some question is usually left open when a case is remanded, mandamus will not lie unless the state court reopens a question which has been decided by the United States Supreme Court.

Common law certiorari, although sparingly used, can be issued "as an auxiliary process and, whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice . . . ." One of the purposes of this common law writ is to circumvent the requirement that there must be a final determination in a case before it will be reviewed by the Court. It is discretionary with the Court and usually will not issue. However, where the sole appellate jurisdiction lies in the Supreme Court, the common law writ of certiorari is the proper means of seeking review.

The distinction between the common law writ and the statutory writ is that the latter is only available to review cases in appellate courts, whereas the former is used to bring the case into the court system when no other appeals are allowable. Much has been written concerning the grant or denial of a petition for a statutory writ of certiorari, but suffice it to say that a denial of certiorari means nothing more than that fewer than four Justices were willing to hear the case. In particular, a denial of certiorari subsequent to seemingly evasionary tactics...
in the state court does not indicate that the Court condones the action taken on the mandate.

The Court's discrimination in striving for a working relationship between federal and state judiciaries is perhaps the key to its use of remand. The degree of discrimination exercised by the Court in the cases dealt with herein ultimately will be only a personal conclusion of the reader, an approval or disapproval based on grounds incapable of being fitted into a technical discussion of jurisdiction. For that reason categorization in presentation of the cases is impossible without attitudinizing. Motive of the state court is not a proper test for determining whether evasion has occurred. On the other hand, to judge whether state procedures were legitimately employed on remand by referring to technical concepts of jurisdiction is to ignore the policy sought to be effected by concepts of federal-state jurisdiction and the self-imposed jurisdictional restraints of the Supreme Court. Moreover, there may be a close question of Supreme Court use of "state court evasions" to avoid delicate and tedious constitutional questions. The only categories presented in this discussion then will be: (1) cases of noncompliance, (2) cases of questionable compliance, and (3) a separate, limited category of cases vacated and remanded, illustrating peculiarities involved in use of that procedure.

In view of the ambiguity possible in disposition under the remand procedures, it would be impossible to discuss meaningfully the pertinent cases save by detailed exposition of each, thereby showing what both the state court and Supreme Court attempted to accomplish and, as far as possible, their reasons. A brief history of the procedural aspects of the cases will be used to that end. Further, these cases will serve to illustrate the procedures used by the Supreme Court, the methods utilized by the state courts to avoid the mandate, and the various attitudes displayed by the state courts after remand. A review of these cases will better familiarize the reader with the problems which inhere in a dual-level court system.

I

Noncompliance

Deen v. Gulf, Colo. & S. F. Ry.47

In a suit brought in Texas under the FELA, the court of civil appeals reversed a jury verdict for the plaintiff.48 On appeal the United States Supreme Court held that the evidence of the employer's liability

47 353 U.S. 925 (1957).
justified the decision of the jury and remanded to the state court.\(^49\) The Texas appeals court required the plaintiff to remit a portion of the judgment, but it refused to grant defendant’s motion to summarily remand for a new trial because that was foreclosed by the United States Supreme Court decision.\(^50\) The Texas Supreme Court then affirmed the remittitur but remanded to the appeals court to make an evaluation of the evidence to determine if the jury verdict was justified.\(^51\) The United States Supreme Court on this, the second appeal from the Texas court, stated that “the determination of that issue [weight of the evidence] was foreclosed” by the earlier decision but made no mention of the remittitur.\(^52\) Pursuant to the Court’s second mandate, the Texas Supreme Court reversed its prior remand to the court of civil appeals and entered judgment for the plaintiff subject to the remittitur.\(^53\) Justice Smith dissented from the majority opinion since he felt that the opinion of the United States Supreme Court had foreclosed the question of remittitur against the petitioner and that the court was only partially complying with the mandate. Further, he took exception to the directions to the court of civil appeals to weigh the evidence after the Supreme Court had passed conclusively on this point.\(^54\)

*International Ass’n of Machinists v. Street*\(^55\)

Plaintiffs, a group of railroad employees, brought suit in a Georgia court to enjoin enforcement of a union-shop agreement between a group of railroads and labor unions in accordance with the Railway Labor Act.\(^56\) The agreement required all employees to join the union and to pay initiation fees and assessments and dues in order to keep their jobs. Plaintiffs, employees of Southern Railway, contended that a substantial part of the money that each of these employees was thus compelled to pay was used, over their protest, to finance the campaigns of political candidates whom they opposed and to promote the propagation of political and economic doctrines, concepts and ideologies with which they disagreed. This they argued was a violation of their rights

\(^{49}\) 353 U.S. 925 (1957).

\(^{50}\) 306 S.W.2d 171 (Tex. Civ. App. 1957).

\(^{51}\) 138 Tex. 466, 312 S.W.2d 933 (1958).


\(^{54}\) Id. at 241, 317 S.W.2d at 915.


under the first amendment to the Constitution. The trial court dismissed the complaint on the ground that *Railway Employees' Dept v. Hanson*,\(^{67}\) upholding the constitutionality of the Railway Labor Act, was controlling. The Supreme Court of Georgia reversed and remanded for a new trial, ruling that the complaint stated a constitutional violation and that *Hanson* was not applicable.\(^{68}\) Subsequently, the trial court found a violation of plaintiffs' rights under the first and fifth amendments and issued a perpetual injunction against enforcement of the union-shop agreement. The Supreme Court of Georgia affirmed.\(^{69}\)

On appeal the United States Supreme Court avoided the constitutional issues by construing the Railway Labor Act to prohibit the opposed expenditures\(^{60}\) but held that the blanket injunction was not the proper remedy. Moreover, it was found that the union-shop agreement was not unlawful and that the employees were still obliged, "as a condition of continued employment, to make the payments to their respective unions called for by the agreement."\(^{61}\) The Court also ruled that this was not a class action and that "any remedies . . . would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object."\(^{62}\) Holding that an injunction against all political expenditures could not be permitted,\(^{63}\) the Court reversed and remanded "for proceedings not inconsistent with this opinion."\(^{64}\) The Court outlined two possible remedies which would give restitution to the complaining employees:

One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. . . . A second remedy would be restitution to each individual employee of that portion of his money which

\(^{57}\) 351 U.S. 225 (1956).
\(^{61}\) Id. at 771.
\(^{62}\) Id. at 774. The concurring opinion of Mr. Justice Douglas made the impact of this statement clear when he stated that he concurred in relief being granted as suggested "on the understanding that all relief granted will be confined to the six protesting employees." Id. at 779.
\(^{63}\) Id. at 772.
\(^{64}\) Id. at 775.
the union expended, despite his notification, for the political causes to which he had advised the union he was opposed.65

