AN IMMEDIATE problem with which this country is faced is how, without violating our constitutional guarantees of personal freedom, we may overcome the dilemma\(^1\) raised by the subversive foreign propaganda\(^2\) inevitably directed toward us in this critical period. Because propaganda and mass psychology are inextricably interwoven with public opinion, the *sine qua non* of an effective democracy, and because the extent and influence of subversive propaganda may not be known until too late, if ever, the solution of this problem is as difficult as it is important. Combatting this insidious force today is much more difficult than during World War I.\(^3\) First, the technique is more subtle,

\(^1\)Ph.B., Yale University (1925), LL.B., *id.* (1928), S.J.D., Northwestern University (1931); member of the Bar of the District of Columbia; formerly counsel for the Federal Housing Administration; formerly Special Assistant to the Attorney-General; author of *The Hoosac Mills Case and Our Founding Fathers* (1936) 25 *The Georgetown Law Journal* 48; *The National Housing Program* with V. Joyce Brabner Smith (1936) 30 *Ill. L. Rev.* 557; *The Commerce Clause and the New Federal “Extradition” Statute* (1934) 29 *Ill. L. Rev.* 355, and numerous articles in other legal and financial publications.

\(^2\)On the one horn are our constitutional liberties; on the other the problem of preventing, without undermining these constitutional liberties, the growth and spread of those groups which, acting under the protection of these liberties seek, when the time is ripe, to overthrow the Constitution.

\(^3\)The purpose of propaganda is to exert a quantitative pressure on public opinion, and thereby modify its attitudes and actions toward desired ends. This is effected by directing a stream of selected information, true and false, and suggestion into the public consciousness. Its media are individual and group expression by word of mouth, print, art, stage, movies, radio, and the mails. Subversive propaganda is that propaganda which originates from sources whose ultimate and avowed aim is the overthrow of the government. In this country it must be a highly developed technique of exploiting through every known medium the existing democratic institutions and constitutional rights in order to sabotage public opinion and undermine our democracy. See generally for nature of propaganda and its techniques, *Doob, Propaganda* (1935).

\(^4\)The Gallup Poll indicates that 48% of the nation’s voters are conscious of “fifth column” activities in this country. *Washington Post*, Aug. 14, 1940, p. 2.
effective and aggressive, due to experiences of the past and to recent startling successes in Europe, which also emphasize the vast potentialities of subversive propaganda. Never before has a world aggressor so emphasized the mental phase of war and conquest.\(^4\) Secondly, and corollary thereto, we are confronted with the problem of revising our traditional concepts of war and peace in order to delineate our action effectively.

There are three primary methods of dealing with this situation: (a) Education and Analysis; (b) Counter Propaganda, and (c) Censorship and Suppression. The use of the first two methods is, without question, constitutional; the third is subject to the limitations of the First and Fourteenth Amendments to the Federal Constitution, which prohibit abridgment of freedom of speech or of the press by Congress or the individual States.\(^5\)

In order to give proper consideration to its solution, let us first examine the manner in which the problem, as it arose in the past, has been met.

\(^4\)That the dictators are keenly aware of the potentialities of this weapon, and are ready to seize upon it as a means of accomplishing their ends is clear. Hitler explained his program for waging war to Hermann Rauschning, president of the Danzig Senate, in 1933. He then declared: "War is nothing but cunning deception, delusion, attack and surprise. What is the object of war? To make the enemy capitulate. Why should I demoralize him by military means if I can do so better and more cheaply in other ways?"

To effectuate this program Hitler created the Ministry of Propaganda and Public Enlightenment headed by Dr. Paul Joseph Goebbels. To him "Propaganda has but one object, to conquer the masses. Every means that furthers this aim is good; but every means that hinders it is bad." It is stated that on his staff before the war there were 25,000 full time workers; he spent $100,000,000 per annum. His powers were limitless. He personally supervised its activities in this country. The mail of the country was flooded with his material. Germany's Transoceanic News Service decided to extend its activities to 341 Madison Ave., New York. The German Library of Information at 17 Battery Place, New York, began the publication of Facts in Review.


The Sedition Act of 1798⁶ appears to have been the first legislative attempt to cope with subversive propaganda in this country. At the time of its enactment the United States, although not at war, was involved in controversies with France. It was maintained by the Federalist administration that the law was necessary to suppress French activities in the United States. The act provided that it should be unlawful to combine or conspire together, with intent to oppose any measure or measures of the Government or to impede the operation of any law, or to counsel, advise or attempt to procure any insurrection, riot, unlawful assembly or combination whether such act should have the proposed effect or not. It was further made unlawful to utter or publish false, scandalous and malicious writings against the Government, either House of Congress, or the President, if published with intent to defame any of them, or to excite against them the hatred of the people or to stir up sedition or to excite resistance of law, or to aid any hostile designs of any foreign nation against the United States.

Opposition to this statute was general and reached its climax in the famous “Kentucky Resolutions”. It was considered a return to the English common law sedition principles and violative of the First Amendment. Despite this, numerous prosecutions of alleged violations were made until the election of 1800 repudiated the act as well as the Federalist Party.

The short-lived Act of June 25, 1789, authorized the President to order out of the country all such aliens as he considered dangerous to the peace and safety of the country, or such aliens as he should suspect of being concerned in treasonable or secret machinations against the Government.⁷ Another statute enacted during this period, and which seems to have attracted little attention, is that of January 30, 1799,⁸ which was reënacted as Section 5 of the Act of March 4, 1909.⁹ It made it unlawful for any citizen of the United States to carry on without permission intercourse with any foreign government or agent with intent to influence the measures or conduct of that government in relation to

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⁶1 Stat. 596 (1798).
⁷1 Stat. 570 (1789). This statute expired in 1800.
⁸1 Stat. 613 (1799).
any disputes or controversies with the United States, or to defeat the measures of the Government of the United States.\textsuperscript{10}

During the Civil War Congress passed laws declaring seditious conspiracy to be unlawful,\textsuperscript{11} and making it illegal to incite to rebellion or insurrection.\textsuperscript{12} Toward the end newspapers publishing articles considered detrimental to the Government were barred from the mails.\textsuperscript{13} Chief reliance for the strong control of improper utterances existing during this period, however, seems to have been effected through the Army regulations.

Participation in the titanic struggles of World War I precipitated enactment of the Espionage Act of 1917.\textsuperscript{14} On May 16, 1918, it was amended\textsuperscript{15} by adding to the offenses originally listed, several others. Offenses forbidden by the Act may be summarized as follows: Willfully making or conveying false reports or statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; willfully causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces; willfully obstructing the recruiting or enlistment service of the United States; conspiring to obstruct recruiting or enlistment; saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice; uttering, printing, or writing any profane, scurrilous or abusive language or language intended to cause contempt, scorn, or disrepute regarding the form of Government, the Constitution, the flag, or the uniform of the United States; using language intended to incite resistance to the United States or to promote the cause of its enemies; urging any curtailment of production of things necessary to the prosecution of war

\textsuperscript{10}While prosecutions under this statute have been limited (Charge to Grand Jury—Treason, Fed. Cas. No. 18,274 (D. Mass. 1863), it seems that a broad interpretation and application of this statute might be effective in interdicting subversive activities of foreign governments in this country, insofar as they are carried on through citizens of this country.

\textsuperscript{11}Act of July 31, 1861, 12 STAT. 284, 18 U. S. C. § 6 (1934).

\textsuperscript{12}Act of July 17, 1862, 12 STAT. 590, 18 U. S. C. § 4 (1934). The courts have interpreted both of these Civil War statutes to require the use of acts of force rather than mere advocacy thereof in order to constitute an offense. Baldwin v. Franks, 120 U. S. 678 (1886); Wells v. United States, 257 Fed. 605 (C. C. A. 9th, 1919).

\textsuperscript{13}Patterson, Free Speech and a Free Press (1939) 140; Deutsch, Freedom of the Press and of the Mails (1937) 36 Mich. L. Rev. 703, 724.


\textsuperscript{15}40 STAT. 553 (1918).
with intent to hinder its prosecution; advocating, teaching, defending or suggesting the doing of any of the above acts; uttering words or doing acts supporting, or favoring supporting, or favoring the cause of any country at war with the United States, or opposing the cause of the United States therein.

These portions of the act are applicable only when the United States is at war. Violations are punishable by a fine of not more than $10,000 or imprisonment for not more than 20 years. A person harboring or concealing a person guilty of these offenses is punishable by a fine of not more than $10,000, or imprisonment for not more than 2 years, or both.

The Act further provides that the Postmaster General, upon evidence satisfactory to him that any person or concern is using the mails in violation of the Act, may have all mail addressed to the person or concern returned to the sender. A similar prohibition remains in force as part of the criminal code. The penalty for its violation is the same as the penalty for all the laws against the sending unmailable matter through the mails, a fine of $5,000, or imprisonment for 5 years, or both.

This legislation has been considered by the Supreme Court in numerous cases. There have been various interpretations placed upon the results reached by these decisions. Perhaps the most authoritative statement thereof is to be found in the recent review of these decisions in the Supreme Court’s opinion in Herndon v. Lowry. Mr. Justice Roberts there summed up by saying:

We sustained the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them. We recognized, however, that words may be spoken or written for

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140 Stat. 554 (1918). See Masses Publishing Co. v. Patten, 245 Fed. 102 (C. C. A. 2d, 1917), in which case the constitutionality of this provision was sustained.

17 Act of June 15, 1917, 40 Stat. 230, 18 U. S. C. §§ 343-345 (1934). The other provision of the Espionage Act which is in force in peace time is the provision which authorized the issue of search warrants for the seizure of property used as a means of committing a felony. This applies to all felonies as well as to the acts classified in the Espionage Act as wartime offenses. 40 Stat. 228 (1917), 18 U. S. C. § 611 (1934).


various purposes and that willful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

It has now been made clear that the power of Congress in this matter is greater during time of war than peace, but the power, under traditional concepts, is not absolute even during war.21

In addition to the protection afforded by the enforcement of the above described federal laws, many states enacted similar, but more drastic laws of their own. These statutes were various and broad. Some of those which tended to cover more specifically the subject of subversive propaganda and its related activities are set forth below.22

21Schenck v. United States, 249 U. S. 47 (1919); Hughes, The Supreme Court (1928) 104; The Federalist (Williams & Whiting, 1810) 23; Patterson, op. cit. supra note 13, at 167; War, Applied Democracy (1940) 16 U. of Cin. L. Rev. 53, 152; Frohwerk v. United States, 249 U. S. 204 (1919); Herndon v. Lowry, 301 U. S. 242 (1937); Chafee, op. cit. supra note 19, at 32.

22I. Statutes Suppressing Undesirable Utterances:


It has been held proper for a State to enact a statute covering sedition against the Federal Government. State v. Tachin, 92 N. J. L. 269, 271, 106 Atl. 145 (1919). Contra: Ex parte Meckel, 87 Tex. Cr. 120, 220 S. W. 81 (1921). It also appears that the federal district courts, as well as the state courts have jurisdiction to hear suits arising under these statutes, regardless of the amount of controversy involved. Deutsch, Federal Equity Jurisdiction of Cases Involving the Freedom of the Press (1939) 25 Va. L. Rev. 507.

II. Statutes prohibiting Red Flags and Other Insignia:

Alabama, Laws 1919, No. 83; Arizona, Laws 1919, c. 11; Arkansas, Laws 1919, c. 512, § 2; California, Laws 1919, p. 142; Colorado, Laws 1919, c. 171; Connecticut, Public Acts 1919, c. 35; Delaware, Laws 1919, c. 231; Idaho, Laws 1919, c. 96; Illinois, Laws 1919, p. 420, § 265 (f); Indiana, Laws 1919, c. 125; Iowa, Laws 1919, c. 199; Kansas, Laws 1919, c. 184; Kentucky, Laws 1920, c. 100, § 10; Massachusetts, Laws 1913, c. 678, § 2; Michigan, Laws 1919, No. 104; Minnesota, Laws 1919, c. 46; Montana, Laws 1919, c. 25; Nebraska, Laws 1919, c. 208; New Jersey, Laws 1919, c. 78; New Mexico, Laws 1931, c. 33; New York, Laws 1919, c. 409; Ohio, Laws 1919, p. 57; Oklahoma, Laws 1919, c. 133; Oregon, Laws 1919, c. 35; Rhode Island, Laws 1919, c. 1771; South Dakota, Laws 1919, c. 191; Utah, Laws 1919, c. 129; Vermont, Laws 1919, c. 195; Washington, Laws 1919, c. 181;
While prosecution for violation of the provisions of the Espionage

West Virginia, Laws 1919, c. 24, § 2; Wisconsin, Laws 1919, c. 369.


Perhaps the leading case in which the constitutionality of state legislation on this subject has been considered is Gilbert v. Minnesota, 254 U. S. 325 (1920). A statute of Minnesota made it a criminal offense for anyone to speak, teach or advocate that citizens should not aid or assist the United States in carrying on the World War or discourage enlistment in the military forces. The defendant was charged with having, during war time, published an article in which he stated that "we are stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you, if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours . . . ."

The principal opinion by Mr. Justice McKenna held the statute was a valid exercise of the State's police power and that the State had the power to assist the Federal government by maintaining the "morale, spirit and determination" of the people. The Schenck, Frohwerk, Debs, Abrams and Schaefer opinions were cited by him. The majority were of the opinion that as the war was in defense of national honor and as the statement of Gilbert was a deliberate misrepresentation of the objects for which it was prosecuted, he could have had no purpose other than to interfere with the Draft Act.

Mr. Justice Brandeis dissented on the ground that the Federal government was primarily charged with the duty of organizing the army; as the government had not spoken on the subject and the Espionage Act did not condemn such action, it was not within the power of the State to prohibit such statements so long as they were not shown to have actually interfered with enlistment. Chief Justice White was also of the opinion that the matter was within the exclusive power of Congress. Mr. Justice Holmes concurred in the decision but not in the majority opinion.

Whether legislation on such subject matter is properly within the scope of the state's jurisdiction seems to be open to some question. In view of the fact that the states possess all power not expressly denied them, and can reach objectionable writings under their general police power and criminal jurisdiction, the question would appear to be settled. State v. Holm, 139 Minn. 267, 166 N. W. 181 (1918); State v. Tachin, 92 N. J. L. 269, 106 Atl. 145, aff'd, 93 N. J. L. 485, 108 Atl. 318 (1919); State v. Gibson, 189 Iowa 1272, 174 N. W. 34 (1919); Patterson, op. cit. supra note 13, at 199. But Prof. Chafee argues at some length that legislation on such matters, at least insofar as it relates to prosecution of the war is exclusively with the jurisdiction of the Federal Government when it has legislated thereon. Chafee, op. cit. supra note 19, at 111; cf. id. at 199.
Act was relied upon as an important means for restriction of subversive propaganda during the World War period, the Federal Government also made use of other powers, chiefly that of censorship and licensing. As pointed out above, Section 2 of the Act of May 16, 1918, gave the Postmaster General broad powers of censorship of the mails. By virtue of Section 19 of the Trading with the Enemy Act, any matter published in a foreign language in this country was declared unlawful unless a translation thereof was furnished to the postal authorities before circulation. Section 3(d) of the same Act, authorized the President to cause to be censored all communications between the United States and any foreign country. Section 2 of the Act of August 13, 1912, had empowered the President in time of war to revoke the license of any private radio station. Also in 1912, the postal statutes under which newspapers and periodicals are admitted to the second-class mail at nominal mailing costs, had been amended to extend the requirements with relation to publication of ownership, circulation and indebtedness, and to require that advertising matter be labeled as such. The Priority Shipment Act of August 10, 1917, gave priority powers over the railroad shipments which permitted the withholding of essential supplies from disaffected newspapers and other publicity media. Another effective control was the free deportation of aliens during the war, extending even to naturalized citizens.

In addition to the foregoing, there was established by executive order of April 14, 1917, a Committee on Public Information, the C.P.I., which concerned itself with propaganda and censorship. The C.P.I. was the central agency which collected information from government agencies, including the War and Navy Departments, concerning war progress and

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23 STAT. 554 (1918).
24 STAT. 425 (1917).
25 STAT. 413 (1917).
28 As amended, its constitutionality was sustained in Lewis Publishing Co. v. Morgan, 229 U. S. 288 (1912).
29 40 STAT. 272 (1917).
activities and then prepared it in suitable form for distribution through every known media of publicity. Its activities have been summed up by Mr. George Creel, chairman of the Committee:31 “Thirty odd booklets were printed in several languages. Seventy-five million copies were circulated in America, and many million copies were circulated abroad. Tours were arranged for the Blue Devils (French soldiers), Pershing’s Veterans, and the Belgians, and mass meetings were arranged in many communities. Forty-five war conferences were held. The Four Minute Men commanded the volunteer services of 75,000 speakers, operating in 5,200 communities, and making a total of 755,190 speeches. With the aid of the volunteer staff of several hundred translators, the Committee supplied the foreign language Press of America with selected articles. It planned war exhibits for the state fairs of the United States, a series of inter-Allied war expositions, and secured millions of dollars worth of free advertising space from the Press, periodical, car and outdoor advertising forces of the country. It used 1,438 drawings prepared by volunteers for the production of posters, window cards and similar material. It issued a daily newspaper with a 100,000 circulation for official use. It ran an information service and syndicated feature articles for the Press. Plate-matter for the country Press, and specialized material for the labour, religious and women’s Press was supplied. Moving pictures were commercially successful in America and effective abroad, such as ‘Pershing’s Crusaders’, ‘America’s Answer’, and ‘Under Four Flags’. Over two hundred thousand stereopticon slides were distributed. Still photographs were prepared, and a stream of 700 pictures per day of military activities were censored. Cable, telegraph and wireless were employed by an official news service. A special mail and photograph service was also built up for the foreign Press. Reading-rooms were opened abroad, schools and libraries were fitted out, photographs were displayed prominently. Missions were sent to the important districts of the world to look after American propaganda on the spot. The service cost the taxpayers $4,912,553 and earned $2,825,670.23 to be applied on expenses.” The Committee’s policy for absolute accuracy in all of its information does not appear to have been effectuated in practice by its agents throughout the country. While unpopular, as was to be expected of an organization faced with such tasks, it accomplished its

31CREEL, HOW WE ADVERTISED AMERICA (1920).
purpose—crystallization of an indefatigable will to win.\textsuperscript{32}

The chairman of the C.P.I. was a member of the Censorship Board established by executive order of October 12, 1917, pursuant to powers granted in the Trading with the Enemy Act. Censorship was also effected by the Postmaster General, with the cooperation of the Army and Navy under the powers discussed above over means of communication, and by prosecution for violations of the Espionage Act. A special War Emergency Division was set up in the Department of Justice charged with registering enemy aliens and prosecuting sabotage and sedition. The service of the American Protective League composed of 250,000 members were used in this latter activity. Mr. Creel, as chairman of the C.P.I., seems to have acted as cooperating and liaison officer between all of these agencies. Between voluntary censorship and the threat, or invoking, if need be, of the various powers given by the war legislation described above, an effective censorship was maintained. The authority therefor was broad, complete and to all practical purposes final.\textsuperscript{33}

\textbf{Post-War Control}

The Armistice brought a general reaction in public opinion against war time restraints of all kinds. Activities of the C.P.I. in the United States, both in propaganda and censorship were stopped within 24 hours; the voluntary censorship of the press dispatches was discontinued within a few days. All forms of control, domestic and foreign, were ended within a year.

However, it became clear even before conclusion of the War that the problems involved in controlling subversive propaganda activities would not completely terminate therewith, but would be continued in a new direction to meet the unaccustomed prevalence and outspoken expression of radical ideas.

Further Federal control of this activity during the early post war


\textsuperscript{33}See Chafee, \textit{op. cit. supra} note 19, at 107; Deutsch, \textit{op. cit. supra} note 13, at 723 et seq.

For a more detailed discussion and analysis of the censorship and propaganda activities of the Federal Government during this period see \textit{Mock and Larson, Words that Won the War} (1922); \textit{Willoughby, Government Organization in War Time and After} (1919) 33; \textit{Tobin and Bidwell, Mobilizing Civilian America} (1940). It has been suggested that much was lacking in the way of a proper coordination of the censorship and propaganda activities. Swisher, \textit{Civil Liberties in War Time} (1940) 55 \textit{Pol. Sci. Q.} 321.

\textsuperscript{34}The Espionage Act was effective by express provision only until termination of the
period was brought about through indirect rather than direct means. The seventy odd bills pending in Congress at the end of the War having to do with various phases of the problems were allowed to lapse. However, the Radio Act of 1927, as amended by the Communications Act of 1934, contained broad possibilities for censorship. In spite of the specific limitation of Sections 315 and 326 of the latter act, Sections 307 and 309 which authorized the commission “if public convenience, interest or necessity will be served thereby” to refuse renewal of the license (which must be reapplied for every six months) have been and are a potent method for censorship of domestic air broadcasts. The Transportation Act of 1920, by giving the Government priority power over railroads in war time, provided a basis for censorship through withholding of supplies from disaffected parties.

During the 30's evidence of government activity directed toward the immediate problem raised by increased propaganda activities of foreign governments began to be manifest. The 1931 Industrial Mobilization Plan prepared by the War Department provided for a Director of Public Relations, but gave him no powers of censorship. Two years later the 1933 plan, in Appendix IV, specified definite functions of censorship for that agency in addition to its propaganda functions. The bitter attacks of the Nye Committee on this aspect of the plan resulted in the complete omission of reference to war-time publicity and censorship in the 1936 Plan. The 1939 Plan adopted a similar attitude.