On remand the Supreme Court of Georgia reversed its prior holding and sent the case back to the trial court with instructions, directing that notice be given to all 15,000 of Southern Railway's nonoperating employees "of their right to intervene and become parties to the case," and that all such employees "who so desire, be given an opportunity and be permitted to intervene as parties plaintiff."66 This permitted nonprotesting employees to participate in the suit. Although the Georgia Supreme Court recognized that the United States Supreme Court had held that an employee could have relief only against the use of his exacted funds to support political causes which he opposes, it directed the trial court to frame a final decree making either "refunds or reductions to be so computed that the dissenting member contributes to the costs of the collective bargaining alone."67 As to the part of the mandate precluding a blanket injunction of all political expenditures, the Georgia court instructed:

[S]hould the trial court be unable to determine a method practical in performance by which the plaintiffs can be safeguarded from any harm caused by withdrawal from the general fund of any monies for political purposes, then it should make use of its equity powers to give the protection by enjoining the unions from spending any monies for political purposes.68

Subsequently, a motion for leave to file a petition for a writ of mandamus against the judges of the Supreme Court of Georgia was denied.69

The first opinion rendered by the Georgia Supreme Court was indicative of what was to follow after the reversal and remand by the United States Supreme Court.70 In speaking of alleged congressional usurpation of control under the guise of the commerce clause, as upheld in the Hanson case, Chief Justice Duckworth related:

By this unilateral determination of its own powers the general government has at the same time and in the same manner deprived its creators, the States, of

65 Id. at 774-75.
67 122 S.E.2d at 222.
68 Ibid.
69 International Ass'n of Machinists v. Duckworth, 368 U.S. 982 (1962). In petitioner's brief it was contended that the Supreme Court mandate is being violated every day that the injunction remains in effect pending the trial court's disposition. Brief for Petitioner, pp. 14-15. This exemplifies the confusion resulting from a reverse and remand of an injunction. The effect should be that the injunction is set aside.
powers they thought and now believe they retained. . . . We believe that a single person armed with right—*the right to work*, should in all courts of justice be able to defeat the selfish demands of multitudes . . . . We would so rule in any case where we are allowed jurisdiction. When the Supreme Court has . . . held the closed shop labor contract act valid we must likewise hold, not upon our own judgment, but solely because we are required to follow the Supreme Court ruling.71

*Kedroff v. St. Nicholas Cathedral*72

An ejectment suit was brought by a New York religious corporation to determine which of two prelates, the appointee of the Patriarch of Moscow or the appointee of a convention of the North American churches, was entitled to the use and occupancy of a cathedral of the Russian Orthodox Church in New York City. The trial court sustained a motion by defendant, appointee of the Patriarch of Moscow, to dismiss the complaint,73 and the New York Supreme Court, Appellate Division, affirmed.74 The New York Court of Appeals reversed and entered judgment for plaintiff, holder of the legal title, on the ground that the Religious Corporations Law of New York75 had the purpose and effect of transferring the administrative control of the Russian Orthodox churches in North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches.76 The New York court pointed out that the "legislature [had] concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy,"77 and that therefore the authorities selected by a convention of the North American churches had the right to occupancy and possession of Saint Nicholas Cathedral.

On appeal the United States Supreme Court declared unconstitutional the New York statute as applied to appellant on the ground that it interfered with the free exercise of religion.78 The Court ruled that freedom to select the clergy, where no improper methods of choice are proven, must have federal constitutional protection against state interference as a part of the free exercise of religion, indicating that *any*

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71 Id. at 283-84, 99 S.E.2d at 104.
72 344 U.S. 94 (1952).
75 N.Y. Religious Corps. Law § 105.
76 302 N.Y. 1, 96 N.E.2d 56 (1950).
77 Id. at 33, 96 N.E.2d at 74.
78 344 U.S. 94 (1952).
state interference based on a determination that the Supreme Church Authority in Moscow was no longer functioning as a true religious body would be a violation of the first amendment. The opinion pointed out that the parties had admitted in argument before the Court that the decision of the New York Court of Appeals could not be sustained on state grounds, i.e., under New York common law.

On remand "for such further action as it deems proper and not in contravention of this opinion," the New York Court of Appeals ordered the case remitted for a new trial since the Supreme Court "did not determine the constitutional validity of the alternative common-law disposition of the case previously announced by this court," viz., that the Supreme Church Authority in Moscow was no longer capable of functioning as the head of a free international religious body. In the words of Judge Desmond, dissenting, "the long and short of it is that the order which this court now hands down violates not only the Supreme Court's mandate, and the First Amendment but long and thoroughly settled New York law . . . ." The Supreme Court denied a motion for leave to file a petition for a writ of mandamus.

On retrial the New York Supreme Court found that the church hierarchy in Moscow was the head of an actual functioning religious order and dismissed the ejectment complaint. This decision was unanimously affirmed by the Appellate Division. The New York Court of Appeals reversed and, contrary to the finding of fact in the trial court, found that the appointee of the Patriarch of Moscow should be rejected under the common law of New York because the Patriarch was subject and subordinate to the Soviet Government. The decision, therefore, was based on the same premise which was found to underlie the statute the first time the Court of Appeals heard the case and which caused the United States Supreme Court to declare the statute unconstitu-

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79 Id. at 116-20.
80 Id. at 97.
81 Id. at 121.
82 306 N.Y. 38, 49, 114 N.E.2d 197, 204 (1953).
83 Id. at 57, 114 N.E.2d at 208.
84 Ex parte Kedroff, 346 U.S. 893 (1953). Mr. Justice Black and Mr. Justice Douglas would have issued a rule to show cause why leave to file should not be granted. This is one of the rare occasions on which members of the Supreme Court would have proposed the issuance of a writ of mandamus to state courts.
tional. But this time the Court of Appeals made its own finding under the New York common law rather than attributing any intent to the legislature. There may be a distinction between the two, but there is no real constitutional difference.

The Supreme Court granted certiorari and in a per curiam opinion reversed without remanding for further proceedings, holding that this New York Court of Appeals decision was no different than the first. Absent the Supreme Court remand for further proceedings, the defendants would have been spared some eight years of litigation. Perhaps that statement is easily made now that the case has run its unusual course. But when the Supreme Court remanded, the only possible consistent course that could have been taken by the New York Court of Appeals was an order dismissing the complaint. Under these circumstances a reversal, without a remand for further proceedings, would not in any sense have been improvident or unfair to the state court.

**NAACP v. Alabama ex rel. Patterson**

The NAACP opened an office in Alabama without fulfilling the statutory requirements for a foreign corporation, and the state obtained a restraining order prohibiting the Association from carrying on any activities. In a suit brought by the Alabama attorney general against the Association in the state circuit court, the Association refused to comply with a court order to produce certain books, papers and documents, including a membership list, and was adjudged in contempt. A fine of $10,000 was imposed which was to be raised to $100,000 if the order was not complied with in five days. At the end of this time, the court refused to accept partial production (everything but a membership list) and the fine was increased to $100,000. A petition to stay execution of the judgment was denied, the court holding that the proper method of reviewing civil contempt was by a writ of certiorari. Subsequently, a petition for writ of certiorari was denied

88 363 U.S. 190, 191 (1960).
90 Motion to amend remittitur to conform with the Supreme Court mandate was granted. 8 N.Y.2d 1124, 171 N.E.2d 890, 209 N.Y.S.2d 809 (1960). Compare this case with Georgia Ry. & Elec. Co. v. Decatur, 295 U.S. 165 (1935), discussed in Note, 55 Harv. L. Rev. 1357, 1362 (1942).
92 Ex parte NAACP, 265 Ala. 356, 91 So. 2d 220 (1956).
on grounds of insufficiency of averments.93 After the state court had again denied certiorari,94 finding the contempt judgment valid but failing to pass on the production order because the proper method of review was mandamus,95 the Supreme Court granted certiorari. That Court held that an order requiring the production of a membership list would restrict freedom of association of the individual and was therefore repugnant to the fourteenth amendment.96 As a result, the judgment of civil contempt was reversed. The Court refused to pass on the temporary restraining order because the state court had failed to consider it.

On remand the Alabama court accused the Supreme Court of passing on a nonfederal ground, viz., the interpretation of its own procedural rules regarding the proper method of review.97 The original state decision upholding the contempt judgment was reaffirmed because it was based on failure to produce any of the material, not merely the membership list, and the court would not engage in the presumption that the rest of the order had been complied with.98 At this point the good faith of the Alabama court is called into question. The Supreme Court was led to believe that failure to produce the membership list was the only ground for the contempt judgment, which belief was apparently correct since the other matter had been tendered. As a result, the Court had decided the case with regard only to the membership list. A motion to send the Supreme Court mandate to the circuit court for a hearing on the merits of the restraining order was summarily denied.99

Certiorari was again granted, and the Court held that the question of production of any matter other than the membership list had been foreclosed by its earlier decision.100 The judgment of the Alabama Supreme Court was reversed, but it was held that if the state circuit court found it necessary to require the Association to produce any other items, it could do so subject only to the limitations imposed by "this and our earlier opinion."101

Upon remand to the Alabama Supreme Court, the court further remanded the case to the circuit court with directions to "undertake such

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93 265 Ala. 699, 91 So. 2d 221 (1956).
94 265 Ala. 349, 91 So. 2d 214 (1956).
95 Id. at 353, 91 So. 2d at 217.
97 Ex parte NAACP, 268 Ala. 531, 109 So. 2d 138 (1959).
98 Id. at 532-33, 109 So. 2d at 139-40.
99 Id. at 533, 109 So. 2d at 140.
101 Id. at 245.
proceedings as may be deemed proper." In addition, the temporary injunction was to remain in effect until a hearing on its merits.102

The Association sought a restraining order in a federal district court to prohibit the state from refusing to register the corporation. The district court refused to take jurisdiction because the Supreme Court had failed to rule on the constitutional question involved, requiring the Association to proceed through regular state appellate channels.103 On appeal the Court of Appeals for the Fifth Circuit agreed that the Association’s complaint should be litigated in the state courts, but held that the district court should have retained jurisdiction so that steps could have been taken if the Alabama courts failed to act promptly on the merits of the restraining order.104 On certiorari the Supreme Court remanded the case to the Fifth Circuit to direct the district court to proceed with a trial on the merits if the state court had not granted a hearing on the merits by January 2, 1962.105 On December 29, 1961, the Alabama circuit court issued a permanent injunction banning the NAACP from doing business in the state.106

Florida ex rel. Hawkins v. Board of Control107

Relator Hawkins, a Negro, applied for but was denied admission to the University of Florida law school pursuant to a Florida constitutional provision prohibiting Negroes from attending the school.108 Upon petition to the Florida Supreme Court for a writ of mandamus to compel his admittance, the court declined to make a final determination but retained jurisdiction "until it be shown ... either that the Board of Control has furnished, or has failed to furnish, to the relator ... such opportunities and facilities ... as are substantially equal to those afforded all other students ..."109 Two further petitions for mandamus

102 Ex parte NAACP, 271 Ala. 33, 34, 122 So. 2d 396, 398 (1960).
103 NAACP v. Gallion, 190 F. Supp. 583 (D. Ala. 1960). The gravamen of the complaint seemed to be that, even though the Association had made several motions, the Alabama Supreme Court had refused to send its mandate and the mandate of the United States Supreme Court to the circuit court. After almost eight months the Alabama Supreme Court finally remanded the case, but this was done only two days before the Association filed suit in the district court.
104 290 F.2d 337 (5th Cir. 1961).
107 350 U.S. 413 (1956).
108 Fla. Const. art. 12, § 12.
109 47 So. 2d 608, 616 (Fla. 1950).
were denied, the second denial based on the fact that a Negro law school which Hawkins might attend had been opened at Florida A. & M. The court rejected the argument that in order for there to be equal treatment there must be identical treatment. The Supreme Court of the United States granted certiorari and vacated and remanded the case in light of *Brown v. Board of Educ.*

Before the Florida court had heard the case on remand, the Supreme Court had issued the “implementation decision” to supplement the original decision of *Brown*. Relying on this “implementation decision,” the court appointed a judge to collect evidence to determine whether immediate desegregation would present “grave and serious problems” to the law school. Two judges felt compelled to dissent in part because of the Supreme Court mandate.

Hawkins appealed to the Supreme Court, and although certiorari was denied, the Court declared that the “implementation decision” did not apply to graduate or professional schools and that the relator was entitled to prompt admission. Adequate nonfederal grounds for Hawkins’ exclusion from the law school subsequent to the Supreme Court’s terse opinion would be difficult to imagine. However, the Florida court on rehearing held that the denial of certiorari allowed their earlier decision to stand on state grounds, viz., the right of the court to require testimony to be collected in an attempt to ascertain the consequences of desegregating, which testimony proved conclusively that great public harm would result if relator gained admission to the law school. The court reaffirmed its prior denial of a petition for mandamus, again with two justices dissenting.

The relator again petitioned the Supreme Court for certiorari which was denied, but without prejudice to seek relief in the federal courts. A federal district court denied Hawkins injunctive relief because he

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110 60 So. 2d 162, 164-65 (Fla. 1952).
111 Id. at 165.
115 83 So. 2d 20, 25 (Fla. 1955).
117 93 So. 2d 354, 359-60 (Fla. 1957).
118 Justice Drew proclaimed that “the power we possess is for the purpose of giving effect to the will of the law. I conceive it to be my plain duty to give effect to the law which has been established by the United States Supreme Court.” Id. at 368.
had failed to prove his qualifications for admission. Since he had brought his suit in a class action, however, the court held that an injunction should issue "enjoining the defendants [Board of Control of Florida] from enforcing any policy, custom, or usage of limiting admission to the graduate schools . . . of the University of Florida to white persons only."121