Congress became interested in the problem. On January 17, 1931, the Fish Committee submitted its report on the investigation of communist propaganda. The Committee made numerous pertinent recommendations, none of which were adopted. On February 15, 1935, the

War, except for the two provisions relating to the powers of the Postmaster-General to censor the mails and that authorizing the issuance of search warrants for the seizure of property used in committing a felony.

See Trinity Methodist Church, South v. Federal Radio Comm., 62 F. (2d) 850 (App. D. C. 1932). Patterson, op. cit. supra note 13, at 219. Section 606 of that Act provides that the President during war time may cause the closing of any radio station.
Industrial Mobilization Plan, 1936, War Dep't Pub. 45.
Industrial Mobilization Plan, 1939, War Dep't Pub. 10. See Mock and Larson, op. cit. supra note 33, at 342.
In addition to a number of recommendations for the passage of bills amending the immigration laws and bills for the deportation of alien communists, the Fish Committee
McCormack Committee, appointed to investigate Nazi and other propaganda, made its report. Based upon the specific recommendations contained therein, Congress enacted, on June 8, 1938, "An Act to require the registration of certain persons employed by agents to disseminate propaganda in the United States and for other purposes." This act was amended by the Act of August 7, 1939, for purposes of clarification. The act, as amended, required all agents in this country having a foreign principal to file a statement with the Secretary of State setting forth certain information regarding the activities and relationship of that agent recommended: (1) Amendment of the postal laws to declare non-mailable all publications advocating revolutionary communism and the amendment of the interstate commerce laws to prohibit the interstate transportation of such publications. (2) The enactment of a Federal law to prosecute Communists or other persons, organizations or publications for spreading false rumors for the purpose of causing runs on banks. (3) The enactment of legislation declaring illegal the Communist party in the United States and any other organization advocating the overthrow of the republican form of government, or any organization affiliated with the Communist International at Moscow.

42H. R. Rep. No. 153, 74th Cong., 1st Sess. (1935). The Committee submitted the following recommendation: (1) That the Congress should enact a statute requiring all publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization, to register with the Secretary of State of the United States, and to state name and location of such foreign employer, the character of the service to be rendered, and the amount of compensation paid or to be paid therefor. (2) That Congress should enact a statute conferring upon the Secretary of Labor authority to shorten or terminate the stay in this country of any visitor admitted here under temporary visa, whenever in the judgment of the Secretary such visitor shall engage in the promotion or dissemination of propaganda or engage in political activity in the United States. (3) That the Department of State, in collaboration with the Department of Labor, negotiate treaties and agreements with foreign nations by which such nations shall agree to receive back any person entering this country from such foreign nation at any time such immigrant shall become subject to deportation under our laws. (4) That Congress should make it unlawful to advise, counsel, or urge any member of the military or naval forces of the United States, including the reserves thereof, to disobey the laws or regulations governing such forces. (5) That Congress should enact necessary legislation so that the United States attorneys outside of the District of Columbia can proceed against witnesses who refuse to answer questions, or refuse to produce documents and records, or refuse to appear or who in any other manner hold in contempt the authority of any Congressional committee vested with the powers herein described, at any time during the official, life of the committee. (6) That Congress should make it an unlawful act for any person to advocate changes in a manner that incites to the overthrow or destruction by force and violence of the Government of the United States, or of the form of government guaranteed to the several States by Art. IV, Sec. 4, of the Constitution of the United States.

with the foreign principal.\textsuperscript{45} The principal remaining recommendations of the committee were incorporated in the Alien Registration Act of 1940,\textsuperscript{46} which made it unlawful to seduce the loyalty of the armed forces and to advocate the overthrow of the government by force or violence, amended existing laws having to do with aliens, and provided for the registration of all of them. Pursuant to the House Resolution of May 26, 1938, a special committee, the Dies Committee, was appointed to investigate “un-American” activities and propaganda. That committee has made two reports,\textsuperscript{47} and is continuing its investigation prior to making its final recommendation to Congress.\textsuperscript{48} The states, during this same period, were particularly active in the enactment and enforcement of legislation designed to suppress expressions of foreign political doctrines, especially communism.\textsuperscript{49}


\textsuperscript{46}As of May 1, 1940, there were approximately 400 agents registered with the State Department under the Act. Not all of these agents were participating in the dissemination of foreign political propaganda, although it was the latter at whom the legislation was clearly directed as shown by its extensive legislative history. \textit{Hearings on H. R. 1591 before a subcommittee of the Committee on the Judiciary of the House of Representatives}, 75th Cong., 1st Sess., June 16, 1937; H. R. Rep. No. 1381, 75th Cong., 1st Sess. (1937); Sen. Rep. No. 1783, 75th Cong., 3d Sess. (1938).


\textsuperscript{49}The so-called Voorhis Act of October 17, 1940, Pub. L. No. 870, 76th Cong., 3d Sess., sponsored by Representative Voorhis, a member of that committee, further extends the legislative policy of affording the public full information upon such activities. The act requires registration of (1) every organization subject to foreign control which engages either in political activity or in civilian military activity; (2) every organization which engages both in civilian military activity and in political activity; and (3) every organization having the purpose or aim of establishing, controlling, conducting, seizing or overthrowing a government or subdivision thereof by the use of force, violence, military measures or threats thereof. Such organizations must register within 30 days from Jan. 15, 1941, the effective date of the Act. A registration form is prescribed. Supplemental statements must be filed every six months. (The file of a registration statement with the Attorney-General does not operate to remove the necessity of filing a registration statement with the Secretary of State. See Order of Att’y Gen., of January 10, 1941, (1941) 2 U. S. L. Week 2414).


These statutes were considered by the Supreme Court in a number of cases. Herndon
The Present

It is agreed that our problem is to rid this country of foreign control and pressure on public opinion, rather than to suppress foreign ideas. We must agree also that if the electorate of its free will constitutionally expresses its desire for a Communistic, Nazi, Fascist or any form of government, such would be proper. However, we do not want such a government fostered upon us against our own free will. This seems to be the crux of the subversive propaganda problem—to prevent the molding of public opinion against its will.

Looking at the past for help, we find that only during World War I did we resort to the three methods of approach which it is suggested we may utilize now, that is, (a) Education and Analysis, (b) Counter Propaganda, and (c) Censorship and Suppression, although broad measures were taken in this direction at the very inception of our government. Traditionally, we have had a sharp demarcation between our attitude and method of dealing with subversive propaganda in time of war and peace. That is natural and proper, and might be helpful in determining our method of approach at the present time, if we could clearly understand when we are at war and when at peace.

In the past, the status of war and the status of peace have been fairly

v. Lowry, 301 U. S. 242 (1937) (Ga.); Fiske v. Kansas, 214 U. S. 380 (1917); Whitney v. California, 274 U. S. 357 (1925); Burns v. United States, 274 U. S. 328 (1928) (Calif.); Gitlow v. New York, 268 U. S. 652 (1923). See De Jonge v. Oregon, 299 U. S. 353 (1931); Stromberg v. California, 283 U. S. 359 (1931). See also Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497 (1926), sustaining the constitutionality of a New York statute (CIVIL RIGHTS LAW c. 664, 1923), which required oath-bound associates to file a sworn copy of their constitutions, oaths, lists of members, etc. In only one, Herndon v. Lowry, supra, was the statute held void per se. In the Fiske, Whitney, Stromberg, and De Jonge cases, the statute was only held bad as applied. A verdict of guilty was sustained under the New York statute in the Gitlow case. The court in that case seemed to sanction the statute on the basis of an implied legislative finding of general danger which removed the necessity for proof of danger in the individual case. For a more extended analysis of these decisions, see Patterson, op. cit. supra note 13, at 182.

In Hague v. C. I. O., 307 U. S. 496 (1939), the Court had before it an indirect attempt to restrict the expression of views considered objectionable by a local municipality. A Jersey City ordinance provided, among other things, that no public parades or public assembly should take place unless licensed by the Director of Public Safety, which license was to be refused on belief by him that it would prevent riots, disturbances or disorderly assemblage. The Court held this power could be made the instrument of arbitrary suppression of free expression of views on national affairs and therefore bad. Cf. American League of the Friends of New Germany of Hudson County v. Eastmead, 116 N. J. Eq. 487, 174 Atl. 156 (1934).
well defined concepts of international law and usage, allowing a corresponding clarity in approach to the problems involved. But events of the last ten years have rudely awakened us to the fact that the line of demarcation is no longer clear. Not only has there been actual physical contact of opposing armies without the formal usual declaration of war, but there has been created that new status termed “non-belligerency”, or “extended strategy”, that is, activity short of formal warfare, in which the aggressor state launches an offensive against another by every means short of war. Included in this stage is the so-called “fifth column” offensive. From the experiences of the European Democracies this attack may be just as effective and dangerous, if not more so, than actual hostilities. Likewise, no one familiar with the facts has denied that this same method of attack is being undertaken against this country, and that as our aid to the remaining democracies increases so will efforts increase to prevent such aid. In fact, are we not already in the war to a limited extent?

These new conditions, especially in the light of the results achieved in Europe, emphasize the need of reexamining our methods of approaching the problem, perhaps even to the extent of discarding our traditional concepts of war and peace, and recognizing that new techniques and

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methods of waging warfare compel us to adopt corresponding methods of meeting them. Assuming that we view the problem as that of a country being invaded, or a country partially at war, rather than a country at peace, let us consider to what extent, and the manner in which, we might apply our three methods of meeting the problem presented by subversive activities in this country.

a. Analysis and Education

There seems to be universal agreement among those who have concerned themselves with the implications of subversive propaganda and its related activities in this country, that one of the most potent and effective ways of dealing with it is through enlightenment and education of the public—encouragement of the capacity to detect encroachment upon our constitutional guarantees.

Publicity as to its sources and methods, bringing with it the steady retribution of public opinion, has and will prove effective. The Act of June 8, 1938, as amended, requiring the registration and publication of the names and activities of agents of foreign principals is a step in this direction. The recent Voorhis amendment includes classes of organizations which might conduct un-American activities in this country with

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52 Cf. Fenwick, American Neutrality, Trial and Failure (1940) 144, 147. It is interesting to observe how, during the 1790's, Congress was driven by the continual harassment of the French to resort to what has been termed "imperfect war" and to "wage a partial war." The Eliza, 7 Cranch 113 (U. S. 1812).

53 Cf. Bridges, A Suggestion toward a New Definition of Treason (1939) 30 J. Crim. L. 470, in which the author ably points out that the various subversive activities systematically pursued in this country (note 51 supra) are modern methods of warfare, and should be considered from the viewpoint of treason rather than the guarantees of free speech. See also Stoneborough, loc. cit. supra note 50. Certainly there is no protection in the Constitution for abuses of the free speech privilege (United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 (1921)), and those who "While (ostensibly) claiming its privileges seek (ultimately) to destroy it, may well be considered to have abused their right." It is sinister irony that these liberties do not exist in the dictator countries, yet their advocates here are the ones who cry the loudest against the denial of them.

54 Legislative investigating committees are an effective means of disclosing the sources and ramification of these activities. See the case of Dr. Colin Roll who left this country following such publicity. Washington Post, Aug. 30, 1940, p. 1. Note also the departure of Dr. G. A. Westrick following press publicity as to his activities in this country. Washington Post, Aug. 12, 1941, p. 1. See also Wm. C. Bullit's speech, N. Y. Times, Aug. 19, 1940, 4C, warning this country of its dangers in the light of the history of Europe.

55 Note 44 supra.
disclosure of their activities and expenditures. The fact that there have been no registrations under this amendment indicates the difficulties of legislating effectively, for it is hard to imagine that there are no organizations which should have registered. 56

Complementary to and as a part of the program of publicity and education there might be created a Federal agency or unit charged with the responsibility of making a careful, continuing study and analysis of subversive propaganda activities in this country. Recommendations and reports should be made to a responsible executive officer. 57 An exhaustive study of attempts of European democracies to meet this same problem and ascertainment of where they failed would be helpful. 58

b. Counter Propaganda

From here on we move into a field of greater controversy. One suggestion is the formulation of a basis and program for the dissemination of counter propaganda. It is said that we are living in an age of competing propagandas. 59 Since subversive propaganda is being directed against us, why (unless we can interdict that propaganda) is not the logical thing to do in such a situation to meet fire with fire. For instance, students of public psychology seem to agree that a systematic, continuous flow of propaganda directed at undermining and destroying the public feeling of security must necessarily be met by constant reassurance in order to maintain public morale. 60 Unless such a counter-attack is properly timed we may very well discover that we have too long underestimated the new technique and remained inactive while irreparable damage is done. 61

56See note 48. Postmaster General Walker has just announced that 75,000 pieces of foreign propaganda mail has been confiscated in two months on the ground that it was non-mailable because emanating from agents who have not registered. He expects this to result in many registrations. Recent indictments of agents for failing to register indicate that this legislation is a double-edged weapon.

57This unit could effectively utilize and cooperate with efforts now being made by numerous responsible private, local and educational groups in this direction. This creation of such a unit was recommended by the Federal-State Conference on Law Enforcement Problems of National Defense, held at the Department of Justice, Washington, D. C., Aug. 5-6, 1940.

58See Loewenstein, loc. cit. supra note 50.

59See Doob, op. cit. supra note 2, at 405.

60Hadley, Psychiatric Considerations Bearing on Censorship and Propaganda, Psychiatry (Nov. 1940). See also Foster, Censorship as a Medium of Propaganda (1937) 22 Sociology and Social Research 57, 65.

61See Doob, op. cit. supra note 2, at 146.
Such a work might, to a limited extent, be of the nature of the Creel Committee, but would confine itself to emphasizing and dramatizing "Americanism" and giving publicity to the various subversive activities and techniques disclosed by the program suggested in part (a) above. Its purpose would be to build a strong national unity which would permit of effective and decisive action.\(^6\)

The personnel for this work might be different from that of the Creel Committee, which was composed largely of men drawn from the newspaper and allied fields. In keeping with the advances made in propaganda technique, its executive head should be surrounded by sociologists, social psychologists, students of public opinion in various fields and experts in communication media. All would coordinate planning, strategy and timing of the program.

c. Censorship

If we could cut ourselves off from the inflow of foreign subversive propaganda and suppress activities of individuals and groups disseminating it from within the country there would be little need for use of the methods suggested above. This could to a large extent be accomplished by a strict enforcement of existing "war-time" legislation, State and Federal, and the enactment of certain additional legislation. If we are to view ourselves as a country already partially in the war, this would seem to be proper, and may be the solution if rapidly changing conditions produce the exigency.

In any event, there are certain things which we can and should do now. In the first place there is no doubt that the most effective censorship is subjective rather than objective.\(^6\) Accordingly, if, as a result of proper education, analysis and counter propaganda the public mind is sufficiently educated, it will build its own resistance to subversive propaganda. As an example, if the directors of the various media of communication such as the newspapers, radio and movies voluntarily take it upon themselves to give prominence and emphasis to morale building material

\(^6\)Much effective work is being done along this line at the present time by private groups such as the American Bar Association, and individuals. This should be stimulated and encouraged so that the sheer weight of this movement would leave no room for public consideration of subversive material. For a wartime picture of C. P. I. activities and a blue print for tomorrow's C. P. I., see Mック and Larson, \textit{op. cit. supra} note 33, at 337.

\(^6\)See note 60 \textit{supra}. 
and minimize or delete subversive material much will be accomplished.\textsuperscript{64}

Secondly, there is certain existing Federal legislation, a strict enforcement of which would put a stop to the dissemination of much subversive propaganda. Prosecutions under the Act of January 30, 1799, as amended and reenacted,\textsuperscript{65} which makes it unlawful for any citizen of the United States to carry on intercourse with any foreign government or agent with intent to defeat the measures of the United States, would be helpful in breaking up "Trojan Horse" activities by citizens.

A vigorous enforcement of Sections 1 and 2 of Title I of the Alien Registration Act, 1940,\textsuperscript{66} would increase its effectiveness in preventing seduction of the loyalty of the armed forces and in suppressing propaganda which advocates overthrow of the government by force or violence.\textsuperscript{67} More strict application of power to deport aliens covered within the existing Federal law\textsuperscript{68} might be effective in rooting out some subversive propaganda agents.\textsuperscript{69} The Registration program provided for in the Alien Registration Act of 1940\textsuperscript{70} will be helpful. Publicity will also assist to accomplish the desired result.\textsuperscript{71}

Section 1 of Title XII of the Espionage Act,\textsuperscript{72} which declares mailable all material violating any of the prohibitions of that Act, is operative now. In view of the scope of those prohibitions,\textsuperscript{73} a rigid enforcement of this provision of the law might go far to stop certain

\textsuperscript{64}It is clear that this type of censorship goes on every day in varying degrees in connection with religious and political questions, but it should be encouraged and extended along the lines suggested above. However, due to the competition among newspapers, this may not be entirely satisfactory. The recent suggestion that newspapers withhold information concerning the presence of damaged British warships in our repair docks, has resulted in a voluntary request by many newspapers for government censorship as more practical.

\textsuperscript{65}See note 9 supra.

\textsuperscript{66}See note 45 supra.


\textsuperscript{68}See note 30 supra.

\textsuperscript{69}The diplomatic immunity afforded embassy and consular officials should be reexamined in the light of current activities of these calls. See Dorothy Thompson, Nazi Foreign Missions (1937) 3 Vital Speeches 712. The Havana Conference of Pan American Foreign Ministers adopted a resolution recommending "uniform" restriction of the privileges and immunities of diplomats and consuls in an effort to check subversive activities. N. Y. Times, July 28, 1940, p. 1.

\textsuperscript{70}See note 45 supra.

\textsuperscript{71}See note 54 supra.

\textsuperscript{72}See note 18 supra.

subversive propaganda material probably even now flowing through the mails.\textsuperscript{74} As pointed out above,\textsuperscript{75} the Radio Act of 1927, as amended, contains possibilities for barring questionable programs from the air. Reenactment of a provision similar to Section 19 of the Trading with the Enemy Act\textsuperscript{76} requiring translation of matter published in a foreign language to be furnished to the proper authorities also might be of assistance in combatting the unseen forces of the enemies of democracy.

So far as new legislation is concerned, the recent recommendation of the Postmaster General for complete disclosure of foreign activities indicates the trend of thought today. Legislation requiring: (1) all foreign propaganda to be properly labeled and copies to be filed for inspection by the government and the public; (2) information stating the source of the material to be published thereon; (3) and names and addresses of the recipients to be made available, at least, to public officials, are suggestions which Congress soon should consider.

\textbf{CONCLUSION}

The immediate adoption of a program to counteract subversive propaganda, placing primary emphasis on publicity and information, the keystones of intelligent and effective action by a democracy, coupled with that vigorous enforcement of existing legislation which our present activity in the world struggle warrants, should, if properly administered and coordinated, go far toward defeating this elusive attack. We must bear in mind, however, that in order to rid the country of fertile fields for the sewing of subversive propaganda, ultimately we must solve the economic and social problems raised by poverty in the midst of possible plenty. The propaganda of acts is stronger than that of words, and a strong, healthy citizenry will leave no room for preying upon its psychology with illusory promises of betterment.


\textsuperscript{75}See note 13 \textit{supra}. The international and domestic radio technique should be given immediate attention. Study of this propaganda media is now being made by the Princeton Listening Center, Princeton University.

\textsuperscript{76}See note 24 \textit{supra}.
JUDICIAL REVIEW AS A SAFEGUARD TO DEMOCRACY

C. Perry Patterson*

I. Definition of the Subject

The examination of this thesis is inherently subject to certain limitations. It does not question the possibility of democracy, nor does it require an inquiry into its social or political nature. In an uncritical sense it could be defined as "government of the people, by the people, and for the people." The word is used in its idealistic connotation and is, therefore, hypothetical in character.

A constitutional democracy is assumed by the subject. Also the Constitution would have to be the supreme law of the land and the courts would have to be given jurisdiction of all cases arising under the Constitution before there could be judicial review with sufficient scope to prevent legislative and executive usurpation. The Constitution would have to be written to distinguish it from conventions which are of a political nature only and are, therefore, not subject to judicial enforcement. The Constitution could not be made by the ordinary legislative process because legislative supremacy would be inherently established. The Constitution would have to be enacted by popular sovereignty in order to have the character of a fundamental law in contrast with a mere legislative act. When the question of how the Constitution of the United States was to be ratified, whether by legislatures or by conventions, was being debated in the Federal Convention of 1787, James Madison, the father of the Constitution, made the following explanation: "He considered the difference between a system founded on Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. (1) A law violating a treaty ratified by a preexisting law, might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges null and void. (2) The doctrine laid down by the law of the nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagement. In case of a union of people under one constitution, the nature of the pact has

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always been understood to exclude such an interpretation. Comparing
the two modes in point of expediency he thought all the considerations
which recommended this Convention in preference to Congress for pro-
posing the reform were in favor of state conventions in preference to the
legislatures for examining and adopting it.”

It is clear from this quotation that Madison felt that unless the
Constitution was made a fundamental law rather than a treaty between
independent states judicial review would be upon doubtful grounds. He
said: “A law violating a treaty . . . might be respected by the judges as a
law,” but “a law violating a constitution established by the people them-
selves, would be considered by the judges as null and void.” The con-
vention adopted Madison’s proposal for ratification and the Congress
and the state legislatures acquiesced, the Articles of Confederation to
the contrary notwithstanding. Thus was established what John Marshall
called the “Great Revolution.”