II

QUESTIONABLE COMPLIANCE

Covey v. Town of Somers122

A lien for delinquent taxes on the real estate of Nora Brainard was foreclosed under a New York statute123 which provided for notice to the taxpayer of the foreclosure proceedings by mail, posting of notice at the post office, and publication in local newspapers. Such notice had been given. Miss Brainard, a long-time resident of the town had failed to file an answer, judgment of foreclosure had been entered, and a deed to her property delivered to the town. About a week later she was adjudged insane and committed to a hospital. Subsequently, appellant Covey was appointed committee of her person and property. He filed a motion in the trial court where the judgment had been entered to have the default opened, the judgment vacated, and the deed set aside. Appellant argued a denial of due process in that Nora Brainard was known by town officials to be financially able to meet her obligations but mentally incompetent to handle her affairs or to understand the meaning of any notice served upon her, and that no attempt had been made to have a committee appointed for her person and property. The trial court denied the motion, and on appeal the New York Court of Appeals affirmed.124 Subsequent to affirming, the New York court amended its remittitur of record to disclose that a due process question arising under the United States Constitution had been passed upon.125

On appeal the Supreme Court held that the New York statute, as applied to appellant, was repugnant to the due process clause of the fourteenth amendment.126 Mr. Chief Justice Warren, writing the opinion of

121 Id. at 853.
122 351 U.S. 141 (1956).
124 308 N.Y. 798, 125 N.E.2d 862 (1955).
126 351 U.S. 141 (1956).
the Court, rejected appellee's contention that the exclusive remedy available to appellant in the state court was an action to set aside the deed, as distinguished from the motion to open the default which appellant had pursued. The majority felt that the New York Court of Appeals would not have indicated that a constitutional question had been reached if the basis of its decision was that appellant had pursued the wrong remedy.\footnote{127} The dissent by Mr. Justice Frankfurter, on the other hand, urged that the New York Court of Appeals would not sanction a clear denial of due process and that its decision must have been based on the procedural ground.\footnote{128} The Court reversed and remanded.

On remand the New York Court of Appeals ruled that the Supreme Court had misinterpreted its prior finding that a constitutional question had been passed upon.\footnote{129} It held that the basis of its prior decision was that an action to set aside the deed was the exclusive remedy and that plaintiff had pursued the wrong remedy. Because the Supreme Court had said that no constitutional question could have been reached if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy, the New York court, feeling it had not been reversed, affirmed its prior decision. A subsequent appeal to the Supreme Court was dismissed for want of jurisdiction and certiorari was denied,\footnote{130} as was a motion for leave to file a petition for a writ of mandamus.\footnote{131}

In dismissing the appeal for want of jurisdiction, the Supreme Court recognized, necessarily, that the state court's decision was based upon an independent, adequate nonfederal ground broad enough to sustain its judgment.\footnote{132} Petitioner, at the time he was appointed committee, had an adequate remedy available to him under New York law in the action to set aside the deed,\footnote{133} which remedy was sufficient under the circumstances to satisfy the demands of due process since he had some twenty months after being appointed committee to bring an action to set aside the deed.

The case is illustrative of what appears to be the only procedure whereby a state court, of its own initiative, is capable of pointing out

\footnotesize{\begin{itemize}
\item \footnote{127} Id. at 143-44.
\item \footnote{128} Id. at 147-48.
\item \footnote{129} 2 N.Y.2d 250, 257, 140 N.E.2d 277, 281, 159 N.Y.S.2d 196, 201 (1957).
\item \footnote{130} 354 U.S. 916 (1957).
\item \footnote{131} Covey v. Court of Appeals, 354 U.S. 919 (1957).
\item \footnote{133} N.Y. Sess. Laws 1948, ch. 743.}
\end{itemize}}
a misunderstanding of its position by the Supreme Court. But the New York court's action would not have been necessary had its earlier findings been free from ambiguity. It is difficult to understand why the New York court ruled that a due process question had necessarily been passed upon when the basis of its decision was that appellant had pursued the wrong remedy. The court’s own contradiction on remand, that “at no stage of the proceedings had the merits of the committee's arguments [concerning the due process question] been reached or ruled upon,”134 casts some doubt on the legitimacy of its use of a corrective measure.

_Naim v. Naim_135

A white woman and a Chinese man left Virginia to be married in North Carolina, concededly to evade a Virginia miscegenation statute,136 and immediately thereafter returned to Virginia where they resided as man and wife. The woman subsequently sued for an annulment of the marriage on the ground that it was void under Virginia law. The Circuit Court for the City of Portsmouth entered a decree annulling the marriage, and the Virginia Supreme Court affirmed.137

On appeal the United States Supreme Court refused to entertain the case because of the inadequacy of the record concerning the relationship of the parties to the state of Virginia at the time of the marriage, and also because the constitutional issues were not presented in “clean-cut and concrete form.”138 The Court vacated and remanded with directions to the Virginia Supreme Court to further remand the case to the circuit court for additional findings of fact.

The Virginia Supreme Court reaffirmed its earlier decision on remand on the ground that since the record before both the circuit court and itself were complete and adequate, the decisions were final.139 In addition, the court denied the existence of procedures which would allow the case to be returned to the circuit court for further findings of fact as the Supreme Court had directed.140 The action of the Virginia Supreme Court effectively defeated any possibility of a hearing on the merits of the constitutional questions. The United States Supreme Court denied

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137 197 Va. 80, 87 S.E.2d 749 (1955).
139 197 Va. 734, 90 S.E.2d 849 (1956).
140 Id. at 735, 90 S.E.2d at 850.
a motion to recall or to recall and amend the mandate since "the decision of the Supreme Court of Appeals of Virginia . . . in response to our order . . . leaves the case devoid of a properly presented federal question."\[^{141}\]

**Pennsylvania v. Board of Directors**\[^{142}\]

The will of Stephen Girard set up a trust creating an institution for "poor white male orphans," naming the city of Philadelphia as trustee. Later a Board of Directors of City Trusts, a city agency, was substituted. Two Negroes applied for but were denied admission to the Girard-created school because they did not meet the racial stipulation of the will. Their action to force the Board to admit them was dismissed by Pennsylvania courts on the ground that the trust was set up by a private individual who was free to dispose of his property as he saw fit, and that the city agency administering the trust did not act in a governmental or even a proprietary capacity, but merely as a fiduciary.\[^{143}\] The Supreme Court reversed on the ground that the Board operating the school was an agency of the state, even though acting as trustee, and therefore its refusal to admit the Negro boys was discrimination prohibited by the fourteenth amendment.\[^{144}\]

On remand to the Supreme Court of Pennsylvania, the case was further remanded to the Orphans' Court of Philadelphia County, which, in order to carry out the intention and purpose of the trust, substituted as trustees thirteen private citizens. The Pennsylvania Supreme Court affirmed on the ground that under established trust principles it is proper to remove a trustee who is not capable of carrying out the trust as created by the settlor.\[^{145}\] It rejected the argument that the order of the Orphans' Court to change the trustees was in itself discriminatory state action.\[^{146}\] The Supreme Court declined to review the state court decision.\[^{147}\]

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146 Id. at 455-56, 138 A.2d at 853. Justice Musmanno, dissenting, believed that the action of the Orphans' Court "loses sight of a Constitutional amendment and misreads the plain wording of the mandate of the Supreme Court." Id. at 471, 138 A.2d at 861.
147 Pennsylvania v. Board of Directors, 357 U.S. 570 (1958). The Supreme Court would have faced a major problem had it reviewed this decision. It would have had to choose between approving of the discrimination effected, thereby giving the southern states a lift in their efforts to preserve school segregation, or opening the way to subjecting all charitable trusts to the standards of the fourteenth amendment. Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979, 980 (1957).
It is difficult to justify the argument that the action taken by the Orphans' Court was not discriminatory state action. In exercising its power to revise the foundation of Girard College, the Orphans' Court would seem to have put state action behind an unconstitutional exclusion. Its exercise appears to be precisely that "active intervention of the state courts, supported by the full panoply of state power," which the fourteenth amendment forbids.

Rogers v. Calumet Nat'l Bank

Herbert Paszotta died in 1943 leaving a testamentary trust for the benefit of two German citizens. The trust was to terminate and the corpus paid to the beneficiaries on cessation of hostilities and resumption of normal political relations between the United States and Germany. In October 1950 the Attorney General of the United States issued his vesting order pursuant to the Trading with the Enemy Act and seized the property that had been the corpus of the trust. The Appellate Court of Indiana held that formal cessation of hostilities and resumption of normal relations between the United States and Germany had occurred on December 31, 1946, and that therefore "the absolute ownership of the property held in trust for the appellees . . . under the terms of the Paszotta will vested in them on December 31, 1946 . . . ." The Indiana court concluded that the two beneficiaries had property which could be so seized by the Attorney General but that such action in this instance was an abuse of discretion because no showing had been made that the seizure was necessary in the national interest.

The Supreme Court granted certiorari and in a per curiam opinion reversed and remanded the Indiana decision on the ground that "a state court is without power to review the discretion exercised by the Attorney General of the United States under federal law." On remand the Appellate Court of Indiana held that the will in question with its trust estate was to be construed according to the law of Indiana and that under Indiana law a will should be so construed as to give effect

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153 Id. at 633-34, 149 N.E.2d at 217.
154 Id. at 634-36, 149 N.E.2d at 217-18.
156 In the matter of Paszotta's Trust, 172 N.E.2d 904 (Ind. App. 1961).
to the intention of the testator as expressed and shown by the language thereof.\textsuperscript{157} The Indiana court then altered its prior view and held that "it is now our considered opinion that the trust estate could not, under any circumstances, vest . . . while the same was subject to seizure by . . . the Attorney General,"\textsuperscript{158} reasoning that only property that has vested is subject to the seizure. It believed that had the Supreme Court felt the seizure justified, it would not have remanded the case for proceedings in the first place, referring to

the obvious indication of the reluctance of the court [the Supreme Court] to approve the seizure made by the appellant under the existing conditions and circumstances, and in its implied favorable regard of the property rights of those affected by such seizure. If such was not the attitude and leaning of that court, then its admonition was fruitless and needless.\textsuperscript{159}

If the Supreme Court desired a legally justifiable reason for avoiding the seizure rather than the Indiana court's "abuse of discretion" basis, remand was certainly the vehicle to achieve it.\textsuperscript{160}

\textit{Williams v. Georgia}\textsuperscript{161}

Petitioner Williams, a Negro, was found guilty of murder by a Georgia jury and sentenced to death. He contended that his constitutional rights under the fourteenth amendment had been violated because the list from which the jury was empaneled had been selected by a drawing of cards in which the names of white persons were written on cards colored differently from those on which the names of Negroes were written. This practice had been struck down by the United States Supreme Court in another case\textsuperscript{162} after the trial of Williams but a month before the defendant had filed an amended motion for a new trial. Defendant did not challenge the procedure until six months later when he did so by extraordinary motion.\textsuperscript{163} The Georgia Supreme Court affirmed the trial court's dismissal of this motion, holding that Georgia law per-

\textsuperscript{157} Id. at 908.
\textsuperscript{158} Id. at 906.
\textsuperscript{159} Id. at 908.
\textsuperscript{160} It should be noted that the Solicitor General's office did not petition for certiorari after the Indiana decision on remand.
\textsuperscript{161} 349 U.S. 375 (1955). It should be noted that the procedure employed by the Supreme Court in this case is unique in the period studied. The state court decision was neither vacated nor reversed by the Supreme Court.
\textsuperscript{162} Avery v. Georgia, 345 U.S. 559 (1953).
\textsuperscript{163} Ga. Code Ann. § 70-303 (1935) provides for a tardy motion for a new trial where good reason is shown why the motion was not timely.
mitted a challenge to the list from which the jury was empaneled only before trial, and on the further ground that the defendant had failed to show the due diligence necessary to justify granting of the motion.\textsuperscript{164} On certiorari the Supreme Court, without vacating or reversing, remanded for reconsideration to the Georgia Supreme Court.\textsuperscript{165} Mr. Justice Frankfurter, writing for the majority, felt that Georgia law permitted an objection to be raised to the list of prospective jurors after trial so that the state court had discretionary power to grant defendant's extraordinary motion. He found that the Supreme Court could review the exercise of this discretion,\textsuperscript{166} even though he recognized that reasonable state procedures should not be the subject of review by the United States Supreme Court.\textsuperscript{167} The opinion concluded:

We think that orderly procedure requires a remand to the State Supreme Court for reconsideration of the case. Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally empaneled.\textsuperscript{168}

On remand the Georgia Supreme Court was indignant in its refusal to carry out the wishes of the United States Supreme Court, stating that the "law is that the question sought to be raised must be raised before trial and not otherwise."\textsuperscript{169} An excerpt from Chief Justice Duckworth's opinion reflects the feeling of the Georgia court:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." \ldots Even though executives and legislators, not being constitutional lawyers, might often overstep the foregoing unambiguous constitutional prohibition of Federal invasion of State jurisdiction, there can never be an acceptable excuse for judicial failure to strictly observe it. This court bows to the Supreme Court on all Federal questions of law but we will not supinely surrender sovereign powers of this State. In this case the opinion of the majority of that court recognizes that this court decided the case according to established rules of law and that no Federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of the court, which are the only judgments by that court that this court can constitutionally recognize.\textsuperscript{170}

\textsuperscript{165} Williams v. Georgia, 349 U.S. 375 (1955).
\textsuperscript{166} Id. at 388-89.
\textsuperscript{167} See id. at 382-83.
\textsuperscript{168} Id. at 391.
\textsuperscript{170} Id. at 763-64, 88 S.E.2d at 376-77.
The Supreme Court denied certiorari on petition from the affirmance on remand. It is questionable whether certiorari was providently granted in the first instance, that is, whether a constitutional question was properly before the Court. The Georgia Supreme Court had expressly stated that a challenge to the list of prospective jurors must be made before trial. It would seem that this determination should have been binding on the United States Supreme Court unless the Georgia procedure could not adequately afford due process. Georgia law had long been settled that defendant must challenge the array when the panel is "put upon" him and not thereafter. It is also difficult to perceive the Court's purpose in remanding for reconsideration as it did. If the Court really believed that it had adequate grounds to hear the case, it would seem desirable to have disposed of the case on the merits as it had done in Avery v. Georgia, rather than remanding the case for reconsideration. The Georgia court had already considered and rejected the grounds which the United States Supreme Court made the basis of its remand.