The subject refers to judicial review as a safeguard. It means, there-
fore, a safeguard to a democracy organized by a constitution which is
the supreme law of the land. Such a democracy is a limited democracy.
It has agreed to live by the constitution. Even in changing the constitu-
tion it is limited to the amendment process which is a part of the supreme
law of the land. The kind of democracy, then, that is under consider-
ation is one in which both the governors and the governed in both their
individual and collective capacity are limited by an organic supreme law.

It is seen then that judicial review as an aid in maintaining this type
of political order is an agency of law enforcement. The limitations which
it enforces are not its own, constitutionally speaking, but have already
been provided in the Constitution. Judicial review, then, in its constitu-
tional character is not a limitation upon government or its citizens in-
dividually and collectively, but a mere device for the enforcement of
limitations provided by a paramount law.

4Ibid. (Italics supplied).
5Barron v. Baltimore, 7 Pet. 242, 249 (U. S. 1833). In another case Marshall, speaking
for the Supreme Court, defined this revolution. Speaking of the states prior to the adop-
tion of the Constitution, he said: “This is true. But when these allied sovereigns converted
their league into a government, when they converted their Congress of Ambassadors, de-
puted to deliberate on their common concerns, and to recommend measures of general
utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole
character in which the states appear, underwent a change, the extent of which must be
determined by fair consideration of the instrument by which that change was effected.”
Gibbons v. Ogden, 9 Wheat. 1, 3 (U. S. 1824).
The courts in enforcing a paramount law act in the same way as they do in enforcing a statutory law. If they misinterpret statutory law in Great Britain, as they do at times, according to Parliament, it becomes the business of the Parliament, the supreme law-making agency, to repeal the decision of the courts by clarifying the law. Likewise under judicial review, if the courts misinterpret the will of the supreme law-makers, it is their constitutional right to restore the Constitution or to modify it if they dislike its judicial interpretation.

The two systems are both alike and unlike in several respects. In each the courts interpret the supreme law of the land, though in the one instance it is the acts of Parliament and in the other the acts of the people. In each instance the courts are forced to give meaning to the supreme law and this meaning is binding on the nation and individuals until the supreme law-making agent changes it or the courts themselves change it. In Great Britain the courts interpret the supreme law alone, since the acts of the Parliament and the supreme law are the same, whereas under judicial review the courts must interpret both the supreme law and the acts of the government. Under judicial review the courts in considering a case involving only the Constitution would be exactly in the same position as the courts in Great Britain always are.

In final analysis the subject is not restricted to a federal democracy. Its scope is not limited by the unitary or composite form of organization though in the latter the scope of judicial review would presumably be somewhat larger though the scope of judicial review is itself subject to the Constitution. In our system it is restricted to cases because judicial power is restricted to cases. In the Weimar Constitution of the late German Republic it was restricted to the acts of the states, which arrangement proved to be a weakness of the German Democracy. While judicial review in our system is limited to cases, the Congress has the power to limit the cases in the appellate jurisdiction of the Supreme Court. In my humble opinion this is a weakness in our system.\footnote{Ex parte McCordle, 7 Wall. 506 (U. S. 1869).} While the Congress by using this power could not free itself from judicial review, it would in effect make the inferior federal courts and the state courts into supreme courts and give as wide diversity to constitutional law as there were differences in the judicial opinions of the various jurisdictions. It would be tantamount to abolishing the supreme law of the land by abolishing its uniformity and establishing pluralism.
II. The Search for Devices as Limitations Upon Government

Since, at least, the days of the Roman Republic man has been searching for effective devices with which to protect himself against governmental despotism. If there is any one thing about which history has rendered an unanimous verdict, it is the importance of the enforceable limitations upon government. James Bryce once said government is always by a few, whether in the name of one, few, or many. This is inherent in the problem of government, regardless of what theory of governmental organization may be devised. Harold J. Laski says: "The one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and they assume that the good of the community depends upon the continuance of this power. Liberty always demands a limitation of political authority, and it is never attained unless the rulers of a state can, where necessary, be called to account."

History has repeatedly demonstrated that theoretical and political limitations are inadequate because they cannot be enforced except by revolution or force. English experience, which is always interesting and suggestive, is very instructive in this matter. Undoubtedly England's greatest contribution to mankind is liberty. This result was achieved by the development of limitations upon political authority. The first problem was to limit the King. Their first method was judicial review. This method was asserted by Chief Justice Coke in Dr. Bonham's case in 1612. After an altercation with the King the Chief Justice and his colleagues were dismissed. If the English judiciary of this time had been independent of executive authority there is reason to believe that English political development might have been very different from what it has been.

The failure of the courts left this problem to the Parliament. The result was several depositions and executions of Kings, a civil war between the Parliament and the King—the use of force, in other words—and finally the Bill of Rights in 1689, asserting the supremacy of Parliament. Since the courts from their very nature could not use force, the Parliament alone was capable of solving the problem in the absence of a fundamental law enforceable by independent courts.

Their next problem was to limit the powers of the House of Lords. In

*Laski, Liberty in the Modern State (1930) 12 (italics supplied).*
this matter they first relied on convention. For more than a hundred years the House of Lords had not changed the budget of the Government. This practice was considered to have hardened into a convention binding the legal power of the Lords, the violation of which would be revolutionary. Still, notwithstanding, convention did not bind.

The next expedient was to resort to the American practice of making the relation of the Lords to the Commons a matter of constitutional law by passing the Reform Bill of 1911, fixing the supremacy of the Commons in budgetary matters. Here is registered the failure of convention as a constitutional basis upon which the English have placed their major emphasis.

Their present problem is to limit the powers of the Cabinet which exercises the powers of both the Executive and the Parliament and which is, according to one of the best authorities on English government and politics, a dictator. By its power of dissolution of the Commons and its control of a highly centralized party system it has, according to Muir, destroyed representative government. If this be true, the English have restored executive government and are, in this respect, practically where they were in the seventeenth century. They have substituted a plural for a single executive and in this change have broadened the character of the executive, but they have also added to its power. It is easier for a Ministry of sixty able politicians with almost an absolute grip on the voters through a highly centralized party organization to maintain itself than it was for a monarch without popular support. The modern dominant tendency toward national collectivism, which tends to make the suffrage into a plaything for the politician, demands autocratic power for its fulfillment.

The two most able authorities on the English system, Ramsey Muir and Prof. Harold J. Laski, think that Great Britain is under the control of an oligarchy. Professor Laski has voiced the apprehension that a conservative cabinet would refuse to retire if Labor should capture a majority of the House of Commons at a general election. Since the program of Labor calls for the abolition of the House of Lords and the nationalization of private property, he thinks a conservative government would ask the King for a dissolution in order to have a referendum

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4Muir, How Britain is Governed (1930) 87-115.
4a Ibid.
on such an important change in the constitution. Of course, the Lords themselves could suspend such a program for two years, since budgetary matters are not involved. Any Parliament has the right to extend its term of office indefinitely. The Government of the Day and its majority in the Commons would have a commercial interest in this matter.

It is clear from this discussion that conventions as a limitation on government will be respected only so long as they conserve the interests of the government. There is nothing to prevent an English Government, if it should sense defeat at the ballot box, from changing the constitution into a totalitarian state and perpetuating itself in power. Great Britain will not readily acquiesce in the abolition of the House of Lords and nationalization of private property. It may have to resort to a coup d'etat to prevent it. This could result in civil war. The conclusion is forced, therefore, that Great Britain as yet has evolved no effective constitutional guaranty or safeguard for her democracy.

The experience of the French in searching for safeguards against autocratic power is both interesting and instructive and the results are not satisfactory for either a governmental system or guaranties for democratic institutions. The despotism of the seventeenth and eighteenth centuries, and of the regimes of Napoleon I and III have poisoned their minds against executive and judicial agents. They cannot forget that an executive dismissed their legislative body for 175 years and then used the Parliament (the supreme court) to register his decrees as law. Centuries of their history reveal the executive and the judiciary as agents of tyranny. Naturally they turned to parliamentary government as a limitation upon executive and judicial authority. Since the political executive lacks the power of dissolution, France has provided a stronger position for representative government than any other nation in the world.

Many Frenchmen realize that their system is not well balanced. They know that their executive is too weak and that personal rights despite the Declaration of Rights of Man are dependent for their security upon the grace of political power. They have attempted repeatedly to remedy these defects by amendments, but since the amendment process is in the hands of the personnel of the Parliament and since such amendments would mean limitations upon legislative authority, they have naturally failed.

The movement for the establishment of judicial review upon even a broader basis than in the United States is gradually making headway.
In 1928 a very famous treatise on judicial review was published by a distinguished avocat in the Cour d'Appel of France. In this treatise he has the following to say:

"From this comparative study of the American and French constitutional systems, it is possible to see that there is a governmental principle in both countries which demands some method of passing upon the constitutionality of laws. That principle is that rigid constitutions require independent tribunals to pronounce the law. In the United States, historical precedents encouraged and foreshadowed the establishment of judicial control. But in France, tradition was opposed to it and has operated as a powerful influence to prevent its establishment. The records of the early parliaments instead of supporting a system of judicial review, have served as a warning against it each time the judiciary has been reorganized. The legislative power, which in the United States was made subject to the Constitution and placed on a level with the other branches of government has, in France, been made the center of our governmental system. It became a privileged body; in practice it continues to be. That is one of the principal reasons why France has rejected the theory of judicial review. Without discussing further the merits and demerits of the arguments against such a system, it is possible to suggest certain conclusions which appear to be valid not only for the United States and France, but for all countries with similar constitutional structures:

"(1) Judicial control of legislative acts is a normal attribute of rigid constitutions which are designed to remain superior to ordinary legislation.

"(2) The legislative body ought not to exercise any power of the ultimate sovereign. The legislative power is created in the same manner as the executive and the judicial. It, like the others, should be subject to law, and particularly to the higher law of the constitution.

"(3) Law is to be simply the statement not the creation of tribunals, civil or administrative.

"(4) The ordinary courts are best qualified to pass upon the constitutionality of laws. They possess this qualification because they are in a position to see that the superior law is enforced above the inferior.

"(5) The law which the judges ought to enforce should consist first of the written constitutional laws. These laws are sufficient in countries whose constitutions are very comprehensive, as in the United States, but in France, under the Constitution of 1875, where the laws of legislative procedure are brief and simple, the guardianship of the courts should be extended not only to written but customary constitutional principles. Of the latter, here are examples: Most of our modern liberties, formerly protected by successive Declarations of Rights; the principle of the separation of powers, the prohibition against ex post facto laws, the provision for annual budgets, etc.

"The constitutional practice of judicial review should be introduced into France. It has functioned long and well in the United States and has been adopted in more and more countries. In this book it has been the aim to pre-
pare the ground for it and to show that it should no longer be opposed. In fact, conditions have become more and more favorable to it. . . .” 7

Further light on the importance of judicial review as a safeguard of democracy may be gained by briefly calling attention to the experience of our forefathers in the British Empire and the sad fate of the German people under the Weimar constitution of the late German Republic. It will be recalled that the American colonial governments were subject to judicial review. Their charters and the common law were to them the supreme law of the land and their legislative acts were null and void if they did not conform to this law. The Judicial Committee of the Privy Council, the supreme court of the Empire, as well as the Courts of Westminster Hall exercised the power of judicial review very extensively. 8 “In all,” says Evans, “8,563 acts of the Colonies which later formed the United States were submitted to the Privy Council, of which 469 were disallowed.” 9 Besides direct appeals to the Privy Council for the validation of colonial enactments, there were more than 260 appeals of cases from the colonial courts to the Privy Council. 10

Sir Charles Pratt (later Lord Camden), Attorney General of Great Britain, speaking of the right of the King to set aside particular clauses of colonial legislation in opinion given August 19, 1760, explained the difference between the council as an administrative body advisory to the King and as a judicial body or court as follows: “At the same time we are of the opinion that there may be cases in which particular provisions may be void ab initio though other parts of the law may be valid, as in clauses where any act of Parliament may be controverted or any legal right of a private subject bound without his consent. There are cases the decisions of which do not depend on the exercise of a discretionary prerogative, but may arise judicially and must be determined by the general rules of law and the constitution of England. And upon this ground it is, that in some instances whole acts of assembly have been declared void in the courts of Westminster Hall, and by His Majesty in Council upon appeals from the plantations.” 11

7Blondel, Le Controle Jurisdictionel de la Constitutionale des Lois (1928) 374 et seq.
8Schlesinger, Colonial Appeals to the Privy Council (1914) 28 Pol. Sci. Q. 279.
9Evans, Cases on American Constitutional Law (1938) 20.
11Id. at 21. See also Hazaltine, Appeals from the Colonial Courts to the King in Council (1894) Annual Report, Am. Hist. Ass’n 299.
It thus happened that, while the acts of the colonial governments were subject to judicial review, the acts of Parliament were not, despite the fact that a few of its acts were held unconstitutional by colonial courts. While this right was repeatedly asserted, it was never recognized by the home government. The result was the usurpation of the rights of local government by the King in Parliament. Failing by means of fifteen years of debate, repeated petitions, economic boycotts, and two years of actual fighting to reverse the policy of the home government and being denied the right to test the constitutionality of its acts, there was nothing left but to revolt. In all probability, a well recognized division of powers with judicial review to maintain it would have prevented revolution.\textsuperscript{12}

Professor Hugo Preuss contended in the Weimar Convention for the adoption of judicial review of both federal and state legislatures, but the Convention decided against him, restricting the application of the principle to the legislation of the states. Legislative supremacy was granted to the Federal Parliament. Since the Parliament could change the Constitution, the application of judicial review to state legislation meant that such legislation in conflict with federal legislation was null and void.\textsuperscript{13} The result was the abolition of the states by the Reich and the establishment of totalitarianism.

III. \textsc{Self-Imposed Limitations on Judicial Review as an Agent of Control}

1. Judicial review must be distinguished from judicial supremacy. It is a judicial rather than a legislative process and must in theory be differentiated in function from that of a Council of Revision which Madison and Wilson so persistently advocated in the Federal Convention and to which all the acts of both the Congress and the state legislatures had to be submitted before they went into effect. The Council of Revision would have been a legislative body and would have been a third

\textsuperscript{12}James Madison said: "The fundamental principle of the Revolution was that the colonies were coordinate members with each other, and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American parliament as in the British Parliament, and the royal prerogative was in force in each colony by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgement there. A denial of these principles by Great Britain and an assertion of them by America produced the Revolution." \textit{6 Madison, Works} (Hunt ed. 1900) 373.

\textsuperscript{13}\textsc{Oppenheimer, The Constitution of the German Republic} (1923) 166-175.
house for both the nation and the states. This distinction was clearly recognized in the Federal Convention. Gerry of Massachusetts opposed the Council of Revision, saying: “They [the judges] will have a sufficient check against encroachments of their own department by their exposition of the laws, which involved a power of deciding on their constitutionality.”

George Mason of Virginia, an advocate of a Council of Revision, said: “He would reply that in this capacity they could impede, in one case only, the operation of laws, they could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive, or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wishes the further use to be made of the Judges, of giving aid in preventing every improper law.”

It is clear from the debates in the Convention that judicial review is limited to the question of constitutionality of legislation.

2. Since the jurisdiction of the courts is restricted to cases, it is clear that the question of constitutionality can be raised only in actual cases or controversies. As Marshall said, “the judicial power,” does not extend “to every violation of the Constitution.” Here is a double limitation, in fact: first, to cases, and second, by the disposition and financial ability of litigants to bring cases into court. Of course, the proper drafting of legislation would still further reduce the possibility of cases.

3. The restriction of judicial review to the exercise of judicial power has excluded advisory opinions and political questions. Advisory opinions were excluded by the Supreme Court under the chief justiceship of John Jay in an opinion to President Washington in 1793. This question was thoroughly reexamined by the Court under Chief Justice Taney and, in an opinion never published as a decision of the Court, it said, speaking through the Chief Justice in his last judicial utterance: “The power conferred upon this court is exclusively judicial, and it cannot be required or authorized to exercise any other.”

This limitation tremendously restricts the influence of judicial review, by excluding political questions and advisory opinions from its consideration.

The political question first arose in connection with the Dorr Rebellion in Rhode Island. It was attempted to induce the Supreme Court to de-

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34II Farrand, op. cit. supra note 1, at 97.
35Id. at 76. (Italics supplied).
36Cohens v. Virginia, 6 Wheat. 264, 405 (U. S. 1821).
373 The Correspondence and Public Papers of John Jay (1890-1893) 486.
cide which of two governments in Rhode Island was republican in character. The Court held that this was a political question and exclusively in the jurisdiction of the Congress.\textsuperscript{19} There are in all our constitutions a great many provisions which cannot be judicially enforced. All provisions which provide for the discretion of either the executive or legislative agents cannot be subjected to judicial interpretation. In this field there is executive and legislative supremacy, limited only by expediency.

4. Moreover, there is an entire code of limitations which judicial process has felt is necessary as a matter of policy. These limitations constitute a judicially made constitution for the exercise of judicial review and may be regarded as inherent limitations upon the exercise of this power. It is worthwhile to notice some of these limitations as they further show how widely judicial review differs from judicial supremacy:

a. There is always the presumption of validity in favor of the statute. This presumption must be overthrown "beyond all reasonable doubt" before the statute is held void. During Marshall's chief justiceship the Court said: "It is but a decent respect due to the... legislative body by which any law is passed to presume in favor of its validity until the violation of the Constitution is proved beyond all reasonable doubt."\textsuperscript{20} Chief Justice Waite, speaking for the Court said: "The declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt."\textsuperscript{21}

b. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding. Justice Brewer, speaking for the Court, said: "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts.

\textsuperscript{19}Gordon \textit{v.} United States, 2 Wall. 561 (U. S. 1864), and 117 U. S. 697 (1885).
\textsuperscript{20}Luther \textit{v.} Borden, 7 How. 1 (U. S. 1849). See Mississippi \textit{v.} Johnson, 4 Wall. 475 (U. S. 1867); Pacific States Telephone and Telegraph Co. \textit{v.} Oregon, 223 U. S. 118 (1912).
\textsuperscript{21}Ogden \textit{v.} Saunders, 12 Wheat. 213, 270 (U. S. 1827).
\textsuperscript{a}Sinking Fund Cases, 99 U. S. 700, 718 (1878) (Italics supplied).
It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.  

C. The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it. . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”

d. If a case can be decided on either of two grounds, one involving a constitutional question and the other the construction of a statute or general law, the court will decide the case on the latter basis. Appeals from state Supreme Courts challenging their decisions on constitutional grounds are frequently dismissed because they can be sustained on independent state grounds.

e. The Court will not pass on the validity of a statute upon a complaint of one who fails to show that he has been injured by the statute. This denial extends to one who lacks a personal or property right. A public official interested in only the performance of his official duties cannot challenge a statute about which he has constitutional quibbles. The dismissal of a suit brought by a citizen to test the constitutionality of the Nineteenth Amendment was affirmed. The Court refused to permit the Commonwealth of Massachusetts to challenge the constitutionality of the Federal Maternity Act on behalf of its citizens.

f. When the validity of an act of the Congress is questioned, even though a serious doubt of its validity is raised, the Court will first ascertain whether a construction of the statute is possible without passing on its constitutionality.

g. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

h. The Court will not inquire into the motives of legislative bodies,\(^30\) nor attempt to separate motives from intent or purpose in favor of the validity of legislation.\(^31\)

i. The validity of an act depends upon its actual operation and effect as applied and enforced rather than upon its form.\(^32\) Substance and not form is basic in construing legislation.

j. The Court restricts the effects of its decisions to partial unconstitutionality when the separation of the constitutional from the unconstitutional parts of a statute is possible. A presumption of divisibility was created when a statute, in a recent case, provided: “If any provision of this act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the act and the applicability of such provision to other persons and circumstances shall not be affected thereby.”\(^33\)

k. Constitutional guarantees are considered “waived, unless the objection is seasonably raised.”\(^34\) The objection “must be raised at the first opportunity presented in the conduct of the case.”\(^35\)

l. The Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”\(^36\)

m. The effect of invalidity of a statute varies with the nature of the statute. If it is worded so as to apply to a fixed set of facts beyond the jurisdiction of the legislative body it is totally void. The language of the Court is: “An unconstitutional statute is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”\(^37\) If however, the statute permits inclusion and exclusion of any particular set of facts or circumstances, “the decision affects the

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\(^{30}\)Arizona v. California, 283 U. S. 423 (1931).
\(^{31}\)Hammer v. Dagenhart, 247 U. S. 251 (1918).
\(^{34}\)Tari v. State, 117 Ohio St. 481, 496, 159 N. E. 594, 599 (1927).
\(^{35}\)Magill v. Boatmen’s Bank, 250 S. W. 41, 42 (1923).
parties only, and there is no judgment against the statute."38 "A statute may be invalid as applied to one state of facts and valid as applied to another."39

It is clear from this discussion that judicial review is far from judicial supremacy. The great bulk of legislation never comes in contact with judicial review, and a large amount of litigated legislation is sustained in whole or in part. Of more than 45,000 acts of Congress passed since its creation, only 71 by August 30, 1935, had been held unconstitutional in whole or in part.40 Of these only about 18 can be said to have been acts of broad policy really affecting the life of the nation.41 This is why Mr. Justice Holmes said: "The United States would not come to an end if we lost our power to declare an Act of Congress void."42 Of course, this is a statement of a nationalist, rather than of a federalist, made prior to recent developments. He saw the problem of maintaining our federalism as primarily a matter of restraining the states. Even if one admitted that this has been true to the present, it would not necessarily follow that it will continue to be true. In fact, if the states are preserved at all, it is evident that the problem for the future will be the restraining of the Congress. Mr. Justice Holmes had fought for the Union as had John Marshall. He said: "The thing for which Hamilton argued, and Marshall decided and Grant fought, and Lincoln died, is now our cornerstone."42a He never ceased to believe that the dangers to the Union lay in the dogmatism of state rights. After making the statement that the Union could survive without the right to declare the acts of Congress unconstitutional, he said: "I do think the United States would be imperilled if we could not make that declaration as to the laws of the states."42b