The only possible disposition of the case on remand would have to have been either a grant of a new trial or a refusal in reliance on grounds already stated. The Supreme Court seems to have disregarded its jurisdiction in order to enter what was in effect a plea for clemency. It is arguable that this nobility was only an unconstitutional intervention into the jurisdiction of a court offended by such intervention. The opinion of the Georgia court spells out the problem inhering in a remand, viz., the inevitable clash of national and local interests of interwoven sovereignties. If a state court wishes to air its disdain for federal intervention, the opportunity is afforded it on remand.

III
Vacate and Remand

As has been pointed out, cases vacated and remanded in light of another Supreme Court decision differ from cases reversed and remanded

175 345 U.S. 559 (1953).
176 See discussion of International Ass'n of Machinists v. Street, pp. 827-30 supra.
and are unique in their function. The following cases illustrate that function and indicate the possible situations on remand: (1) where the cited case is distinguishable;177 (2) where the cited case provides no direction for the state court;178 (3) where the cited case is distinguished but the distinction is questionable.179

_Uphaus v. Wyman_180

Here the state court distinguished the cases cited by the United States Supreme Court to the satisfaction of the Court. Uphaus had refused to comply with two subpoenas duces tecum which required him to produce material pertinent to an investigation of subversive activities in the state, and as a result, he was adjudged in contempt.181 On appeal the United States Supreme Court vacated and remanded the case182 in light of _Sweezy v. New Hampshire_, in which the Court had held that the state had failed to prove that the legislature desired the information which the attorney general sought to elicit.183 On remand the New Hampshire Supreme Court affirmed its earlier opinion on the grounds that the legislature did desire the information in question and that the state had a right to protect itself against subversion.184 Uphaus again appealed to the United States Supreme Court, and in this opinion the Court noted its agreement with the Supreme Court of New Hampshire185 and affirmed for basically the same reasons that the state court had affirmed its earlier opinion.

_Morgan v. Ohio_186

Morgan was convicted of contempt for refusal to answer certain questions propounded by the Ohio Un-American Activities Committee. An Ohio immunity statute precluded the invocation of freedom from self-incrimination, and as a result, the Ohio Supreme Court upheld the convictions.187 The United States Supreme Court vacated and re-

179 See McCrary v. Aladdin Radio Indus., Inc., 355 U.S. 8 (1957); In re Patterson, 353 U.S. 952 (1957).
180 355 U.S. 16 (1957).
187 State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956).
manded\textsuperscript{188} in light of \textit{Sweezy v. New Hampshire}\textsuperscript{189} and \textit{Watkins v. United States}.\textsuperscript{190} The predominant issue in \textit{Sweezy} and \textit{Watkins} paralleled the one in the instant case—the limits of legislative inquiry—but this ended the similarity. In the cited cases the secondary issue was whether the questions were pertinent to the investigation,\textsuperscript{191} whereas in \textit{Morgan} it was whether the appellants could invoke the privilege in the face of a state statute granting immunity.\textsuperscript{192} The basic similarity in the cases did not give the state court an adequate guideline, and the Ohio court reaffirmed the convictions of contempt.\textsuperscript{193} The United States Supreme Court granted certiorari and reversed three of the four convictions,\textsuperscript{194} relying on the fact that the investigating committee had alluded to the available privilege from self-incrimination but that after it was invoked Morgan was indicted and held in contempt because of the immunity statute. The Court felt that this practice was deceitful and a form of entrapment.\textsuperscript{195} One conviction was upheld because the defendant refused to answer the questions after the committee had warned him that the self-incrimination privilege was not available because of the immunity statute.\textsuperscript{196}

\textit{McCrary v. Aladdin Radio Indus., Inc.}\textsuperscript{197}

When union truck drivers would not cross the picket line of another union, complainant sought and obtained an injunction which enjoined the carriers and their drivers from refusing to cross the line and ordered them to render customary carrier service. The truckers, after obeying the injunction for some three months, again declined to cross the picket line and were adjudged in contempt.\textsuperscript{198} On appeal the Supreme Court vacated and remanded\textsuperscript{199} in light of a prior decision\textsuperscript{200} based upon \textit{Weber v. Anheuser Busch, Inc.}\textsuperscript{201} which held that the activities complained of

\textsuperscript{188} Morgan v. Ohio, 354 U.S. 929 (1957).

\textsuperscript{189} 354 U.S. 234 (1957).

\textsuperscript{190} 354 U.S. 178 (1957).

\textsuperscript{191} Id. at 208-09; 354 U.S. at 253-54 (1957).

\textsuperscript{192} State v. Morgan, 164 Ohio St. 529, 533, 133 N.E.2d 104, 108 (1956).

\textsuperscript{193} 167 Ohio St. 295, 147 N.E.2d 847 (1958).

\textsuperscript{194} Raley v. Ohio, 360 U.S. 423 (1959). The fourth conviction was affirmed by an equally divided court.

\textsuperscript{195} Id. at 438.

\textsuperscript{196} Id. at 443-44.

\textsuperscript{197} 355 U.S. 8 (1957).

\textsuperscript{198} Aladdin Indus., Inc. v. Associated Transp., Inc., 42 Tenn. App. 52, 298 S.W.2d 770 (1955).


\textsuperscript{201} 348 U.S. 468 (1954).
came within the exclusive jurisdiction of the NLRB. Upon rehearing, the state court distinguished Weber on the grounds that the instant case presented an ancillary contempt proceeding and that the disobedience of the truck drivers was neither a concerted activity nor an unfair labor practice forbidden by the National Labor Relations Act. The Supreme Court denied certiorari.

In the original state court proceedings the drivers had relied on Weber and other related cases, but the court had rejected their applicability. In the second state court decision Weber was distinguished on the same grounds as in the original state opinion. It would seem that these distinctions had been impliedly rejected when the case was vacated and remanded by the Supreme Court and that the use of a similar distinction was inconsistent with the mandate of the Supreme Court.

*In re Patterson*  

Patterson, an expelled member of the Communist party, applied for admission to the Oregon bar. The denial of his application for admission was affirmed by the Oregon Supreme Court on the grounds that his testimony, denying that the Communist party advocated the overthrow of the Government by force and violence and that he did not believe in that doctrine, precluded him from practicing law in Oregon. The United States Supreme Court vacated and remanded the case, citing *Konigsberg v. State Bar* and *Schware v. Board of Bar Examiners.* The cited cases had held that prior membership in the Communist party did not provide sufficient grounds for exclusion from the respective bars. On remand the Oregon court adhered to its prior decision and distinguished Patterson. The court relied on the fact that Konigsberg and Schware were mere members of the party, and this at a time when the Communist party was recognized in this country, while Patterson had been a leader and therefore inferentially advocated the overthrow of the Government. The United States Supreme Court denied certiorari.

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204 353 U.S. 952 (1957).
205 210 Ore. 495, 302 P.2d 227 (1956).
210 Id. at 409-10, 318 P.2d at 912.
Notes

Conclusion

In light of the exposition of the foregoing cases, it might seem that measures should be taken to enforce strict compliance with the mandate of the Court. As indicated at the outset, the common law writs of mandamus and certiorari are available to the Court to compel compliance. However, the intervention of other considerations makes the efficacy of coercion a close question. Those other factors are the diverse and sometimes parochial attitudes of the nation's political subdivisions and the Supreme Court's primary responsibility for effecting a smooth functioning between the two judicial systems. To accomplish the latter most effectively, each system must function with constant attention given to the deference owing to the other system. As to the former, the federal judiciary must be cognizant of the states and their internal problems. For example, in both Florida ex rel. Hawkins v. Board of Control and NAACP v. Alabama ex rel. Patterson, the Court's decision involved sociological and environmental prejudices which had existed as long as the South itself. Even granting that an authoritarian disposition by the Court unequivocally lays down the law for all to follow, the issuance of mandamus or common law certiorari, or the imposition of other remedies which have been suggested, would be a direct attack on local attitudes. Also it appears that the Court might have been aware of the danger to the interworking of the two judiciaries in exertion of its authority in these situations, i.e., coercive measures could well lead to a loss of balance between the two independent judicial systems.

Although circumstances which tend to mitigate state court disobedience exist in some cases, this is not true of all. In Deen v. Gulf, Colo. & S.F. Ry., there was no prejudice indigenous to that area nor other pressing local interests. On the contrary, the action of the Texas court seems more to

212 Methods such as impeachment or prosecution of disobedient state judges, utilizing a master to oversee the carrying out of the mandate, and remands to a federal district court, can be disposed of as unrealistic or incapable of improving the existing situation. These remedies are obviously too harsh. No more stringent remedy than an award of final execution, e.g., Williams v. Bruffy, 102 U.S. 248 (1880), Tyler v. Maguire, 84 U.S. (17 Wall.) 253 (1872), or a mandate ordering a specific judgment, Stanley v. Schwalby, 162 U.S. 255 (1896), has yet been employed by the Supreme Court. The former is practical in some instances. Compare Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), with Williams v. Georgia, 349 U.S. 375 (1955). However, its widespread use, in view of the necessity of a proper balance between state and federal courts, is not recommended. Numerous other remedial proposals have been made. See generally Note, 67 Harv. L. Rev. 1251 (1954); Note, 55 Harv. L. Rev. 1357 (1942); Note, 95 U. Pa. L. Rev. 764 (1947); Note, 56 Yale L.J. 574 (1947).
have been the result of a complete disregard of the supremacy of the United States Supreme Court on a question of federal law than anything else. Certainly, when there are no considerations such as existed in Hawkins and NAACP, the propriety of direct enforcement of the mandate grows more apparent. In this regard International Ass’n of Machinists v. Street also seems to demand enforcement of the mandate.

Three alternatives for the Court can be gleaned from this study: (1) maintain the status quo, i.e., refuse to issue mandamus or to resort to any of the other coercive measures; (2) issue mandamus in every case where there is evidence of an evasion of the mandate; or (3) issue mandamus on a selective basis, looking to the local interests affected and the Court’s duty to police the interfunctioning of the two judicial systems.

If the status quo is maintained, there will continue to be state court evasion in varying degrees, amounting at times to abuse. However, the evasion which has been pointed out in this survey comprises only a small percentage of the total remanded cases; within that small percentage (approximately 10%) the question of noncompliance is often so close that it is difficult to state categorically whether or not an evasion has occurred, and if it has, the degree to which the state court is culpable.

The second alternative would not seem to be the answer because it could destroy the balance between the state and federal judiciaries. A policy encompassing wholesale enforcement would subjugate the states to the power of the federal judiciary even where there may have been a valid nonfederal ground on which the state court could have relied.213 Also, existence of an evasion may be a close question and incapable of conclusive determination. To advocate this action by the Court would be to close one’s eyes completely to the very real and legitimate differences of opinion that raise questions of noncompliance and jeopardize the distribution of judicial power.

The third alternative more closely approaches an acceptable compromise, but there are factors which render it unworkable. First, so many outside factors which would mitigate the state court action on the one hand or magnify its evasive character on the other would have to be considered that the work of the Supreme Court would become pure sociology. Secondly, some semblance of a standard by which to judge the individual cases would be required, and this standard, of necessity, would be personal and subjective to an intolerable degree.

In light of the basic need for a better relationship and understanding

213 In the post-remand period, a nonfederal question may be passed on by the state court as a means of evading the Supreme Court’s mandate. Note, 67 Harv. L. Rev. 1251, 1257 (1954). See generally Note, 95 U. Pa. L. Rev. 764 (1947).
between state and federal jurists, programs such as the Appellate Judges Seminar at New York University may be the best solution. This program, conducted annually, brings together as members and faculty various appellate judges on both state and federal level and permits them to discuss problems in various fields, including the Supreme Court opinions which sometimes create state court problems. With its enrollment consisting of state supreme court judges, United States Courts of Appeals judges, and recently a United States Supreme Court Justice, the program is potentially capable of taking long strides towards the achievement of a smoother functioning national judicial system containing a minimum of inconsistency between state and federal jurisdictions. A clearer understanding of the objectives of the Supreme Court could eliminate many of the remands and the resulting problems. For example, in the area of due process a very large number of cases are the subject of Supreme Court remands to state courts. One obvious reason for this is the lack of state court cognizance of the ground rules which the Supreme Court has sought to lay down in the area of criminal procedure. But this lack of cognizance may be cured by discussion and state realization that the only prospect of nonconformity is a flood of habeas corpus problems, well-founded or not.

As pointed out, a deeper source of fourteenth amendment problems is the sociological area of race. It is peculiar to our time, and questionable compliance in this area cannot be attributed to an increasing attitude in state courts against federal authority based on traditional jurisdictional jealousy. This problem's contribution to the over-all increase of noncompliance may not be susceptible to solution by judicial conferences. On the other hand, it is clearly an area not susceptible to treatment by such a device as mandamus without great sacrifice of the system itself and little long-term gain for individual rights. In any event, it will take time before any such program will begin to achieve noticeable advances in the field of federal-state judiciary relations. Meanwhile, the employment of any coercive measures by the Supreme Court should not be encouraged.

JOHN A. LYNCH, JR.
G. ROBERT WILEMAN

214 Mr. Justice Brennan is confident that much can be accomplished by the seminar vis-à-vis resolving any problems involving the federal and state judiciaries. Interview with Mr. Justice Brennan in Washington, D.C., Feb. 15, 1962.