The effect of judicial review on state legislation can only be approximated. Many more acts of the states have been invalidated because there are many more legislatures involved. It is claimed that there are two million statutes and ordinances on the American statute books. In about 40,000 decisions of the Supreme Court from 1790 to 1911, 223

38Shephard v. Wheeling, 30 W. Va. 479, 483, 4 S. E. 635, 637 (1887).
40Const. Ann. (1938) 1065 et seq.
41Warren, Congress, the Supreme Court, and the Constitution (1925) 275-301.
42Address before Harvard Law School Association, Feb. 15, 1913; Speeches of Oliver Wendell Holmes (1913).
42aHolmes, Collected legal papers (1920) 270.
42bIbid.
acts of the states were declared unconstitutional,43 and from 1911 to 1938, 408 of their acts were nullified.44 While there are no statistics as to the number of statutes invalidated by state supreme courts, it is true that they rarely hold legislative acts unconstitutional, because their judges for the most part are popularly elected. Madison fully realized the limitations of judicial review as a means of preventing legislative usurpations. This is why he insisted on a Council of Revision. He said that in cases of “usurpation and abuses on the part of the United States the final resort within the purview of the Constitution lies in an amendment to the Constitution according to a process applicable by the states” and that “in the event of failure of every constitutional resort, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact to original rights and the law of self-preservation.”44a

IV. THE ADVANTAGES OF JUDICIAL REVIEW

1. Judicial review develops the principles and the philosophy of a constitution. The nature of our Constitution was early developed by the Supreme Court. The Constitution, said the Court, was not a document of details, partaking of “the prolixity of a legal code,” but consisted of “great outlines” and “important objects,” “the minor ingredients” of which were to “be deduced from the nature of the objects themselves.”45 It was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”45a “We must never forget,” said the Court, “that it is a Constitution we are expounding.”45b “It would have been an unwise attempt,” said the Court, “to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly. . . .”45c

Here is a liberal philosophy of the fundamental law. It is a “constitution,” not a “legal code”; “great outlines,” not “immutable rules”; “important objects,” not “minor ingredients”; “intended to endure for ages” and “to be adapted to the various crises of human affairs.” It has

43Moore, The Supreme Court and Unconstitutional Legislation (1913) 139.
44United States Supreme Court Cases Declaring State Laws Unconstitutional, 1912-1938 (1938) 1-15.
44aId., at 15.
44bMadison, op. cit. supra note 12, at 398.
44cMcCulloch v. Maryland, 4 Wheat. 316, 407 (U. S. 1819).
45Id., at 415.
45aId., at 407.
45bId., at 415.
been this philosophy of implied powers which has made it possible for the Constitution to be a progressive and living document. It is now true that the great bulk of the present functions of the national government is based upon implied powers. It is doubtful that this development could have been achieved by the amendment process. Judicial review may be said, therefore, to have furnished the life blood of the Constitution.

The radical character of this decision shocked the nation. Luther Martin, a delegate to the Federal Convention, author of the Supreme-Law-of-the-Land clause of the Constitution, and the chief counsel for the state of Maryland, said in his argument before the Court that “we are asked to engrat upon it [the Constitution] powers ... which were disclaimed by them, [the advocates of the Constitution] and which, if they had been fairly avowed at the time, would have prevented its adoption.”46 Hezekiah Niles said: “A deadly blow has been struck at the sovereignty of the states, and from a quarter so far removed from the people as to be hardly accessible to public opinion. ... The welfare of the union has received a more dangerous wound than fifty Hartford Conventions ... could inflict.” Some parts of the opinion, he declared, are “incomprehensible.” “But perhaps, as some people tell us of what they call the mysteries of religion, the common people are not to understand them, such things being reserved only for the priests!”47

In a later decision in discussing the nature of the subject matter of the commerce clause the Court said that “the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule ... ; and some ... as imperatively demanding that diversity, which alone can meet the local necessities of navigation. ... Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.” But on the other hand, if the subject matter was “local and not national,” it could best be “provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities. ...”48

Here is a rule as progressive as society itself. Whenever the subject

46Id. at 373.
4716 Niles' Register (1819) 41-44.
matter becomes national in character, it passes to the jurisdiction of the Congress. This is why a subject matter may be held on one side of the line of federalism at one time and fifteen or twenty-five years later held to be on the other side of this line with perfect consistency. This is the rule by which eighteenth century provincialism became nineteenth century nationalism.

This doctrine adapted the Constitution to the actual structure of society. It permitted the states to regulate incidental features of interstate commerce in the seventies and eighties just as later it permitted the Congress to regulate incidental features of intrastate commerce. This is sometimes called the formula of "superior fitness and propriety." Its application is determined by the nature of the subject matter or a factual situation. The swing toward nationalism in this doctrine came in 1886 when Mr. Justice Miller, speaking for the majority of the Court, said: "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might chose to impose upon it, that the commerce clause was intended to secure." The dissent in Peik v. Chicago & Northwestern Ry. had become the law in Wabash Railroad v. Illinois, not because of the change of principle but of subject matter.

This formula of "superior fitness" is closely akin to the doctrine of what directly and substantially affects interstate commerce is subject to national regulation. It differs from it in that the latter is exclusively nationalistic. Here doctrines combined with the principle of prohibition of articles "intrinsicly injurious" to health, morals, and honesty, and the tremendous expansion of the connotation of "regulate" and "commerce" are illustrative of the effects of judicial review to add vitality to our Constitution by making it the expression of a progressive national will. This organic or adaptative theory of interpreting the Constitution was expressed by Mr. Justice Story when he, speaking for the Court, said: "The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages.

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See Munn v. Illinois, 94 U. S. 113 (1876); Peik v. Chicago & Northwestern Ry., 94 U. S. 164 (1876).


See Alpfange, The Supreme Court and the National Will (1937) 139-143.

Id. passim.
the events of which were locked up in the inscrutable purposes of Providence.\textsuperscript{53}

The organic or adaptative theory of the Constitution has been a favorite hunting ground when the Court was seeking a basis for sustaining an expansion in the power of the national government. "... when we are dealing with words that are a constituent act, like the Constitution of the United States," said Mr. Justice Holmes, speaking for the Court, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of \textit{what was said a hundred years ago}.\textsuperscript{54} In other words, it is what we are in 1920, and not what was said in the Constitution in 1787, that should govern the Court according to Mr. Justice Holmes.

2. Judicial review protects personal rights. An impressive contrast between judicial review and the executive as a safeguard for constitutional rights is found in the cases of Jefferson and Lincoln, both of whom professed almost religious fanaticism for human rights. The Constitution says that "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort."\textsuperscript{55} In other words, one cannot talk treason in the United States, one can only do it. Despite this plain constitutional provision these two humanitarian Presidents undertook to substitute for actual treason the European doctrine of constructive treason and were prevented by the Courts.

In the case of Aaron Burr, John Marshall sustained the Constitution and abolished the European practice from American soil. "In interpreting this very provision of the people’s basic, fundamental and permanent law," Beveridge says, "Chief Justice John Marshall forever overthrew the brutal and unreasonable European doctrine of constructive treason, and forever established in the United States the humane and reasonable American doctrine of personal and actual treason.

\textsuperscript{53}Martin v. Hunter's Lessee, 1 Wheat. 304, 326 (U. S. 1816).
\textsuperscript{55}Art. III, § 3.
"Cautious writers on the subject have estimated that Marshall's judicial opinions on treason have saved many thousands of lives of innocent men and women, which otherwise would have been sacrificed to popular passion. During the Civil War, for instance, the number who would thus have been made victims of abnormal suspicion, groundless rumor and even personal spite would have been very large. [55a]

In 1864 three citizens of Indiana were arrested by order of a general of the United States Army. They were brought before a military commission, tried, and sentenced to be hanged May 19, 1865. They asked for and received a writ of habeas corpus from the Supreme Court. The Supreme Court declared their convictions illegal and set them free. In the decision Mr. Justice David Davis, speaking for the Court, said: "No graver question was ever considered by this court." [56a] "The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages." [56a] "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint and . . . that the principles of constitutional liberty would be in peril, unless established by irrepealable law. [56b] . . . 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. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . . [56c]

3. The doctrine of separation of powers would have meant little or nothing in the American constitutions but for judicial review. While this doctrine has been severely criticized, its merits are irrelevant in the study of judicial review as a preservative of constitutional principles. The tendency toward executive government throughout the world has given new vitality to this doctrine as a means of preserving representative government, without which democracy cannot exist. History furnishes no instance of the destruction of a political order by either the legislative

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[56a] Ex parte Milligan, 4 Wall. 2, 118 (U. S. 1866).
[56b] Id. at 119.
[56c] Id. at 120.
[56d] Id. at 121.
or judicial branch, but it is replete with wreckage wrought by executive usurpation. Every revolution has been a revolt from executive authority. The theory of separation of powers is formally announced in only forty of the state constitutions. In the other eight and in the Constitution of the United States this principle is derived from the language of these constitutions because they divide government into three departments and vest the legislative power in one, the executive in another, and the judicial in a third.\textsuperscript{57} Blackstone, in speaking of the separation of powers in the British Constitution, said: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over balance for the legislative."\textsuperscript{58} In the seventeenth and eighteenth century despotism legislative bodies were either dismissed or controlled by the executive and the courts were used to aid executive supremacy.

In a society operated on a basis of group interests this doctrine makes it more difficult for any one group or combination of groups to secure control of the government and exploit the public. Whatever the merits of the doctrine, judicial review is the best means of preserving it. Literally dozens of cases in state and federal courts have arisen over this doctrine, and, strange as it may seem, the decisions in these cases have mainly been directed toward the prevention of legislative bodies from giving away their powers to insistent executives.\textsuperscript{59}

4. Judicial review is used by practically all systems of governments as a restraint upon the bureaucracy which generally exercises both legislative and judicial powers. In view of the increasing importance of the administrative function, whose growth is at the expense of both legislative and judicial functions and whose powers generally fall under execu-

\textsuperscript{57}Dodd, \textit{State Government} (2d ed., 1928) 58.

\textsuperscript{58} 1 Bl. Comm. 269.

tive control, a very serious problem of adjustment has arisen. The bureaucracy really exercises the powers of a complete government. To grant it supremacy is tantamount to granting executive supremacy, since its personnel is generally subject to unrestrained removal by the executive. This problem is aggravated in systems like ours where the Political Executive and the Constitutional Executive are one and irresponsible because he is not subject to the supervision of the Congress nor can his responsibility to the electorate be regarded as a serious matter. Without judicial review the bureaucracy becomes the long arm of a very powerful and irresponsible executive, enjoying tremendous legal and political powers paralleled in only totalitarian states.

Whether judicial review should extend to the fact-finding as well as the rule-making and judicial functions of the bureaucracy need not be discussed here further than to say that finality as to the factual character of an issue determines what jurisdiction has control, whether the issue involves the separation of powers or the line of federalism. The problem is how administrative efficiency can be secured without establishing executive autocracy. It is safe to say that judicial review must occupy a controlling position in any administrative system of law whether statutory or fundamental.60

5. The protection of judicial review against legislative usurpation is its major function, whether the legislation be by administrative agents or so-called legislative bodies. There are no records or statistics on this subject relative to our own system. The volume of legislation that has been declared unconstitutional by both federal and state courts is tremendous. It is clear from a summary study that our Bills of Rights in our forty-nine constitutions would have meant very little but for judicial review. From 1867 to 1925—a period of 58 years, a little more than one-third of the history of our republic—Congress or one of its branches violated our national Bill of Rights ten times.61

Congress has tried to authorize illegal searches and seizure of private papers; 62 to authorize criminal prosecution of a man after compelling him to testify before a grand jury; 63 to take private property for a public use without just compensation; 64 to authorize the retrial in a Federal

60 See Powell, Separation of Powers; Administrative Exercise of Legislative and Judicial Power (1913) 27 Pol. Sci. Q. 215.
61Warren, op. cit. supra note 41, at 150.
63Counselman v. Hitchcock, 142 U. S. 547 (1892).
Court of facts already tried and settled in behalf of the plaintiff in a State Court; to authorize imprisonment of persons at hard labor without an indictment by a grand jury; to prevent a defendant from being confronted in a criminal prosecution with the witnesses against him; to allow an appeal by the Government in a criminal trial after the accused has been found not guilty by a jury; to make an act criminal which was not a crime at the time of its commission and to punish a man by ex post facto law for its commission.

One branch of Congress attempted to imprison a man for refusing to testify in an investigation of a matter over which it had no jurisdiction. It attempted to imprison a man without jury trial for publishing a letter containing matter alleged to be defamatory of the House.

Congress has three times passed bills of attainder in violation of an absolute prohibition in the Constitution, in 1804 in connection with the Yazoo land frauds in Georgia, in 1862 during the Civil War, and in 1865 as a result of the Civil War. The first of these statutes was never tested in Court; the second was threatened with a veto by President Lincoln and was modified by Congress itself; the third was held unconstitutional by the Supreme Court.

Madison felt that judicial review was protection against legislative usurpation. In discussing the powers of Congress he said: "If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the state legislatures should violate the irrespective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the elec-

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65 Justices v. Murray, 9 Wall. 274 (U. S. 1870).
66 Wong Wing v. United States, 163 U. S. 228 (1896).
69 Ex parte Garland, 4 Wall. 333 (U. S. 1867).
70 Kilbourn v. Thompson, 103 U. S. 168 (1881).
72 Ex parte Garland, 4 Wall. 333 (U. S. 1867).
tion of more faithful representatives, annul the acts of the usurpers." Madison refers to the veto and judicial review.

If judicial review can maintain the Bills of Rights against executive and legislative assaults it will preserve our democracy. Neither fascism nor communism could be established or maintained in the presence of a free science, a free education, and a free church. The climax of the last speech made by Senator William E. Borah was: "Not long ago a traveler from a totalitarian state, after spending months in America, said to his people, 'Before any progress can be made in breaking down American institutions, a way must be found to discredit the American Bill of Rights.' I have said it is a sacred document. If human liberty is sacred, this document is sacred."  

6. The effect of judicial review in preserving a constitution is not restricted to its nullification of legislative and executive acts in actual cases. Its existence as a principle of the constitution is a tremendous restraint and causes a serious consideration of the constitutional character of governmental action. It contributes very largely to the stability of both the political and economic order of a nation. Constitutional checks versus confidence in men was discussed as follows by Jefferson:

"It would be a dangerous delusion of our confidence if the men of our choice should silence our fears for the safety of our rights. Confidence is everywhere the parent of despotism. Free government is founded on jealousy, not confidence. It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. Our Constitution has accordingly fixed the limits to which, and no further, our confidence will go. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."  

7. Judicial review is an aid in preserving representative government. One of the major problems facing democracy is the preservation of its representative character. Democracy was created by legislative bodies and has perished wherever they have been destroyed. The nature of modern society tends to force legislatures to delegate their powers to executives and bureaucrats. If some solution of this problem, providing a substantial position for legislative bodies in the governing process, cannot be devised, there is no hope for democracy. Executive totalitarianism is the only alternative.

[^73]Federalist, No. XLIV.
[^74]N. Y. Times, Jan. 21, 1940, § E, p. 4, col. 3.
The process of legislative abdication, now a *fait accompli* in totalitarian states, has made tremendous progress in both our national and state governments. Every board and commission in the nation is a recognition of the incompetence of legislative bodies. The most important functions of government in this country are now in the hands of boards and commissions enjoying legislative powers and, in some instances, those of a complete government. This process has been extended in some matters to single executive officers.

The question recently arose as to whether Congress could delegate the power of legislation to hundreds of unofficial organizations such as steel manufacturers, shoe men, laundry owners, butchers, barbers, or dry cleaners to prescribe codes, and with the aid of the courts to punish by fines and imprisonment their violation. The Court regarded this type of delegation as a very different matter from that of delegating legislative power to official agents of the Congress, such as boards and commissions. Contrasting this type of delegation with that of giving thousands of code-makers a roving commission to legislate for their fellow Americans, Mr. Justice Cardozo in a concurring opinion said: "If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. *This is delegation running riot. No such plenitude of power is susceptible of transfer.* The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it."\(^76\) It is unthinkable that the Congress would attempt such an abdication of its powers and violation of its trust to the people. It is an illustration of what a President by means of party pressure would do but for judicial review. It is a plain case of preserving the Congress by judicial review against the will of its members.

8. Judicial review helps furnish a necessary discipline to democracy. It is possible that it has not yet been demonstrated that a democracy can subject itself to a fundamental law. Many people do not understand that the sovereignty of the American people is limited by the Constitution. They think that a mandate from the ballot box is the law of the land and that any other theory of government is undemocratic. They attack the Supreme Court if it does not read into the Constitution the

mandate of the ballot box. In Pollock v. Farmers’ Loan and Trust Co., Mr. Carter, arguing for the constitutionality of the income tax, said: “Nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit. When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final.”

A government by a fundamental law is not a government by the majority unless the will of the majority is in harmony with the fundamental law. In a constitutional democracy the people must abide by the will of the majority and the majority must acquiesce in the supremacy of the fundamental laws as interpreted by independent tribunals. Supremacy of law means nothing unless there is a supremacy of exposition of the law. The amendment process is the constitutional method for harmonizing the fundamental law and the will of the majority. Our democracy must realize that the discipline provided by the fundamental law and its enforcing agent of judicial review is inseparable from its continued existence.

Democracy is not a streamline type of society. It is a fact-finding, fact-considering, deliberate-acting form of society. The amendment process of the Constitution was provided to harmonize the fundamental law with the basic facts of a changing society. Contrary to the misrepresentations of either the uninformed or of the advocates of legislative supremacy, the amendment process has worked more expeditiously than legislation tested by judicial process. The first ten amendments, all regarded as sine-qua-nons of ordered liberty, were added during the first year of the operation of the Constitution. Of the remaining eleven, seven were added within one year of their proposal by the Congress. The time involved in ratification of the remaining eleven is as follows: the 11th—3 yrs., 10 mos.; the 12th—9 mos.; the 13th—10 mos.; the 14th—2 yrs.; the 15th—13 mos.; the 16th—3½ yrs.; the 17th—10 mos.; the 18th—13 mos.; the 19th—14 mos.; the 20th—10 mos.; the 21st—11 mos. It will be noticed that of these eleven, five were ratified in less than a year; three in a little more than a year; these eight average less than a year.

157 U. S. 429 (1895).
158 Id. at 531-532.
The remaining three average about three years and the entire eleven average about one and one-half years. This shows that when public opinion is favorable to an amendment, it can be ratified more quickly than the legislative and judicial process work. Moreover, Congress has the power to expedite the amendment process.\textsuperscript{78}

9. Judicial review fairly considered over a period of time sufficiently long to serve as a test is an instrument of popular government. There are reactionary periods in the operation of judicial review. The same is true of the presidency and the Congress. A study of the veto record of the President and of his task of advocacy of progressive legislation and a survey of the sins of omission of the Congress as to both legislation and the amendment process prove this statement. In fact, a comparative study of the three divisions of the government proves that the court has been the most progressive of the three over the 150 years of the operation of the government. The doctrines of the Court have been suggestive to the Congress as in the case of \textit{Wabash, St. Louis & Pacific Ry. v. Illinois},\textsuperscript{79} the doctrine of which caused the Congress to abandon its \textit{laissez-faire} policy and to establish the Interstate Commerce Commission the next year. In fact the doctrines of the \textit{Granger cases}\textsuperscript{79*} and this case are the basis for the powers of the dozens of utility boards and commissions of both the states and the nation.

By and large judicial review has been the most nationalistic agency of the government. It has practically been a substitute for the amendment process by virtue of its sensitiveness to public opinion. Speaking of the interpretation of the Court in the cases involved in the \textit{Granger} movement, Lord Bryce said: “The Court feels the touch of public opinion.” “These decisions,” he said, “evidently represent a different view of the sacredness of private rights and of the powers of a Legislature, from that entertained by Chief Justice Marshall and his contemporaries. They reveal that current of opinion, which now runs strongly in America against what are called monopolies and the powers of incorporated companies.”\textsuperscript{80} Professor S. Corwin, speaking of the various influences which have determined the content of constitutional law, says: “Again, the Court is at no time entirely free from the pressure

\textsuperscript{78}Dillon \textit{v.} Gloss, 256 U. S. 368 (1921).
\textsuperscript{79}118 U. S. 557 (1886).
\textsuperscript{79*}94 U. S. 113 (1877).
\textsuperscript{80}1 \textsc{Bryce, The American Commonwealth} (1922) 267.
of public opinion." judicial review, however, represents a more matured and a more permanent public opinion than the ballot box. As Professor Corwin has said: "Judicial review undoubtedly means, usually at least, some slowing down of the processes of government. . . . Also, it is a device—like the common law itself—for conserving the old in the content of the new, and for inserting in the democratic process one further, final step in the discussion, clarification, rationalization of public policies." 