APPENDIX

The following is a chart of the studied cases* which have been reversed and remanded or vacated and remanded with an opinion.† The chart illustrates the state courts' disposition of the Supreme Court mandate and indicates whether or not that disposition can be found in the reporter systems.‡

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<th>State</th>
<th>Remanded cases</th>
<th>Type of case</th>
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<th>Disposition of mandate not reported</th>
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<td>Coerced Confession</td>
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<td>First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958)</td>
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* Indicates that the case resulted in a settlement on remand prior to the conclusion of a new trial.

1 The chart does not include the cases vacated and remanded in light of another decision, nor does it include a small number of remanded cases cited in notes 25 and 27, p. 823 supra.

2 In cases where no subsequent history after the remand appears in the reporter systems, the study relies on letters from counsel and copies of orders entered by the state courts.

3 In some cases it appears that the state, although following the mandate in the principal case, has not complied in spirit with the principle laid down by the Supreme Court in subsequent practice.

4 Counsel for petitioner contends that strikingly similar tax provisions are still in effect in other cities in Alabama but that he cannot afford to contest each and every one. In fact, he asserts that the city of Opelika still levies the same tax but now makes it a flat sum license applicable to both retailers and wholesalers, thus eliminating its discriminatory feature.


6 The Supreme Court subsequently reversed an award of damages. 359 U.S. 236 (1959).
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<th>State</th>
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7 This case was remanded for reconsideration without reversing or vacating the state court decision.

8 Communication from counsel indicates that the practice condemned by the Supreme Court in this case is still employed in parts of Louisiana.
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<th>State</th>
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<td>Miller Bros. v.</td>
<td>Due Process: Taxation</td>
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<td>Maryland, 347 U.S.</td>
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<td>Ferguson v. St.</td>
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<td>717 (1961)</td>
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9 "Do you believe in God?" is still one of the questions asked on the present notary public application. Although it appears that the applicant may strike this provision, its continued inclusion may be an intentional source of embarrassment.

10 The Supreme Court of Missouri declared that it was not bound by the Supreme Court's determination that damages were not excessive.
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<td>Ohio</td>
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<td>McBride v. Toledo Terminal R.R., 354 U.S. 517 (1957)</td>
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<td>b) 159 Tex. 238, 317 S.W.2d 913 (1958)</td>
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<td>Gibson v. Thompson, 355 U.S. 18 (1957)</td>
<td>FELA</td>
<td>158 Tex. 231, 310 S.W.2d 564 (1958)</td>
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<td>Davis v. Virginian Ry., 361 U.S. 354 (1960)</td>
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11 On remand the Ohio Court of Appeals kept part of its previous order in force. The Supreme Court of Ohio affirmed, 170 Ohio St. 207, 163 N.E.2d 383 (1959). The Supreme Court subsequently reversed, 362 U.S. 605 (1960), and full compliance with the mandate has since followed.
### APPENDIX (continued)

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BOOK REVIEW


This book will make interesting reading to anyone concerned with the operations of the Supreme Court. The author views the Supreme Court as a policymaking organ of government involved in a constant struggle for supremacy with the legislative and executive branches. He speaks of judicial attacks and retreats and the prudence and timing of decisions as though the Court's rulings were the work of a supra-legislature. In the same vein, he suggests that the Court's influence and the sanctity of its judgments are determined by such things as Gallup polls, the popularity of the Chief Justice, and the amount of pressure exerted by various special interest groups.

Very little light is shed by the book on the soundness of particular decisions either on a legal or practical basis. All those who opposed any of the Court's decisions are joined by the author into an anti-Court bloc. There is a great deal of speculation about every critic's motivations, with little allowance for good intentions.

Professor Murphy asserts that none of the members of the "Warren Court" believe that judicial review is an exact science. He appears to place all the Justices in the "realist" school of jurisprudence whose chief contribution to legal theory has been the continuation of Holmes' efforts "to wash the law in cynical acid." Holmes and others, he notes, tried to demonstrate the "speciousness of the Court's claim to Jovian aloofness and, instead, to place much of the responsibility for constitutional decisions on the personal reactions of the judges to the demands of conflicting forces within society."

The processes employed by the Justices in reaching and articulating their judgments are not on public display. If it is anything like that suggested by Professor Murphy, however, then it is certain that a great deal of time, energy and money are being wasted on preparing records and briefs and in going through the other procedures associated with Court review. Even if the Justices do pay attention to the briefs and the record in a case, Professor Murphy obviously considers these documents an unimportant part of the judicial process.

The processes employed by members of Congress in reaching and articulating their judgments are in the public domain to a much greater extent. In this case, too, the validity of some of the author's generaliza-

1 Murphy, Congress and the Court 249 (1962).
tions are highly questionable. I have agreed with and strongly defended many of the Court's decisions and disagreed with others, but I have never found it useful to discredit the motivations of all those whose views were different on an issue. Professor Murphy applies the "cynical acid" test too freely to the Congress as well as the Court, based on my experience in dealing with some of the very issues analyzed in this book.

Conflicts between the Supreme Court and the other branches of the Government, as Professor Murphy recognizes, are an inevitable result of the system of checks and balances under which we operate. In these conflicts, the Court has many disadvantages because of its limited powers relative to that of the Congress and the Chief Executive. Justices do not appear on nationwide fireside chats with the people. They do not have committee hearings at which they can air and document their grievances or points of view. They communicate with the public only through their formal written opinions and must ultimately rely on the President and the Congress to give full effectiveness to their decisions.

These circumstances impose upon the Congress and the President an obligation to protect the Court from attempts to undermine its status. No matter how much disagreement there may be with particular decisions of the Court, extreme attacks on the members of the Court and upon the tribunal itself are never justified. The Court plays an essential part in the American system as the institutional personification of the rule of law. Proposals to curb its jurisdiction, pack its bench, or interfere with its operations are a direct threat to one of the pillars of our constitutional structure. This book recounts many of the efforts which have been made in our history to curb the power of the Court, all of which have been repudiated.

The author's interpretation of the role of the Court and the attitude of the Justices, however, is not designed to enhance the institution's inviolability. Judicial decisions which merely reflect the personal inclinations of the Justices will not be accorded the homage paid to judgments inspired by constitutional commands and the rule of law. Many who will concede that judicial review is not an exact science will challenge the Professor's notion that the course of decisions is largely a matter of judicial politicking.

Professor Murphy is entitled to his point of view, but this book offers very meagre proof of the validity of his major assertions. Its major defect is the absence of any critical analysis of the decisions of the Court with which Congress was concerned. As a result, the author's comments
on congressional reaction to the more controversial rulings of the Court tend to be oversimplified and in some respects very misleading.

Professor Murphy has an interesting and effective writing style, and his book is well organized. The references are extensively footnoted, and a very useful index is included. Congress and the Court is not offered as the last word on the subject, but I share the author's hope that it "will serve as one of the empirical steppingstones to a more complete theory of American politics than we now possess."2

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2 Id. at vii.
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