V. An Appraisal of Judicial Review in the American System by Foreigners

Possibly one of the most convincing appraisals of judicial review is found in De Tocqueville's Democracy in America. Speaking of the powers of the justices of the Supreme Court he said:

"The peace, the prosperity, and the very existence of the Union were placed in the hands of seven judges. Without their active cooperation the Constitution would be a dead letter. The Executive appeals to them for assistance against the encroachments of the Legislative powers. The Legislature demands their protection from the designs of the Executive. They defend the Union from disobedience of the States, the States from the exaggerated claims of the Union, the public interest against interest of private citizens, and the conservative spirit of order against the fleeting innovations of democracy."

Lord Brougham said: "The devising means for keeping its [Union's] integrity as a Federacy, while the rights and powers of the individual States are maintained entire is the very greatest refinement in social policy to which any state of circumstances has ever given rise or to which any age has ever given birth." Sir Henry Maine said:

"The powers and disabilities attached to the United States and to the several States by the Federal Constitution, and placed under the protection of the deliberately contrived securities we have described, have determined the whole course of American history. That history began, as all its records abundantly show, in a condition of society produced by war and revolution, which might have condemned the great Northern Republic to a fate not unlike that of her disorderly sisters in South America. But the provisions of the Constitution have acted on her like those dams and dikes which strike the eye of the traveler along the Rhine, controlling the course of a mighty river which begins amid

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81 Corwin, Court over Constitution (1938) 116, 117.
82 Id. at 208, 209.
83 1 De Tocqueville, Democracy in America (tr. 1838) 175, 176.
84 The British Constitution (1861) Appendix II, 416.
mountain torrents, and turning it into one of the most equable waterways in the world."\(^{83b}\)

James Bryce says:

"It is nevertheless true that there is no part of the American System which reflects more credit on its authors or has worked better in practice (than the Supreme Court). It has had the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations of the central federal power to the States and the amount of authority which Congress and the President are respectively entitled to exercise, have been most permanently grave questions in American history, with which nearly every other political problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between the Congress and the State Legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying not the judges but the people who enacted the Constitution."\(^{84}\)

He further says that:

"The Supreme Court is the living voice of the Constitution—that is, one of the will of the people expressed in the fundamental laws they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to the permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.

"To discharge these momentous functions, the Court must be stable even as the Constitution is stable. . . . It must resist transitory impulses, and resist them the more firmly the more vehement they are. Entrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of government, and the more dangerous, because impalpable, seductions of popular sentiment."\(^{85}\)

By way of summary, the following advantages may be claimed for judicial review on the basis of its operation in the American system: (1) It converts a speechless document into a living constitution of progressive principles which mere legislation could not do since it lacks the power to comment. It is an official commentary on the Constitution,
doing in this capacity what Blackstone and Dicey did unofficially on the English constitution. (2) It changes a theoretical fixity into a practical flexibility. It can freewheel within a certain latitude, eliminating the transient for the more mature and the more permanent. (3) It converts mere words and phraseology into an organic whole in which an entire society in all its ramifications can be visualized. (4) It is a preservative of original or fundamental principles which give a stability and certainty to both the individual and society without restricting progress. In fact, this certainty and permanence of constitutional rights always within a range of possible, yet circumscribed change has, in my opinion, been a tremendous factor in our progress in all phases of American life. To me it constitutes the promise of American life. (5) It is, in my opinion, the most sane and most effective limitation upon political authority that has been devised. Authority can be checked only by authority. I am well aware that the checking authority may be abused. I think judicial authority in this country has been abused, but I can say the same about the executive veto or bicameralism. This does not warrant the abolition of either of these features of our system or justify the ballot box in demanding that they always work in harmony. I do not believe in ballot legislation or ballot box supremacy unrefined by the representative system. I prefer refined oil to crude oil regardless of the imperfections of the refining system. Government must have authority. The officers of government whether legislative, executive, or judicial must have discretion; otherwise their ability is nullified and they are useless. But unlimited authority or discretion becomes absolutism. Our Constitution most wisely does not provide for absolutism on either side of the line of federalism or within either division of our national and state governments or in any of the checks of our system. Judicial review reverses without the use of the amendment process. This is a fortuitous feature of our system.

It would be the end of judicial statesmanship if the Court lost either the right or the courage to reverse its former opinions within the broad latitude of the Constitution. It would be equally calamitous for members of the Court to lose the right or the courage freely to express the results of their judgments and scholarship on the great constitutional questions which come before them. An independent court of independent and scholarly judges stimulated by a critical opinion of constitutional authorities is the best safeguard for our democracy and, in my opinion, when our democracy ceases to respect the opinions of these experts it will have lost that inherent element of self discipline without which...
COMMON LAW MARRIAGE

HERBERT MYERBERG*

OF ALL the personal relations one is likely to enter into during his life, none is more calculated to give permanence to human society than marriage. Yet in at least twenty-two states and in the District of Columbia, a valid marriage may be contracted with less formality than is required to purchase a house.\(^1\) This does not mean that these jurisdictions do not have their share of statutory provisions prescribing the formal requirements for solemnizing marriages, the preliminaries thereto and the penalties for failure to comply. It means, rather, that their courts consider these statutory provisions as directory merely and as not affecting the validity of common law marriage.\(^2\) Although it would be interesting to trace the history of human marriage down

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\(^1\) The following classification of jurisdictions is based on 1 Vernier, American Family Law (1931) § 26, p. 107, and Supp. 1938; Notes (1925) 39 A. L. R. 538, (1928) 60 A. L. R. 541, (1934) 94 A. L. R. 1000; parenthetical references are intended to clarify the position of several of the States, about which there might otherwise be some doubt.

Common law marriage is valid in the following jurisdictions: Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Wyoming, District of Columbia (Hoage v. Murch, 50 F. (2d) 983 (1931)).


\(^2\) Note (1934) 94 A. L. R. 1000.
through the ages until we found marriage by consent of the parties evolving from the more primitive forms of marriage by capture, purchase and exchange,\(^3\) the sole object of the present article is to consider briefly what is meant by the term "common law marriage" and whether it is desirable to abolish this method of entering into the marriage relation. "Common law marriage," as that term is commonly used and understood, refers to an informal entrance into matrimony by either a marriage *per verba de praesenti* or a marriage *per verba de futuro cum copula*.

Marriage *per verba de praesenti* is constituted when the parties, intending the present assumption of the marriage state, declare in the present tense that they take each other to be husband and wife thenceforth.\(^4\) No particular words are necessary so long as the intention to become husband and wife immediately upon the giving of mutual consent is manifested.\(^5\) The requirement of mutual consent, however, does not mean that a man may avoid the legal consequences of his agreement by any mental reservation or secret intention not to marry; for, if a man, "while endeavoring to accomplish a woman's seduction, blunders into matrimony, he has no one but himself to blame."\(^6\) As to whether the promise *de praesenti* must be followed by cohabitation is a matter upon which there is much confusion in the authorities.\(^7\) Most of the cases which say that marriage *per verba de praesenti* may be constituted by agreement without consummation by cohabitation are found, upon examination, to involve parties who have in fact lived together in the relation of husband and wife.\(^8\) This is not surprising for, as Professor Long has said: "Cases of *bona fide* informal marriages not followed by consummation or cohabitation must be among the rarest of human

\(^{*}\)See Howard, History of Matrimonial Institutions (1904); Westermarck, The History of Human Marriage (1889).

\(^{*}\)Dennison v. Dennison, 35 Md. 361 (1872); Whitehurst v. Whitehurst, 156 Md. 610, 145 Atl. 204 (1928); Notes (1928) L. R. A. 1915E 8, (1923) 33 A. L. R. 27; Keezer, Marriage and Divorce (2d ed. 1923) § 71; 2 Pollock and Maitland, History of English Law (2d ed. 1898) 365 et seq.; see generally, Koegel, *op. cit. supra* note 1.

\(^{*}\)Ibid.


\(^{*}\)Ibid.
transactions.”9 It must be conceded, however, that on principle cohabitation is not essential to create a valid marriage *de praesenti*, although it is of considerable probative force in establishing it.10

In this connection it should be observed that by “cohabitation” is meant not merely sexual intercourse, but the open living together as husband and wife—in short, the “habit and repute” of marriage.11 These terms have a connotation that brings to mind the problems involved in *proving* a marriage12 rather than in *creating* one. Indeed, the failure carefully to distinguish between what is necessary to *create* an informal marriage and what is necessary to *prove* it is largely responsible for the confusion in the authorities as to the necessity for cohabitation in the case of marriages *per verba de praesenti*.13 An illustration of how easy it is to be misled into overlooking this essential distinction is afforded by the Maryland case of *Whitehurst v. Whitehurst*14 where, however, the Court was quick to see and observe the distinction. The plaintiff sought to establish a common law marriage between herself and a decedent whose estate was in question. The marriage was alleged to have been

9 *Long, Domestic Relations* (3d ed. 1923) § 68. See, however, the instances referred to by Koegel, *op. cit. supra* note 1, at 131 et seq., of girls living in the United States during the war who married American soldiers in France. Koegel says: “Many of these marriages were held valid for war risk insurance and other purposes.”

10 See note 7 *supra*, and Note (1907) 124 Am. St. Rep. 104, 112, where it is said: “The true rule, however, is that a marriage is complete when the parties agree, in words of the present tense, to take each other as husband and wife. Cohabitation or copulation following such agreement may be evidence of the existence of the agreement, but it adds nothing to the agreement and is not essential to the validity of the marriage.”


The doctrine that there could be no marriage until man and woman had become one by physical union was a theory of the canon law. In 2 *Pollock and Maitland*, *op. cit. supra* note 4, at 366, the authors say: “The espousal *by words of the present tense* constitutes a marriage (*matrimonium*), at all events an initiate marriage; the spouses are *coniuges*; the relationship between them is almost as indissoluble as if it had already become a consummated marriage. Not quite so indissoluble, however; a spouse may free himself or herself from the unconsummated marriage by entering religion, and such a marriage is within the papal power of dispensation. Even at the present day the technical terms that are in use among us recall the older doctrine, for a marriage that is not yet *consummated* should, were we nice in our use of words, be no marriage at all.”

11 See note 7 *supra*, and Peck, *Domestic Relations* (3d ed. 1913) 144.

12 See generally on this subject, Myerberg, *Proof of Marriage in Maryland* (1938) 2 Md. L. Rev. 120.


taken place in New York in 1923,\textsuperscript{15} by the parties writing their names in that portion of a prayer book which contained a ceremony for mixed marriages. Except for a few intimate friends, the marriage was kept a secret; and many of the witnesses testified that the decedent was reputedly unmarried.

The plaintiff called a New York lawyer as an expert witness to establish the essentials of a valid common law marriage under the law of New York. He testified that neither repute nor cohabitation were necessary once the agreement of marriage was established.\textsuperscript{16} The defendants called an equally reputable expert who informed the court that in his opinion the New York law required the agreement of present marriage to be followed by open and habitual cohabitation and an undivided, general reputation in the community that the relationship was one of marriage.\textsuperscript{17} The Court in sustaining the marriage as having been validly contracted under the law of New York, found as a fact that the agreement \textit{per verba de praesenti} had been followed by cohabitation and said:

"... we do not believe ... that in a case where there was satisfactory proof of an agreement \textit{per verba de praesenti} it would be necessary to prove not only repute but an undivided repute. Undoubtedly that is necessary where the marriage is to be inferred solely from cohabitation and repute.\textsuperscript{18} To hold that undivided repute is necessary in a case such as the present one, would be to hold that the same character and amount of proof or repute is required to establish a marriage where an actual contract is proved, as would be necessary where there is no evidence of an actual contract, and it is sought to have a contract inferred from cohabitation and repute alone."\textsuperscript{19}

The failure to observe the distinction between what is essential to \textit{create} a valid marriage and what is required to \textit{prove} it, has led some authorities into the error of asserting that common law marriages are recognized in Maryland (notwithstanding the requirement of a religious ceremony) because marriage may be proved in that State (as in others) by a mere showing of general reputation, cohabitation and acknowledgment.\textsuperscript{20} But it should be observed that in such cases the law, for the

\textsuperscript{15}This was prior to the abolition of common law marriages in New York; see note 1 supra.

\textsuperscript{16}Whitehurst \textit{v.} Whitehurst, 156 Md. 610, 619, 145 Atl. 204, 207 (1928).

\textsuperscript{17}\textit{Ibid.} (Record, vol. 1, p. 372.)

\textsuperscript{18}See Myerberg, \textit{supra} note 12, at 122, ns. 8 and 9.

\textsuperscript{19}Whitehurst \textit{v.} Whitehurst, 156 Md. 610, 619, 620, 145 Atl. 204, 207 (1928).

\textsuperscript{20}Black, \textit{supra} note 10, at 113, 119; and the \textsc{Russell Sage Foundation Compilation}, referred to by Koegel, \textit{op. cit. supra} note 1, at 162.
sake of morality and decency, merely raises an evidential presumption that an effectual ceremony has taken place, although evidence may not be obtained of the time, place and manner of the celebration. And it is submitted that jurisdictions which recognize common law marriages ought not to regard "habit and repute" as essential to the creation of a valid marriage per verba de praesenti but merely as of evidential significance. Where the agreement de praesenti is shown by direct evidence, nothing more should be required. If direct evidence of the contract is not available, the requisite consent to the present assumption of the marital status might be inferred from a showing of cohabitation and general reputation, just as in jurisdictions where common law marriage is invalid such facts will raise an inference that the parties have been formally married by whatever kind of ceremony the law of the particular State requires.

Marriage per verba de futuro cum copula is constituted where a mutual promise to marry in the future is followed by carnal intercourse. In reality this is not another form of marriage; but simply "a different channel of proof; for the only consent which will create matrimony is the mutual one to present marriage,—not necessarily per verba, but always and indispensably de praesenti." Copulation subsequent to a promise de futuro merely raises a presumption of present consent.

21 Myerberg, supra note 12, at 121. Nor is the strict requirement in Maryland of a religious ceremony to be regarded as relaxed by those Maryland decisions which, in accordance with settled principles of Conflict of Laws, recognize the validity of non-ceremonial or common law marriages performed in a state where such marriages are valid. Jackson v. Jackson, 82 Md. 17, 33 Atl. 317 (1895), recognizing a Pennsylvania common law marriage, and Whitehurst v. Whitehurst, 156 Md. 610, 145 Atl. 204 (1928), recognizing a New York common law marriage.

22 Any other holding leads to the most absurd results. Thus: "If subsequent cohabitation is an essential element then what is the legal position of the parties between the time of the contract to be presently married and the achievement of cohabitation? Is there a condition of suspended animation from which there is no retreat, and from which there can be no advance to a completed marriage without an interval of fornication? The situation is puzzling, paradoxical, and even ridiculous. The parties cannot be 'half-married'; the relation must exist in toto or not at all." Note (1938) 23 IOWA L. REV. 75, 83.

23 In such cases a general and not a divided reputation would have to be proved. As shown in the quotation from Whitehurst v. Whitehurst, 156 Md. 610, 619, 620, 145 Atl. 204, 207 (1928), this is not required where there is direct evidence of the agreement de praesenti.

21 Bishop, Marriage, Divorce and Separation (1891) § 354 et seq.; Keezer, op. cit. supra note 4, § 72; Note L.R.A. 1915E 31 et seq.

22 Bishop, op. cit. supra note 23, § 341. See also 1 Schouler, op. cit. supra note 7, at 41.

23 See note 23 supra.
Regarded thus as evidentiary, there is clearly no inconsistency, as some authorities seem to think,\textsuperscript{26} between the doctrine of marriage \textit{per verba de futuro cum copula} and the principle upon which an action will lie for breach of promise to marry where there has been seduction. It is true that in both cases we have a promise of future marriage between parties followed by intercourse. But, if the carnal knowledge is intended as a gratification of present desires rather than as a transmutation of a future promise into a present one, you have seduction and not marriage.\textsuperscript{27} The type of intercourse which gives rise to the complaint of seduction in breach of promise cases is never accompanied by the intent to be presently man and wife, the intimacy being allowed by the woman generally because she relies upon the man’s promise to marry her in the future. The status of husband and wife results only where the intercourse is with the present intent to consummate the marriage, then and there. The confusion arises, no doubt, from the fact that intercourse after a promise to marry raises a presumption that the parties have given their consent to marriage \textit{de praesenti}. But, as already explained, this presumption is but a rule of evidence and may be rebutted by showing that the parties did not intend immediate consummation of the marriage.\textsuperscript{28} Indeed, as Mr. Bishop points out, the plaintiff in such a breach of promise case takes the position, by the very bringing of the action, “that the particular case is one in which marriage did not come with the copula; and the position of the defendant is the same, so he does not allege the contrary; for if he had

\textsuperscript{26}See Koege, \textit{op. cit. supra} note 1, at 139, quoting Peck, \textit{op. cit. supra} note 11 (2d ed.), at 143, 44: “If an agreement for future marriage followed by cohabitation constituted a valid marriage, then every case of seduction under promise of marriage would be a legal marriage in fact.” This statement is omitted from the third edition of Peck’s work, cited \textit{supra} note 11.

\textsuperscript{27}See Fryer v. Fryer, 9 S. C. Eq. 85, 97 (1832), where the Court said: “The proposition, contended for, that \textit{copula} following promise to marry, is marriage, without regard to the present intention of the parties, seems to me unfounded in principle. If it were true, there could be no such thing as an action for seduction. The doctrine of that action is that where a man promises a woman, that if she will be his prostitute now, he will make her his wife hereafter—to which she assents and so there are mutual promises, and a mutual agreement—this does not constitute marriage. . . . It seems to me, that where, as in the present case, the parties do not understand the \textit{copula} to be lawful, do not intend that it shall, \textit{per se}, constitute the marriage relation, but on the contrary, stipulate that the marriage shall, instead of preceding or accompanying the act, follow it, it would never do to pronounce that \textit{copula} to be anything else than unlawful.”

\textsuperscript{28}Bishop, \textit{op. cit. supra} note 23, § 358.
been willing to be her husband, there would have been no occasion for the suit."

Strangely enough, although the cases are full of dicta to the effect that marriage *per verba de futuro cum copula* are valid in jurisdictions which recognize common law marriages, it is said that where actual cases have arisen the doctrine has been repudiated. Some recognition, however, has been given to the doctrine in Pennsylvania and Texas, as will appear from the comprehensive note to the leading case of *Grigsby v. Reib*, wherein the writer says:

"... the doctrine has been recognized in a few jurisdictions, though there is a disposition to hold that marriage is merely evidenced, and not constituted by this form of contract, and to require something more than mere copula. ... And it remains to be noticed that New York has expressly rejected the entire doctrine of marriage *de futuro* and that the Ohio Supreme Court refuses to apply it. ... The doctrine of marriage *per verba de futuro cum copula* thus seems to be a shadow of its former self, even in the jurisdictions which have not expressly repudiated it as a whole; and it seems a fair conclusion that the doctrine is nearly, if not quite, obsolete."

It is interesting to observe at this point that the term "common law marriage" is not strictly an accurate one and in many respects is found to be misleading. In the United States the term "common law" generally calls to mind that great heritage which the founders of this country brought with them from England and which the constitutions of almost all the states preserve to their respective citizens. As questions involving the common law of England are presented to the various state courts, independent investigations of that law are made, each state's courts having a right to say what it finds the common law of England to be on any particular subject. In consequence, we have

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29 *Id. § 372. See also KOEGEL, op. cit. supra note 1, at 146; 1 SCHOULER, op. cit. supra note 7, at 43, 47.*

30 KOEGEL, op. cit. supra note 1, at 105. See Marsicano v. Marsicano, 79 Fla. 278, 290; 84 So. 156, 160 (1920), where the doctrine was expressly repudiated.

31 *Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124 (1913), L. R. A. 1915E 1, note beginning at pp. 8, 32, 33.*

32 *See the cases cited in L. R. A. 1915E 32, 33, footnotes 99-107.*

33 *In many instances laymen and even lawyers are found applying the term "common law wife" to a woman who is living in concubinage with a man. Of course, if all the elements of a common law marriage are found in the relationship, the parties are no less husband and wife (in jurisdictions recognizing this form of marriage) than if they had been joined in wedlock by a ceremonial marriage. See KOEGEL, op. cit. supra note 1, at 103-104.*
become accustomed to a conflict of opinion among the American authorities as to what the common law of England is on some subjects. And since the English decisions subsequent to 1776 are not binding on our Courts, the same conflict may be found between English and American decisions.

As interpreted by the House of Lords in the famous case of The Queen v. Millis,\(^\text{33}\) decided in 1844 and followed in Beamish v. Beamish,\(^\text{34}\) decided in 1861, the common law of England never did sanction a marriage without clerical intervention. According to this adjudication, a marriage by words of present consent, or by words of future promise followed by cohabitation, was not sufficient to give either spouse any property rights; nor to render the issue begotten legitimate; nor to impose upon the woman the disabilities of coverture; nor to render void a subsequent marriage of either of the parties (the other still living) with a third person.\(^\text{35}\) Yet many American authorities both before and after the Millis case found that a marriage contracted *per verba de praesenti* was valid according to the common law of England although not celebrated in *facie ecclesiae*.\(^\text{36}\) Concerning this anomalous situation, one writer has said:

"The common law of this country, so far as it relates to marriage, is founded upon the English common law of marriage which never existed. This paradox rests upon the fact that our law was founded upon what was supposed to be the law of England while ours was in the making, but was afterwards held never to have been the rule in that country. . . . So far as the United States and Canada are concerned, the general rule obtaining before the decision in Reg. v. Millis, as to what was the common law of England, became the common law of these countries. The English common law was transplanted long before Reg. v. Millis was decided, and at a time when the doctrine of Dalrymple v. Dalrymple [which recognized the validity of marriage *per verba de praesenti*] was thought to have become the doctrine of the common law. So here is found the justification for the statement at the beginning . . . that the common law of the United States . . . is founded upon the English common law which never existed."\(^\text{37}\)

It is significant that for many years after the Millis case America was busy extending its frontiers, and it is conceivable that the refusal

\(^{33}\)The Queen *v.* Millis, 10 Cl. and Fin. 534, 8 Eng. Rep. R. 844 (1844).


\(^{36}\)See 1 BISHOP, *op. cit. supra* note 23, § 410, and notes. The opinion of Sir William Scott (Lord Stowell) in Dalrymple *v.* Dalrymple, 2 Hag. Con. 54, 161 Eng. Rep. R. 665 (1811), was regarded as having established the validity of non-ceremonial marriages at common law.

\(^{37}\)Note L. R. A. 1915E 8, 12.
of many American jurisdictions to follow the Millis case was due to the practical necessities of frontier life. The pioneers who settled the frontier states had but a limited opportunity for formal marriage as compared with the citizens of many sister states, where solemnization was facilitated by an abundance of functionaries to celebrate marriage and ample facilities for disseminating information as to the requirements of the law. Nevertheless, the present day division of the states on the question of the validity of common law marriage appears to have little or no relation to geographical considerations, as a reference to the classification of jurisdictions contained in footnote 1 supra, will show. The uncertainty and confusion that has beset the American authorities generally on this subject is well illustrated by the sequence of adjudications in Maryland.

In that state, in 1739 a St. Mary's County Court recognized the validity of an informal marriage.\(^{28}\) Chancellor Bland, however, in 1828 and prior to the Millis case, without noticing the County Court's decision, held that "according to the law of England a contract of marriage is not deemed complete, so as to entitle the wife to dower, and the issue to inherit, unless it be celebrated in the face of the church, or with the blessing of a priest,"\(^{39}\) and that the law of Maryland also required some formal celebration. In 1871, the Maryland Court of Appeals, in the leading case of Dennison v. Dennison,\(^{40}\) without referring to Chancellor Bland's opinion but relying upon Queen v. Millis and Beamish v. Beamish, refused to be bound by the St. Mary's County Court decision and held that according to the common law of England informal marriages were incomplete and insufficient to confer either dower on the spouses or legitimacy on the children until the same was solemnized by religious ceremony, which solemnization the Ecclesiastical Courts had power to enforce. Judge Alvey, who wrote the opinion for the Court, further held that since there had never been an Ecclesiastical Court in Maryland, the Court could not attribute to such informal marriages even the inchoate force given it by the common law. Judge Alvey concluded that the custom of the people in Maryland from the early days of the Province showed that some formal celebration was always required.\(^{41}\) Commenting on the decision in the Dennison case,

\(^{28}\)Cheseldine v. Brewer, 1 Har. & McH. 152 (Md. 1739).
\(^{29}\)Fornshill v. Murray, 1 Bland 479 (Md. 1851).
\(^{30}\)Dennison v. Dennison, 35 Md. 361 (1872).
\(^{41}\)HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 262, n. 5, however, suggests
Mr. Bishop says: "It is not a following of any interpretation of the common law of England; but the court holds . . . that the unwritten law of the State requires some official or religious ceremony to make the marriage valid."42 This conclusion was based on the following quotation from Judge Alvey's opinion: "In the early days of the province, it was not absolutely necessary that a minister of religion should officiate,—a judge or magistrate could perform the ceremony,—but still, in all cases, some formal celebration was required."43 As to this, Bishop concluded:44 "Here, the reader perceives, is an express declaration that the common law as adjudged in The Queen v. Millis (which required the presence of an ordained clergyman) was never of force in Maryland. The law, or custom, affirmed was local to the State."45

A great deal has been written concerning the doctrine of The Queen v. Millis, which was decided by an equal division of the Lords who gave judgment and which was affirmed in Beamish v. Beamish only because that the judges of the St. Mary's County Court, who decided Cheseldine v. Brewer, 1 Har. & McH. 152 (Md. 1739), being closer to the period in question, were better qualified to say what was the practice and custom of the people during the days when Maryland was a Province, than Judge Alvey who wrote the opinion in Dennison v. Dennison, 35 Md. 361 (1872), long after the colonial era.

It is interesting to note the reason given by the Court of Appeals of the District of Columbia for refusing to follow the Dennison case. Justice Groner, in delivering the opinion of the Court in Hoage v. Murch, 50 F. (2d) 983, 984 (App. D. C. 1931) said: " . . . it is quite true we held in De Forest v. U. S., 11 App. D. C. 458, that, by the Act of February 27, 1801 (2 Stat. 103), the laws of the State of Maryland as of that date were continued in force in the District of Columbia, and we need not stop to inquire whether, by the change in Chapter 3, tit. 1, of the Code of 1929, in which all references to the laws of Maryland is omitted, this is no longer true. The fact remains that Congress has enacted a complete set of divorce and marriage laws for the District of Columbia, and it is to these laws, rather than to those preserved out of the past relationship with the State of Maryland, that we must look for guidance and control in the determination of the question now before us, and hence we do not think we can safely follow the decision of the Court of Appeals of Maryland in Dennison v. Dennison, supra, in which it was held that under the Maryland Marriage Act of 1777, to constitute a lawful marriage, 'there must be superadded to the civil contract, some religious ceremony,' for this is not true under the marriage laws of the District," which the Court went on to hold are merely directory.

41 Bishop, op. cit. supra note 23, § 416.
42 Dennison v. Dennison, 35 Md. 361, 379 (1872).
43 See note 42 supra.
44 It is to be observed, however, that the Maryland law (both at the present time and at the time of the decision in the Dennison case) requires celebration by some religious ceremony, the statutes providing for the presence of an ordained minister, except in the case of Quakers. See 2 Md. ANN. CODE (Flack, 1938) Art. 62, § 4.
the Lords (on the advice of Lord Campbell, who personally had dissent from the judgment in the Millis case) felt themselves bound by the rule of stare decisis. At the present day the question of whether the Millis case was decided correctly or not is of historical interest only. Yet it may not be amiss to observe that such respected authorities as Bishop, Pollock and Maitland, Lord Campbell and Lord Stowell all agree that the Millis case did not correctly declare the common law of England. And in Koegel's work on Common Law Marriage is found a most painstaking investigation of the question, concluding with a criticism of the decision in the Millis case. An examination of these authorities will show that they are in agreement with those expressions in the Millis and Beamish cases which hold that under the common law of England property rights could not be founded on an informal marriage contracted per verba de praesenti or per verba de futuro cum copula, for "no woman can claim dower unless she has been endowed at the church door." But here their agreement ends. The authorities referred to deny that a marriage constituted by an exchange of consenting words would be regarded at common law as null and void in favor of a marriage celebrated in church, and they point out that "we have Bracton's word that a marriage which was not contracted in facie ecclesiae, though it cannot give the wife a claim to dower, may well be a good enough marriage so far as regards the legitimacy of the children."

Pollock, A First Book of Jurisprudence (6th ed. 1929) 313-315. Lord Campbell is here quoted as having said in the Beamish case: "If it were competent to me, I would ask your Lordships to reconsider the doctrine laid down in The Queen v. Millis, particularly as the judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation, . . . But it is my duty to say that your Lordships are bound by this decision . . ., and that the rule of law which your Lordships lay down as the ground of your judgment . . . must be taken for law till altered by an act of Parliament."

1 BISHOP, op. cit. supra note 23, §§ 390-422.
3 Id. at 372; 1 BISHOP, op. cit. supra note 23, § 404; and see generally, KOEGEL, op. cit. supra note 1.
4 POLLOCK AND MAITLAND, op. cit. supra note 23, at 376. KOEGEL, op. cit. supra note 1, at 19, 52, says: "Although, as we have seen certain serious disabilities attached to a marriage not celebrated in facie ecclesiae; still the formless, the unblessed marriage is a marriage. . . . Del Heiths's case does not decide that the issue of an irregular marriage is illegitimate. It only decides that such a marriage is no marriage for purely possessory purposes. Dower and the right of inheritance may well exist without either of them. As Lord Stowell said in Lindo v. Beliasrio (1 Consistory 230) 'marriage may be good independent of any considerations of property, and the vinculum fidei may well subsist without them.'
marriage law of England, they contend,\textsuperscript{51} was the canon law, which prior to the decretal of the Council of Trent (a decretal never of force in England) sanctioned the informal marriage.\textsuperscript{52} The historical background of the law on this subject undoubtedly exposes the error of the decision in the \textit{Millis case} and leads to the conclusion of Pollock and Maitland, that “if the victorious cause pleased the lords, it is the vanquished cause that will please the historian of the middle ages.”\textsuperscript{53}

It is not difficult to paraphrase the words of those great historians of English law to read, that “if the vanquished cause pleased the historian of the middle ages, it is the victorious cause that will please the sociologist of modern times.” Indeed, the great weight of modern opinion advocates the abolition in this country of common law marriage.\textsuperscript{54} “The American Bar Association, the Commission on Uniform State Laws,\textsuperscript{55} and practically all authorities in the field of social reform favor the abolition of common law marriage.”\textsuperscript{56} It is not to be supposed that Pollock and Maitland regarded informal marriage as socially desirable, for in commenting on marriage by words of present consent, or by words of future promise followed by cohabitation, they said: “The scheme at which they thus arrived was certainly no masterpiece of human wisdom. Of all people in the world lovers are the least likely to distinguish precisely between the present and the future tenses. In the middle ages marriages, or what looked like marriages, were exceedingly insecure. The union which had existed for many years between man and woman might with fatal ease be proved adulterous, and there would be hard swearing on both sides about ‘I will’ and ‘I do’. The one contract, which to our thinking should certainly be formal, had been made the most formless of all contracts.”\textsuperscript{57}

Yet the common law marriage is not without its defenders. One writer contends that its sole difficulties are those of proof and lack of record. “The difficulties of proof,” he points out, “are not otherwise than those

\footnotesize{\textsuperscript{51} Pollock and Maitland, \textit{op. cit. supra} note 23, at 366.}
\footnotesize{\textsuperscript{52} It is to be observed that in Dennison \textit{v. Dennison}, 35 Md. 361 (1872), Judge Alvey, relying on the \textit{Millis case}, concluded that his doctrine of the canon law had never been incorporated into the common law.}
\footnotesize{\textsuperscript{53} Pollock and Maitland, \textit{op. cit. supra} note 23, at 370.}
\footnotesize{\textsuperscript{54} Vernier, \textit{op. cit. supra} note 1, § 26, p. 108; Koegel, \textit{op. cit. supra} note 1, at 167-172, and authorities there quoted.}
\footnotesize{\textsuperscript{55} See the Uniform Marriage and Marriage License Act, 9 U. L. A. 252, 270, §§ 1, 23.}
\footnotesize{\textsuperscript{56} Vernier, \textit{op. cit. supra} note 1, at 108.}
\footnotesize{\textsuperscript{57} Pollock and Maitland, \textit{op. cit. supra} note 23, at 366, 367.}
necessarily incurred in litigation involving any other relation of life. . . . So long as human agencies can be employed to resolve human disputes, there is no particular reason for excluding a single class of controversies from hearing because of the hazard of mistake common to all . . . . In government, a choice is always to be made between ends, but a record of marriage is not an end in itself but a means towards social order. It is not wise to defeat social order for the sake of orderliness in method. If a choice of "method" were all that was involved, we would perhaps be constrained to agree that informal marriage ought not to be condemned. But the problem is much more deeply rooted than this. Society has an interest in the marriage relation. And this interest attends the formation of the union just as surely as it does its dissolution. The same public interest which prohibits parties from "divorcing themselves" requires that they be prohibited from "marrying themselves." We need no further evidence of society's increasing concern over the entrance into matrimony than the recent trend of social legislation toward pre-marital physical examination. It is difficult to conceive of any sound objection to a law which would require parties desiring to contract a valid marriage to superadd some public formality to their own words of present consent. Surely, no one would be inconvenienced by a reasonable provision which insisted upon the maximum of simplicity and the maximum of certainty except, perhaps, those men and women who are largely

68Black, supra note 10, at 131, 132.
69In taking this orthodox view, the writer is not insensible to the growing dissatisfaction with it, nor to the authority of a group of respectable reformers who deny that the state has an enforceable interest in the family and insist that the process of establishing the relationship is a matter of personal contract. See authorities cited by Bradway, Tampering with Marriage (1937) 6 Brooklyn L. Rev. 277, n. 3. This article contains an excellent discussion of the nature and extent of society's interest in the marriage relation.
70Bowne, Principles of Ethics (1892) 236, quoted in Kogel, op. cit. supra note 1, at 170: "Marriage is not a socially indifferent thing. The married couple need the recognition and assistance of society; and society in turn has the right to demand a specific announcement of the relation it has expected and recognized."
71See Notes (1938) 13 St. John's L. Rev. 199, (1939) 53 Harv. L. Rev. 309. At p. 312 of the latter, it is said: "Another substantial threat to the effectiveness of the legislation exists in the continuing validity of common law marriage in some of the states having pre-marital health acts. But the fact that such marriages offer an easy opportunity for avoidance may, when added to other familiar considerations, prompt legislatures to impose statutory control on marriage."
72See, for example, the Uniform Marriage and Marriage License Act, 9 U. L. A. 252, 270, §§ 1, 23, and also Domestic Relations Law § 11 (N. Y.).
responsible for the fraud and immorality with which the history of common law marriage is replete.

In recommending statutory abolition of common law marriage, Koegel makes one wise reservation: "The statutes should provide that where the parties attempt a valid ceremonial marriage, but because of an existing impediment can effect no legal marriage, and continue the marital relationship after the impediment is removed, they should be deemed to be legally married effective from the date the impediment is removed." The hardship that can result from the absence of such a provision was recently demonstrated in Maryland, where (as we have seen) the law requires a religious ceremony. In *Mitchell v. Frederick* a ceremonial marriage was successfully attacked upon a showing that it was celebrated while the woman was still married to another man, who was insane at the time and who continued to live for 25 years after the attempted second marriage. The Court held that the continued cohabitation of the parties after the removal of the impediment by the death of the first husband could not validate the union in the absence of another ceremony. In such cases, where both of the parties are unaware of the existence of an impediment, the best interests of society would seem to require that the validity of the marriage and the legitimacy of its offspring be saved by statute. Whether any adjustment would be necessary in such a statute for cases where there was an impediment known to one of the parties but unknown to the other, would depend largely on the policy of each state with respect to such cases.

The type of statute here suggested is entirely consistent with a concomitant abolition of common law marriage. In the situation contemplated, the parties have already complied with the formal requirements of the law, and the record of their intention to become husband and wife is extant. The continued cohabitation of the parties after re-

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*Koegel, op. cit. supra* note 1, at 170.

*Mitchell v. Frederick*, 166 Md. 42, 170 Atl. 733 (1933).

The writer assumes that both parties in the *Mitchell case* were unaware of the existence of an impediment to their marriage. There was no evidence offered in the case from which the good faith of the parties could be determined, as the decision was rendered on a demurrer to the bill of complaint. The Court said, however: "There is no averment concerning knowledge of Alexander Mitchell, or in fact of either of the parties to it, that this second marriage might be invalid." *Mitchell v. Frederick*, 166 Md. 42, 44, 170 Atl. 733, 735 (1934).

moval of the impediment would, under an appropriate saving statute, merely render operative the prior marriage ceremony. Although different legal principles are applicable, there is no sound reason why (in the situation contemplated) the law should not allow the desired social end (legality of cohabitation and legitimacy of offspring) to be effected by the same technique as is employed in cases where invalid marriages are ratified by the conduct of the parties after removal of such impediments as fraud, duress, insanity, drunkenness and non-age. 67 In Massachusetts, where common law marriage is invalid, a saving statute has been enacted which provides:

“If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.” 68

Natural justice—to say nothing of the great public interest involved in upholding marriage and saving the legitimacy of children—requires the enactment of a similar statute, 69 in all jurisdictions where common law marriage has been or is to be abolished.

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67 For a similar suggestion see Strahorn, Void and Voidable Marriages in Maryland and Their Annulment (1938) 2 Md. L. Rev. 211, 227, where in speaking of a subsisting prior marriage as an impediment to a valid marriage, he says: “It would seem more consistent with the judicial inclination to uphold marriage and legitimacy to presume a necessary ceremonial marriage from cohabitation after impediment removed, or even to allow subsequent cohabitation to serve as an outright ratification.” (Italics supplied.) Professor Strahorn’s first proposal merely raises an evidential presumption. His second one, which is italicized, as well as the suggestion in the present text, goes beyond this.


69 The Massachusetts statute is restricted to cases where the impediment is a prior subsisting marriage. It would, perhaps, be wise to extend the saving statute so as to include other impediments.
THE COURTS AND ADMINISTRATIVE AGENCIES

RETROACTIVE VALIDITY OF ADMINISTRATIVE REGULATIONS

A PROBLEM rarely arising in an historical survey of Administrative Law, but portending much of future happenings, was suggested by the recent case of Speert v. Morganthau. An understanding of the problem requires an understanding of this case.

The Federal Alcohol Administration was created by an Act of Congress in 1935 (having previously existed as the Federal Alcohol Control Administration under the NIRA) and given power to regulate and control certain aspects of interstate traffic in liquor, including the licensing of the various branches of the industry, the fixing of standards for bottling, labeling, selling and shipping of distilled spirits. The power to determine standards of identity was also granted. The regulation complained of was issued in 1938 and redefined corn whiskey, which had previously been defined by Regulation No. 5 in 1936. In compliance with the definition of 1936 certain spirits had been distilled by the petitioner and in 1939 were ready for bottling. The Administration, applying the 1938 Regulation, denied authorization of the use of "corn whiskey" labels on the 1936 distillate. The petitioner, a distilling corporation, argued that such action was retroactive as to this distillate and hence a denial of due process. The petitioner applied for a declaratory judgment and injunctive relief to prevent the operation against it of this regulation of the Federal Alcohol Administration which was alleged to be retroactive and therefore violative of the fifth amendment. It was held that regulations arising out of the police power may validly be effective in retrospect.

The situation gives rise to the problem: What type of regulations may be retrospective and yet valid and effective? For the purpose of analyz-


3 Fed. Reg. 486 (1938). Section (2) of this regulation defined "Straight corn whiskey" as "straight whiskey distilled from a fermented mash of grain of which not less than 80% is corn grain, aged for the required period in uncharred oak containers or reused charred oak containers, and not subjected, in the process of distillation or otherwise, to treatment with charred wood."

1 Fed. Reg. 92 (1936). The spirits in question were thus defined in this regulation: Class 2. (d) "Straight bourbon whiskey" and "straight corn whiskey" are straight whiskey distilled from a fermented mash of grain of which not less than 51% is corn grain.

ing problems of administrative rule making, there has been devised a system of tentative categories of regulation types. Of present importance are those classes denominated "legislative" and "interpretive." If the statute is a specific delegation of legislative power to "fill in the details" and so adapt the statute to particular cases or situations, then the pursuant regulation is legislative. If the statute is a general delegation of power to interpret by resolving ambiguous terms and guide in enforcing the statute, then the regulation is interpretive.

Retrospective regulations seemingly first ran afoul of the law courts in the case of Shearer v. Anderson. There the bone of contention was the interpretation of the phrase "or other casualty" as applying in the 1916 and 1918 Revenue Acts. The Commissioner attempted to apply the 1918 interpretive regulation to a tax levied under the 1916 Act. The court decided that, "... whatever the effect of the departmental interpretation of the later act of 1918 may be on the construction of the same clause reenacted by still later legislation, it can not operate retroactively."

Another example of a retroactively impotent regulation was afforded by Helvering v. R. J. Reynolds Tobacco Co. This was a contest of a tax for the year 1929, paid under the Revenue Act of 1928. While the litigation was in progress the Bureau of Internal Revenue adopted Regulation 8 b under the 1934 Revenue Act and immediately attempted to apply its provisions (which, so far as the problem in the R. J. Reynolds case was concerned, differed from the preceding regulations) to the case then pending. Upon this state of facts, the Supreme Court commented, "... the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force."

This decision is strengthened somewhat as a denial of retroactivity to such regulations by the fact that the Revenue Act of 1934 amending the acts of 1926, 1924 and 1921 contained a clause which provided that the Treasury Department may prescribe the extent to which any regulation may be applied without retroactive effect. The clause was held

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8Alvord, Treasury Regulations and the Wilshire Oil Case (1940) 40 Col. L. Rev. 252.
9Alvord, supra note 6 and Lee, Legislative and Interpretive Regulations (1940) 29 The Georgetown Law Journal 1.
1016 F. (2d) 995 (C. C. A. 2d, 1927).
11Shearer v. Anderson, supra at 996.
12306 U. S. 110 (1939).
14Section 3791 (b).
to recognize merely the existence of retroactive regulations, but not to render their issuance imperative in the ordinary situation. The Congressional purpose was to enable the Treasury to correct misinterpretations or omissions and thereby affect cases in which the taxpayer's liability had not been finally determined.  

A few months after the *R. J. Reynolds case*, the Supreme Court was confronted with a similar question. The controversy was as to the meaning of the phrase "net income . . . from property." The expression was introduced in the Revenue Act of 1921 and reappeared in the Acts of 1924 and 1926. Pursuant to the 1921 Act the Treasury issued a definition of the term. The same meaning was continued under the Acts of 1924 and 1926 by appropriate regulations. However, in 1929, following the Revenue Act of 1928, the Treasury attempted to redefine "net income . . . from property." The complainant protested that since the regulation was not issued coincidentally with the 1928 Act, the prior definition persisted. The court denied this view, stating "These regulations applied prospectively only and did not purport to reach back to earlier years when the taxpayer relied on a different rule or practice." 

Decisions such as these have led the writers to formulate an empiric system for ascertaining the retroactive validity of regulations. "The question as to the constitutionality of retroactive taxes is a question of degree. bringing in a standard of reasonableness; if retroactivity is not too extreme, constitutionality will be upheld." Alvord is of the opinion that, "Validly promulgated legislative regulations speak with the force of the statute itself" and therefore certainly can be amended prospectively, and retrospectively as well, although the latter should be avoided as a matter of policy, especially where such an amendment would adversely affect an individual. As to an interpretive regulation—prior to legislative ratification it can be changed, even retroactively; but once ratified it becomes a part of the law and consequently the only permissible interpretation in the absence of a further Act of Congress.

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14T. R. 62, Art. 201 (h).
15Helvering v. Wilshire Oil Co., 308 U. S. 90, 97 (1939).
17Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 Col. L. Rev. 252.  
But however the writers have attempted a scientific analysis of the question of retroactive regulations, the courts have been most reluctant to aid by a categorical pronouncement of a basis of validity. An excellent opportunity was presented in *Mulford v. Smith*,\(^\text{19}\) where a regulation establishing marketing quotas for tobacco growers was in question.\(^\text{20}\) The facts showed that the tobacco producers in Georgia and Florida had practically completed raising, curing and grading their crop before receiving notice of their quotas and that the auction market was about to open at that time. Instead of designating the type of regulation involved and thereby determining its validity, the court preferred to rest its decision on the ephemeral distinction between the amount of tobacco produced and the amount marketed. It was held that since the Act operated not on farm production but on marketing, which occurred after quota assignments, it did not violate due process, though the facts clearly showed tobacco in the locality affected was raised only for the market.

In the present case,\(^\text{21}\) a similar distinction was drawn between the production and marketing of a commercial product. Corn whiskey was distilled, according to the regulation of the Federal Alcohol Administration in 1936. But that product in 1939 was no longer corn whiskey within the terms of the new regulation, not because of physical changes, but because the definitive regulation had changed. The regulation of course was legislative\(^\text{22}\) and so could operate retroactively if the statute was broad enough to permit it, and if Congress had the power to authorize it.\(^\text{23}\)

The present day treatment of administrative regulations, especially their systematic classification, is comparatively recent. No doubt this accounts for the lack of a well-defined yardstick of their retrospective effect. By astute analysis of the few reported cases, however, the commentators (Alvord, Lee, Paul, Surrey *et al.* ) have evolved a scheme of type tagging regulations. Classification as to type is a clue to the determination of retroactive effectiveness. Here the court has provided an interesting check on the workability of the system.

It should be noted before passing final judgment on the decision here.

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\(^{19}\)307 U. S. 38 (1939).

\(^{20}\)Agriculture Adjustment Act 1938, §§ 311-314.


discussed, that the petitioner wholly failed to show any specific injury resulting from the changed regulation—the distillate could still be marketed as bourbon without loss of revenue. Failure to present a case of undue hardship undoubtedly influenced the court in its decision.

J. CARLETON GARTNER

RES JUDICATA IN ADMINISTRATIVE PROCEEDINGS

"A MAN should not be twice vexed for the same cause," and "it is for the public good that there be an end to litigation,"1 are the two maxims upon which is founded the doctrine of res judicata,1 "a principle of universal jurisprudence forming a part of the legal systems of all civilized nations."2 Thus it is only natural for the courts, borrowing from their own experience, to endeavor to apply this ancient doctrine, with all its subtle complexities, to the proceedings of administrative bodies which exercise quasi-judicial functions.

Concisely stated, "In administrative law, then, the question arises: to what extent do administrative tribunals themselves apply res judicata in the course of their exercise of their quasi-judicial powers, and to what extent do the courts require them to apply it? Bearing upon this question is another: what is the effect of the statutory delegation to such tribunals of broad power to vacate or modify their orders?"3

It may be flatly stated that in the absence of some positive indication of legislative intent that the administrative tribunal shall exercise such a power, a court, in reviewing the decisions of such a tribunal, is very likely to hold it bound, in collateral proceedings, by its own prior adjudications, if final and valid, so far as concerns the same parties and the same issues.4

The question as to when there has been such a grant of power is not as simple as it might seem. In the recent case of Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Commission,5 the Supreme Court of California refused to allow the Commission to change its mind in a hearing on a petition even though the statute authorized an independent investigation by the Commission.

1Freeman, Judgments (5th ed. 1925) 1318.
2Id. at 1321.
3Hart, An Introduction to Administrative Law (1940) 356.
4Ibid.
5100 P. (2d) 918 (Cal. 1941)
Briefly, the facts were these: In 1936 the California legislature enacted the Agricultural Proration Act, under which the production of olives was prorated throughout the state in order to stabilize the market. Section 23 of the Act provided that the program could be terminated by a petition of 40 per cent of the olive producers, and by the owners of 40 per cent of the producing factors of the industry. A petition for this purpose was filed in 1939; but, after holding a hearing as required by the act, the Commission ruled that as a matter of fact there were not enough signatures. Later, on the basis of a field survey by its department of finance and without further hearings, the Commission reversed itself, held the petition sufficient, and ordered the program terminated. One of its grounds of justification was a provision of Section 23 of the Agricultural Proration Act, allowing the Commission to "initiate an investigation on its own motion to determine whether or not the facts [warranting a proration program] . . . continue to exist."

Thus the Commission could no doubt have entertained a new petition, or could have proceeded on its own initiative without regard to the previous decision. But it made the mistake (on advice of the attorney general of the state) of rescinding its old order denying the petition to terminate, and issuing a new one granting it. The court observed that "the present proceeding to terminate proration, initiated by certain growers and producers, is an entirely different one from that contemplated by the quoted provision of section 23, and the action of the commission in secretly receiving and considering evidence after the conclusion of the hearing cannot be justified under it."

Though the court hung its decision on the peg of *res judicata*, the court held that, in receiving the report of the department of finance without a public hearing to give the petitioners the right of cross-examination and rebuttal, the commission had failed to meet the statutory requirements of a hearing on the petition, citing *Morgan v. United States* and *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, which state "the well-established federal rule prohibiting a commission from basing its findings on schedules and other general information in its files, unless such schedules were put in evi-

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7*Olive Proration Program Committee v. Agricultural Prorate Commission*, 100 P. (2d) 918, 922 (Cal. 1941).

8*304 U. S. 1* (1938).

9*227 U. S. 88* (1913).
dence in the particular proceeding, and opportunity given the utility to meet and explain them." This rule is apparently followed by all the states except Wisconsin.  

Thus the Supreme Court of California was no doubt technically correct in its exposition of the law on the subject, and yet the practical effect of its decision can be nullified, if the commission doffs its quasi-judicial robes and assumes its legislative toga.

Here the legislature seems to have split its delegation of legislative powers two ways. A certain percentage of agricultural producers may by petition bring about the termination of a proration program, or the administrative agency may do so on its own initiative. In view of the fact that the administrative body has the final word in either event, and since it could not be contended that a ruling on a petition would bar all future administrative determinations on the subject, it is difficult to see how any "personal rights" can vest in any individuals concerned. Yet the court said,

"Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. As to the first factor, almost without exception, the courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified. . . . But if it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changing conditions the doctrine of res judicata is not applicable. . . . The statute contains no provision in express terms giving the commission authority to change its considered determination, made after a full hearing, and the fact that any order made by it may be reviewed in a judicial proceeding to be commenced within 30 days after its effective date is some evidence of legislative intention to the contrary. And since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right to do so."  

As authority, the court cited Heap v. City of Los Angeles, where it was held that a civil service commission could not change its decision on the status of an employee. But that case is more in line with the cases

11 Ibid.
13 6 Cal. (2d) 405, 407, 57 P. (2d) 1323, 1324 (1936).
holding that when an administrative body makes a decision which vests a property right in an applicant, as when a license, a patent, or land is granted, res judicata will be applied, and "it will be revocable only in accordance with power delegated expressly or by implication of the statute." Such power is not "easily implied," and "there seems to be no rule that it is inherently involved in the power to grant." On the other hand, if the first application is refused, the doctrine of res judicata does not keep the administrative agency from considering a second application if it chooses. But in such a case it does bind the applicant, for it would be clearly against public policy to compel an administrative agency to rule on repeated applications from the same party. This was brought out in In re Barratt's Appeal, a patent case.

Thus the application of res judicata is demanded more for the protection of property rights vested as a result of administrative action than for the broad principle underlying that maxim. Furthermore in these cases the agency is an interested party, representing the public interest. The principal case is in this category. However, these cases should not be confused with cases where the administrative tribunal is meting out justice to two private parties. Professor Hart, after considering Welhouse v. Industrial Commission, Gillen Company v. Industrial Commission, Holmberg v. Chicago, St. P., M. & O. R.R. Co. and Arizona Grocery Company v. Atchison, Topeka, and Santa Fe Railway Company decides that no hard and fast rule can be laid down for the latter type of cases. The confusion is brought about by the variety of functions of administrative agencies, shading off by almost imperceptible degrees from the administrative to the legislative to the judicial, and by the varying grants of power by the legislatures to revoke, reconsider or modify decrees.

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14 Hart, op. cit. supra note 3, at 367.
15 Ibid.
16 Ibid.
19 214 Wis. 163, 252 N. W. 717 (1934).
20 219 Wis. 337, 263 N. W. 167 (1935).
22 284 U. S. 370 (1932).
THE FAIR LABOR ACT AND OPP COTTON MILLS v. ANDREWS*  

WHILE a 25 cents hourly minimum wage was automatically established with the enactment of the Fair Labor Standards Act,¹ the avowed objective, a 40 cents minimum, remained unaccomplished. Power to fix wage rates in excess of the statutory minimum was vested by the legislature in an administrator assisted by industry committees. In pursuance of the Act, the administrator promulgated a 32½ cents minimum for the cotton industry to the alleged detriment of Opp Cotton Mills and other small mills in the deep South. Suit was brought by this group protesting both the validity of the Act and the procedure of the Administrator and his industry committee.²

The Act Is a Valid Delegation of Legislative Power

The courts and writers have often declared that legislative powers cannot be delegated.³ At the same time the legislatures are constantly delegating powers considered essentially legislative in character.⁴ And such delegations are constantly being upheld by the courts.⁵ An investigation of this subject affords an illustration of the avowal that one can find good authority for any statement, or, to put it in the pungent words of a jurist, "... judges know which way to decide a good deal sooner than they know how to give the reason why."⁶ The contradiction, or paradox, is resolved by the courts in this way:

"That the legislative power of Congress cannot be delegated is, of course,

*61 Sup. Ct. 524 (Feb. 3, 1941).
²The constitutionality of the Act, as a valid exercise of the commerce clause, was sustained in United States v. F. W. Darby Lumber Co., 61 Sup. Ct. 451 (1941), 29 THE GEORGETOWN LAW JOURNAL infra.
³¹ Cooley, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 224.
⁴² Willoughby, CONSTITUTION (2d ed. 1929) 809; Fairlie, NATIONAL ADMINISTRATION OF THE UNITED STATES (1905) 23.
⁶Justice Holmes, as quoted in Smith, Surviving Fictions (1917) 27 YALE L. J. 153, n. 41; cf. Weeks, Legislative Power Versus Delegated Legislative Powers (1937) 27 GEORGETOWN LAW JOURNAL 314 quoted in Gelhorn, op. cit. supra note 5, at 171 et seq.
clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing rules and regulations."

Thus, Congress cannot give the administrator power to legislate, that is, to make laws, but only power to fill in the details, that is, to make regulations. This statement somewhat encourages the student as he begins a reading of the cases—but before he has gone far he is led to inquire just when a detail is not a detail, since the primary standards set down seem in many instances to leave a broad and relatively barren outline for the administrator to fill up. Such standards have been, for example, "public interest,"8 "public convenience and necessity,"9 "just and reasonable,"10 "purity, quality and fitness for consumption,"11 "undesirable resident,"12 "in their discretion deem expedient."13 Faced with cases such as these petitioner must have advocated his cause none too confidently.

At any rate courts and writers are alike in insisting that the statute itself contain a specific statement of the policy or objective which the legislature has in mind and that it further state a standard or norm to which the administrator must look in determining the nature of the regulations he will promulgate by way of effectuating the legislative policy.14 The Court in the Opp case considered the policy of the Act to be expressed "with precision."15 It was, to wit, to raise the minimum wage to 40 cents an hour as soon as economically feasible, without substantially curtailing employment.16 The standards were likewise deemed adequate. In boosting the minimum rate the administrator and his committee were to be controlled by "economic" and "competitive" conditions throughout the industry under investigation, showing due regard for the possibility that a new rate might substantially curtail employ-

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15United Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940); Currin v. Wallace, 306 U. S. 1 (1939); and cases cited supra.
16Ibid. Ct. 524, 532.
ment, and "other relevant factors."^{17}

To assist the administrator a committee was formed composed of equal numbers from the industrialists, workingmen in the industry, and the general public. After making a thorough study of the industry the committee was to make certain recommendations to the administrator who, after a hearing held by him at which all interested persons were free to appear, would approve or disapprove the recommendations. The administrator's power extended no further than that. If he disapproved the wage advised by the committee he could not then fix one himself but would have to turn the matter back to the committee for further study and recommendations.\(^{18}\) Throughout petitioner's argument there could be discerned resentment over the fact that the predominating power on this committee, as between small and large cotton industrialists, was in the hands of the latter. Such, it will be remembered, was an objection leveled at the Bituminous Coal Act, overthrown in the Carter Coal case as an example of "legislative delegation in its most obnoxious form,"^{19} because it amounted to the vesting, in a majority of a group of private persons, of a power to legislate for the minority of that group.

But this case is distinguishable from the Carter case. In that case the committee itself made the regulations whereas here the committee merely recommends; the administrator, a public official, makes the rule.\(^{20}\)

**What of the Procedure?**

Since relatively few of the thousands of cases handled by administrative agencies ever find their way into the courts (approximately 1%)\(^{21}\)

\(^{17}\)Ibid.

\(^{18}\)Sec. 8(d) of the Act, 52 Stat. 1064 (1938), 29 U. S. C. § 208(d) (Supp. 1940).


\(^{20}\)This device [the industry committee] would seem to provide a broad scope for tapping the information, opinions, and criticisms of those to be effected by the rule, without trespassing the constitutional limitations marked out in the Schecter and Carter cases ... it assures the vigorous participation of representatives of the non-government groups most concerned. As yet, the use of advisory committees of this type is uncommon in federal administrative practice. Should the industry committee, as seems highly probable, survive a constitutional test in the courts, however, it is likely that its appeal as a device for democratic participation in government will hasten its further development in the near future." Isenberg, Developments in Administrative Law, 1930-1940 (1940) 27 Va. L. Rev. 29, 40.

\(^{21}\)Isenberg, supra note 20, at 48. See also Aitchison, Reforming the Administrative Process (1939) 7 Geo. Wash. L. Rev. 703, 714. There are "some 130-odd federal administrative
and since these agencies are quite generally adjusting the rights of individuals, the question of a fair hearing is extremely important. That an adequate hearing before the administrator was afforded to all concerned in this case is not disputed, but the petitioner complained that no hearing was granted his group before the industrial committee. This, even if true, is not material, however, for the committee was not sitting in a quasi-judicial capacity but constituted an inquisitorial body for the benefit of the administrator. Its function was the same as that of the Federal Tariff Commission in the well-known Norwegian-Nitrogen case.

Does the Opp case answer the question whether wage fixing by administrative bodies is a quasi-legislative or a quasi-judicial function? The question is important in view of the distinction sometimes made that hearings are not necessary in the exercise of quasi-legislative powers but are required by the due process clause where the function to be performed is quasi-judicial. When the task of the administrator involves the adjudication of private rights of particular persons and companies the action is said to be an adversary one, quasi-judicial in nature, requiring procedure closely akin to the judicial process. On the other hand, if the power involves the promulgation of a general rule operative in the future upon all persons similarly situated the action is quasi-legislative. An order such as the one here directed certainly looks to the future, applies to a nation-wide group of persons similarly situated and in that sense is indeed legislative in character. Still, cannot it be argued that the regulation directly affects particular persons as well? Petitioner stated in his brief that the maintenance of the rate schedule would ruin his business. It may be asked whether the judicial and legislative spheres ever blend and, if and when they do, what kind of hearing would satisfy the due process clause. Observe the assertion of Chief Justice Hughes in the first Morgan case where rate making

agencies . . . one of which agencies decided 603,246 separate controversies while, during a corresponding period, all of the federal courts decided a total of only 141,167 cases of all kinds.” 64 A. B. A. REP. 580 (1939).

61 Sup. Ct. 524, 525 (1941).


Compare Norwegian Nitrogen Co. v. United States, supra (quasi-legislative) with Southern Ry. v. Virginia, 290 U. S. 190 (1933) (quasi-judicial). In the former case a hearing was not considered necessary while in the latter case the lack of an adequate hearing was deemed violative of the due process clause. Note (1939) THE GEORGETOWN LAW JOURNAL 486.

“The Court will sense before it proceeds far, that this is a grim fight for existence on the part of the small cotton mills of the Deep South.” Brief for Petitioner, p. 13.

Morgan v. United States, 298 U. S. 468 (1931), Note (1939) 27 THE GEORGETOWN LAW
appears to be labeled both legislative and judicial:

“It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to proceedings its distinctive character . . . , it is a proceeding which by virtue of the authority conferred has special attributes. . . . A proceeding of this sort requiring the taking and weighing of evidence, determination of fact based upon consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of judicial proceedings. Hence, it is frequently described as of quasi-judicial character.”

It is noteworthy in this connection that the court has never shown greater concern that full hearings be afforded than it has in the rate-making cases and it is difficult to see a substantial difference, constitutionally speaking, between the fixing of minimum rates and the fixing of minimum wages. Wage-fixing cases on this phase of the subject are few. The only instance of a court’s failure to demand a full hearing in either respect is found in New Jersey where milk price-fixing was regarded as a quasi-legislative function with no hearing in the judicial sense considered necessary. A recent case from California declared an order of the wage administrator invalid for the lack of an adequate hearing which, the court declared, was required by due process of law. In the case, as in the case cited above, the statute expressly requires a hearing and for that reason it is difficult to determine whether, when the courts speak of due process, it means statutory due process—that is, due process as required by the statute—or constitutional due process. Thus, the Court states, in the case:

“The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. The proceedings before the Administrator as provided by section 8(b) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the Committee.”

28 Cardozo, J., in Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304-305 (1937): “The right to such a [fair] hearing is one of the rudiments of fair play . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.” See Note (1939) 52 Harv. L. Rev. 509.
30 People v. Johnson, 109 P. (2d) 770 (Cal. 1941).
31 61 Sup. Ct. 524, 536.
The answer to the question posed may be found in this quotation from the court’s opinion. Is the court speaking there of statutory due process or constitutional due process? The court did not have to tell us definitely because (1) The statute itself, as pointed out previously, makes express provision for adequate notice and hearing, and (2) A full hearing before the administrator was in fact afforded both sides. Perhaps, a later case will more definitely settle the question. But the breezes at present blow favorably for those who think that constitutional due process must be satisfied in these cases.32

Conclusion

Some have come to dread the increasing power of the executive and administrative arms of government, fear the diminishing influence of the legislature, regret the confessed inability of Congress to do its own law making. There are those who think Congress should not lessen its own importance by shying away from what is the admittedly difficult task of making laws that are intricate and specialized enough for our intricate and specialized systems. This school of thought is of the opinion that there are many important delegated powers which Congress could just as well keep unto itself with consequent strengthening of democratic processes. Others insist that this is an age of expertise which must be run by experts. Our elected law makers not being experts, capable administrators present the seeming solution. Many thinkers today accept this latter view and believe that expertise and democracy can form an enduring partnership. Nothing can better assure this belief than a close adherence to the recommendation of the American Bar Association’s Special Committee on Administrative law when it observed:

“Judicial review should be jealously preserved to the extent of assuring due process of law by requiring a hearing of both sides, allowing each side to present its case fully and to meet fully everything to be used against it in arriving at a determination, precluding inspections with one party present and not the other, and interviews with representatives of one side in the absence of or without notice to the other.”33

Dean Landis, among others, has suggested that we adopt in a qualified

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32 See the interesting but inconclusive comment of the judge in Western Union Telephone Co. v. Industrial Commission of Minnesota, 24 F. Supp. 370 (D. Minn. 1938). The court strongly intimated but did not decide (because it did not have to) that a full hearing was required by the Constitution. In arriving at this conclusion the court leaned heavily on the rate making cases.

form the English practice where Parliament reviews proposed administrative rulings prior to their promulgation. Professor Gelhorn points out that this practice has met with but little success in England. It would retard action, no doubt, where oftentimes action needs be prompt. Judicial review likewise slows down the administrative process but that presents a reason not for abolishing judicial review but for devising ways to speed it up. Adopting the suggestion of Mr. Landis should give the Congress a greater share in the ever growing field of administrative legislation as well as a stronger sense of responsibility. Its success or failure would, it seems, depend upon how diligent and serious the legislature was in implementing the practice. At any rate that body has done a good job in the drafting of the Fair Labor Standards Act. It provides for a careful study of the problem involved by those most concerned, viz., the industry itself, the workers in the industry, and the consumers, in addition to a full consideration by a responsible administrator exercising an independent judgment on the evidence after a legal hearing.

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34 Landis, The Administrative Process (1938) 76 et seq.
35 Gelhorn, op. cit. supra, note 5, at 273.
FEDERAL LEGISLATION

WIRE-TAPPING: THE HOBBS AND WALTER BILLS COMPARED

Inspired primarily by the threat to our national security, the House Judiciary Committee has been working overtime recently in an effort to draft a bill which will legalize wire-tapping. The problem before the committee is one of balancing the urgent necessities of national defense and law enforcement against the inevitable invasion of civil liberties that results from an unrestrained use of these methods. In view of the large scale national defense measures that have already been adopted, it is unreasonable to suppose that Congress will hesitate to adopt legislation so essential to our internal security. The problem is not so much will Congress legalize wire-tapping, but rather what restrictions and sanctions will be imposed upon its use in order to limit intrusions upon the individual's privacy to a practical minimum. Some invasion of this right will be necessary, but like other and similar invasions, if properly controlled, it can be justified by the greater good which it attains. To be effective, the control must consist primarily of sanctions to be exercised in advance of its use, and secondarily of penalties to be enforced where the use has been unlawful.

Wire-tapping is not a new subject for court or legislature. Although a problem of relatively recent origin, its history has been an active one. The first important legislation on wire-tapping was adopted in a period of national emergency much like the one we are now passing through.¹

In 1918, the Government assumed supervision of the telegraph and telephone systems of the country. In order to allay the fears of many that such action would result in wholesale "snooping" on the part of government officials, a statute was passed providing that so long as the Government operated these systems, wire-tapping would be prohibited.² By its own limitations the statute ceased to be effective when the war ended.

Between 1918 and 1927 the problem was given little consideration, either by Congress or the federal courts. By 1927, however, twenty-five

¹Previous to this time Congress had passed several acts referring to the control of radio, but their prime purpose was not to regulate interception. Radio Act of August 13, 1912, c. 287, 37 Stat. 302.
²40 Stat. 1017 (1918).
of the states had passed statutes barring wire-tapping. During this same period not one state authorized it by legislative enactment.

In 1927 a case came before the Supreme Court involving the admissibility of evidence obtained by a wire-tapping in a prosecution for violation of the narcotic laws. A bare majority of the Court upheld the validity of wire-tapping as means of securing evidence on the grounds that it did not constitute a violation of any constitutional guarantee. The Court held that wire-tapping did not amount to a search and seizure, and hence, even if the action of the investigators was an unreasonable intrusion upon the right of privacy, it could not be held prohibited by anything in the Federal Constitution. This was the case of Olmstead v. United States, which still stands as controlling the issue of constitutionality.

Following the decision in this case, several bills were introduced before Congress in an attempt to outlaw wire-tapping. The proposed bills sought a solution to the problem in various ways. One provided that evidence obtained by wire-tapping would not be admissible in a criminal action. Other bills went further, making it a crime for any person to tap wires; while another provided that it would be unlawful for a public officer to intercept messages. Other approaches were taken, as in the provision adopted by Congress in its 1933 budget estimate that no part of the funds appropriated to the Federal Bureau of Investigation could be used for wire-tapping to convict under the National Prohibition Act.

These efforts were climaxed in 1934 when the Federal Communications Act was passed. Section 605 provided that:

"... no person not being authorized by the sender shall intercept any

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3See Brandeis' dissent in Olmstead v. United States, 277 U. S. 438, 480 (1927), for a complete compilation of the statutes. Since then several states have permitted wire-tapping.

4Statement made by Lewis F. McCabe, Vice-President of the National Lawyer's Guild, Philadelphia, Pa., before the House Judiciary Committee (1941).

5277 U. S. 438 (1927).


9This provision foreshadowed the congressional intent that was soon to appear in the Federal Communications Act, for the Prohibition Act offered the principal use for wire-tapping.

communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . .”

Despite the clear language of Section 605, the federal courts were reluctant to declare wire-tapping by public officers illegal and to refuse evidence obtained by such practice.\textsuperscript{11} No doubt this attitude may be attributed to the strong influence of the \textit{Olmstead case}. In December of 1937, however, the Supreme Court, in \textit{Nardone v. United States},\textsuperscript{12} decided that the term “no person” as used in the Act, was broad enough to include law-enforcement officers and prohibited the reception into a federal court of evidence obtained by wire-tapping \textit{interstate} communications.

Later decisions have extended the ruling of this case to include evidence intercepted in \textit{intrastate} communications\textsuperscript{13} and evidence indirectly obtained as a result of leads furnished from interstate telephone communications.\textsuperscript{14} And in a recent case, decided within the past year, the statute has been extended to include the recording of a telephone conversation, made with the authorization of one of the parties thereto, on a recording apparatus attached to an extension line.\textsuperscript{15}

Following the \textit{Nardone decision}, Congress immediately took steps to amend Section 605 of the Federal Communications Act. A bill\textsuperscript{16} was proposed to permit interceptions of telephone communications by Government investigators upon authorization of the head of the investigating agency. It was favorably reported by the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce and passed both houses, but failed to become law owing to a slight difference in phraseology of the bill as it passed both Houses.\textsuperscript{17}

Now, once again, the problem is before Congress. Two bills were offered for consideration and debate before the last session of the House Judiciary Committee. They both permit wire-tapping but differ in the

\begin{itemize}
  \item \textsuperscript{12}302 U. S. 379 (1937).
  \item \textsuperscript{13}Weiss \textit{v.} United States, 308 U. S. 321 (Jan. 1, 1940). See discussion in (1940) 28 \textsc{The Georgetown Law Journal} 789.
  \item \textsuperscript{14}Nardone \textit{v.} United States, 308 U. S. 338 (Jan. 1, 1940), (1940) 28 \textsc{The Georgetown Law Journal} 789.
  \item \textsuperscript{15}United States \textit{v.} Polakoff, 112 F. (2d) 888 (C. C. A. 2d, 1940).
  \item \textsuperscript{16}S. 3756, 75th Cong., 3d Sess. (1938).
  \item \textsuperscript{17}Annual Report of the Attorney General (1940) 12.
\end{itemize}
extent allowed and the requirements to be fulfilled before permission will be granted. H. R. 2266 provides that:

"Notwithstanding any other provision of law, whenever the head of any executive department of the United States has reasonable grounds for believing that a felony cognizable under any law of the United States the enforcement of which is under his jurisdiction, may have been committed, and he so certifies, any investigatorial agency forming a part of such department may, in connection with investigation, detection, or prevention of such felony or the apprehension of the perpetrators thereof, intercept, listen in on, or record telephone, telegraph, radio, and any other similar message or communications."\(^{18}\)

H. R. 3099 provides that:

"Upon application by any person employed in the investigation, detection, or prevention of offense against the United States, a judge of a United States district court, or of a State or Territorial court of record, or a United States commissioner, shall issue a permit, signed by him with his name of office, authorizing the applicant to intercept, listen in on, or record, in the district, State, or Territory in which such judge or commissioner has jurisdiction, any message or communication which may be transmitted by wire or radio by the use of any specified communication facilities, if such judge or commissioner is satisfied that there is probable cause to believe that such communication facilities are being used or are likely to be used in transmitting evidence information which would be useful in investigating, detecting, or preventing the commission of a felony cognizable under any law of the United States relating to national defense, or useful in the apprehension of the perpetrators of any such offense.

"The judge or commissioner shall, before issuing such permit, examine on oath the applicant and any witness he may produce, and require their affidavits or their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing they exist."\(^{19}\)

H. R. 2266 is sponsored by Representative Hobbs of Alabama; H. R. 3099 is sponsored by Representative Walter of Pennsylvania. They are both offered as amendments to Section 274 of the Judicial Code.

Although the proposed statutes legalize wire-tapping, the Hobbs bill is obviously much broader than the Walter bill. Both bills would require the investigator to obtain permission from a supervising officer preliminary to wire-tapping, and both would limit the practice to public officers only. There are, however, many dissimilarities in the two proposals:

(1) The Hobbs bill requires that such permission be obtained from


\(^{19}\)H. R. 3099, 77th Cong., 1st Sess. (1941).
the head of the executive department having jurisdiction to enforce the law violated. In practice this procedure is likely to prove unsatisfactory. By executive head of any department is meant cabinet officer. To require an investigator in the field, far removed from the seat of government, to obtain consent of the cabinet head before he can act would produce many complications. This is especially true in criminal investigations where time is of the essence. Moreover, as a practical matter, borne out by the experiences of many administrative agencies, the officer who would actually grant the permission would not be the cabinet officer himself, but one of several possible subordinates. On the other hand, the Walter bill provides that any judge "of a United States district court, or of a state or territorial court of record, or a United States commissioner," can issue a permit authorizing wire-tapping. The objection made to this provision is that it would result in many conflicting rules as to the sufficiency of cause required, etc. Undoubtedly this objection is a valid one, but it is a common problem in the administration of justice and one that has always accompanied the issuing of search warrants. Certainly this lack of certainty or uniformity is not a serious defect. Moreover, it is proper that the determination of such matters should rest in the hands of an unbiased judiciary rather than in an interested executive agency.

(2) The Hobbs bill permits wire-tapping to be used in the investigation of any felony. The extreme liberality of this provision has been vigorously criticized. It includes the tapping of wires of all individuals or corporations who might be suspected of violating such federal laws as income tax and labor regulations—any one of the federal laws which provide a penalty for violation of more than a year in jail. As a result, in hearings before the House Judiciary Committee, proposals have been made to limit investigations to crimes involving espionage, sabotage, kidnaping and extortion. It is difficult to understand why the latter two crimes have been included. Neither violation presents a particularly grave problem to our national welfare. Kidnaping is a heinous offense, no doubt, but it is relatively rare and, like extortion, is a particularly difficult crime to engineer successfully. Why these

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19* In letters to the House Judiciary Committee, the President, Attorney-General, and the Director of the Federal Bureau of Investigation, although recommending that wire-tapping legislation be adopted, have opposed the Hobbs bill as being too broad.

20 There are only two kidnaping crimes of more than 250 that remain unsolved. The Department of Justice had a record of 96.4% convictions during the past fiscal year. Annual Report of the Attorney General (1940).
two domestic crimes have been selected when such others as violations of the narcotic laws, the white slave laws, and bank robberies have been omitted, is difficult to understand. In this respect the Walter bill is again superior. The immediate and most important problem is national defense. H. R. 3099 limits wire-tapping to laws "relating to the national defense." Such power is undoubtedly needed to combat the intrigue of foreign agents. If the proposed regulations prove successful in matters of national defense, and if the need still exists, the privilege can later be extended to our domestic crimes.

(3) The Hobbs bill provides that wire-tapping may be used whenever there are reasonable grounds for believing a felony is being perpetrated. Under this provision, wire-tapping may be permitted even where there are no grounds, reasonable or otherwise, to believe that communication facilities are being used in the perpetration of a felony. All the officer needs to show is the probability of a felony, regardless of whether any means of communication are intended to be used. This provision is entirely too broad and, as worded, stands as an example of the sort of poor draftsmanship that is continually returning to haunt the courts. The Walter bill avoids this defect by providing that a permit will issue only where "there is probable cause to believe that such communication facilities are being used or are likely to be used in transmitting information" of a violation of any law of the United States relating to national defense.

(4) Under the provisions of the Hobbs bill wire-tapping may be used by any government agency charged with the enforcement of any law making an offense under it a felony. Under this provision the power may be given to private detectives hired by various government agencies from time to time. There appears no necessity for such a broad grant of authority. The government agencies possessing trained investigative agencies, such as the Federal Bureau of Investigation, the Postal Department and Treasury Department, should be expressly enumerated and the power denied to all others. In this respect the Walter bill merits the same criticism.

(5) As a means of effective enforcement, penalties should be provided for violations and abuses of the power granted. The Hobbs bill makes no mention of such penalties. On the other hand, the Walter bill provides that any person who maliciously and without probable cause procures a permit shall be subject to a fine of not more than $1000 or for imprisonment for one year. Other sections of the bill extend the
provisions of the Criminal Code to all persons making oath or affirmation under the act and provide for punishment for those who wilfully or with unnecessary severity exceed the authority granted them.

That Congress has the constitutional power to pass an act of this nature is settled by the Olmstead case. Some observers, however, drawing an inference from the strong manner in which the Supreme Court has enforced the Federal Communications Act, feel that if the issue were presented again, the present Court would overrule the Olmstead case. Assuming, arguendo, that the Supreme Court had declared wire-tapping to be a violation of the Fourth Amendment in the Olmstead case, can it in any way be indulged in constitutionally? It would seem so. The Constitution does not prevent all searches and seizures, but only those which are unreasonable. Hence, it would seem that if the constitutional requirements were followed, namely “a warrant issued upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized,” the problem could be solved. While it is true that some difficulty would be encountered in obtaining a warrant to wire-tap, the difficulty could be overcome. It was once impossible to get a warrant to search an automobile, but this is not necessary today under certain circumstances. The problem would consist in applying these provisions to wire-tapping. It has been done in New York State. Of course, secrecy is necessary. It is no problem that some states make wire-tapping a crime. They also make house-breaking a crime, but this has never stood in the way of issuing a valid warrant. The procedure has been adapted to the mails; there is no reason why it cannot be adapted to our other means of communication.

It is concluded, therefore, that of the two bills before the House Judi-

\[21\] Wigmore, Evidence (3d ed. 1940) § 2184b.
\[23\] N. Y. Const. Art. 1, § 12.
\[24\] This was the situation in Olmstead v. United States, 277 U. S. 438 (1927), but the Court dismissed the problem.
\[25\] Code 1926, Title 39, Postal Service Sec. 700. “The Postmaster General may, by a letter of authorization under his hand, to be filed among the records of his department, empower any post office inspector . . . to make searches for mailable matter transported in violation of law, and the inspector or officer so authorized may open and search any car or vehicle . . . or any store or house other than a dwelling house, . . . whenever such officer has reason to believe that mailable matter transported contrary to law may therein be found.”
ciary Committee, the *Walter bill* is superior. It presents a proper answer to the Attorney General’s “problem of proper balance and nice adjustments as between the rights of individuals on one hand and the needs and interests of society on the other.”

JAMES A. MC KENNA, JR.

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TIME and again it has been asserted\(^1\) that the expeditious settlement of the bankrupt’s estate is essential to an efficient administration of the Bankruptcy Act.\(^2\)

Since taxes, along with certain other claims, have priority over those of ordinary creditors, it was provided in Section 64(a)\(^3\) that “... in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the [bankruptcy] court.” The implication of this language plainly indicates a purpose to aid the prompt disposition of bankrupt estates; and it has been so held by the courts.\(^4\)

\(^1\)See *In re* Stavin, 12 F. (2d) 471, 473 (S. D. N. Y. 1925); *In re* W. P. Williams Oil Corp., 265 Fed. 401, 402 (W. D. Ky. 1930); cf. *In re* Sheinman, 14 F. (2d) 323 (E. D. Pa. 1926); and others.


\(^3\)Stat. 666 (1926), 11 U. S. C. § 104(a) (1934). Before the passage of the Chandler Act in 1938, § 64(a) of the Bankruptcy Act provided: “The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing receipt of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.”

Under the Chandler Act § 64 was completely rewritten, and now provides: “a. the debts to have priority . . . shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . .”

One of the active participants in the drafting of the 1938 amendments has stated that the salient provisions of old § 64(a) have been rewritten and are now included in § 64(a) (4); and that the former provisions requiring the court to direct the trustee to pay the taxes and the filing of receipts for such payments, have been deleted as unnecessary. See Weinstein, The Bankruptcy Law of 1938 (1938) 135.

*See* Cohen v. United States, 115 F. (2d) 505, 506 (C. C. A. 1st, 1940); *In re* Stavin, 12 F. (2d) 471, 473 (S. D. N. Y. 1925); *In re* Anderson, 279 Fed. 525, 527 (C. C. A. 2d, 1922); *In re* W. P. Williams Oil Corp., 265 Fed. 401, 402 (W. D. Ky. 1920).
Due in large measure to a desire to avoid delay, and in a lesser degree, to a reluctance to usurp the prerogatives of local tax authorities, a question which the courts have approached in a somewhat indefinite fashion is the extent to which the provisions of Section 64(a) have given the bankruptcy court jurisdiction\(^5\) in disputed tax claims. There is seemingly far less, if in fact there is any, real lack of harmony on this subject in the federal tax cases than there is with those involving non-federal taxes; for this reason it is deemed appropriate to examine the decisions involving federal taxes separately from the non-federal tax disputes. The cases might be further classified into those (1) pertaining to jurisdiction in the sense of exclusiveness of the forum, and (2) in which the question to be resolved is the extent\(^6\) of jurisdiction, namely, the scope of judicial review. But it will be unnecessary to make any more than a mental note of this classification, because the cases of the first type are for the most part federal tax controversies, and nearly all of the second category, non-federal.

**FEDERAL TAXES**

The leading authority construing Section 64(a) is the Supreme Court case of *New Jersey v. Anderson*.\(^7\) And, while it is a more pertinent authority when the powers of the bankruptcy court are challenged with respect to non-federal\(^8\) taxes, it has, nevertheless, been repeatedly cited

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\(^6\)*In re* Lang Body Co., 92 F. (2d) 338 (C. C. A. 6th, 1937); *In re* Gould Manufacturing Co., 11 F. Supp. 644 (D. Wisc. 1935). These cases do not deny that the bankruptcy court can pass on the "legality" of taxes, but they do deny that it can redetermine the "amount" of taxes and disregard the findings of the local tax authorities. *But cf.* Henderson County, N. C. *v.* Wilkins, 43 F. (2d) 670 (C. C. A. 4th, 1930); *In re* E. C. Fisher Corp., 229 Fed. 316 (D. Mass. 1915). These latter cases hold that the court of bankruptcy can decide any question as to "legality" or "amount" *de novo.*

\(^7\)203 U. S. 483 (1906).

\(^8\)The State of New Jersey levied an assessment against a bankrupt corporation for a license or franchise tax on a statutory basis of total stock outstanding. The state tax board fixed the amount at $40,000,000, but the referee found that the amount outstanding was considerably less than that, reducing the tax accordingly. The district court affirmed the order of the referee. The circuit court of appeals, however, held it was not a tax, but rather a general debt and thus not entitled to priority. The Supreme Court reversed the circuit court of appeals, holding that the claim was not a debt but a tax, and that the referee's action in reducing the tax was lawful.
in federal tax decisions.\(^9\) The most significant propositions laid down in this case were that bankruptcy courts had the power to determine the amount really due by the bankrupt wherever any question arose as to the amount or legality of a tax, and that bankruptcy courts should not be concluded by the findings of local tax authorities.\(^10\) Hence, it has been held that the bankruptcy court is the proper forum to ascertain the validity of a deduction taken by the bankrupt in arriving at its taxable income;\(^11\) that the bankruptcy court is not concluded by the findings of the Commissioner of Internal Revenue of the amount due;\(^12\) and that it is unnecessary to pay the tax and then sue for refund,\(^13\) in fact the rules of procedure governing an ordinary taxpayer do not apply to a trustee in bankruptcy.\(^14\) The trustee may not, however, set-off a claim for refund which is barred by the statute of limitations, against the government's assessment of a deficiency for a different year's income tax.\(^15\)

The necessity of winding up the bankrupt's estate as promptly as possible is ever present when the jurisdictional question is at issue in federal tax cases.\(^16\) If for example the trustee were to follow the normal procedure of paying the claim and then filing an application for refund, he would first have two years within which to file his application. There would then be a period of several months before the Commissioner

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\(^10\) The main issue, however, was whether or not the New Jersey levy was a "tax" which was entitled to priority under § 64(b). This fact has been used to advantage by courts which have refused to follow the majority of decisions in giving complete jurisdiction to the bankruptcy court to decide any question de novo as to the legality or amount. See In re Lang Body Co., 92 F. (2d) 338 (C. C. A. 6th, 1937); In re Gould Manufacturing Co., 11 F. Supp. 644 (D. Wisc. 1935).

\(^11\) In re General Film Corp., 274 Fed. 903 (C. C. A. 2d, 1921); cf. In re Sheinman, 14 F. (2d) 323 (E. D. Pa. 1926), where the bankruptcy court refused to apply the method of determining taxable income used by the collector in cases wherein the books and records of the taxpayer are so incomplete or disorderly that it would be almost impossible to determine it, on the ground that the evidence adduced indicated an insufficient effort to calculate the income based on the bankrupt's records.

\(^12\) In re Mutual Parlor Suite Co., 11 A. B. R. (N. S.) 116 (1927).


\(^14\) In re Sheinman, 14 F. (2d) 323 (E. D. Pa. 1926).


\(^16\) See note 4 supra.
acted on it, and, if the application should be rejected, a suit at law would follow, "... all while the bankruptcy proceeding stood practically still." Conversely, if the Federal Government, or a state, were permitted to exercise its sovereign prerogatives by not filing their claims within the period prescribed, the payment of dividends would have to be withheld indefinitely. Thus, in a case where the court sustained the referee's order overruling the United States attorney's objection to jurisdiction after the trustee had notified the tax collector of a motion to bar the tax claim of the United States because the tax asserted to be due was not so in fact, and the United States had never filed any proof of claim in more than two years after adjudication, it was said:

"The section [64(a)] contemplates that the taxes shall be liquidated and paid at once, a purpose which cannot be accomplished if the estate must wait some action by the taxing power. If the court has no power conclusively to decide the issues, it is obliged to hold up the administration until such time as the United States or a state may choose to proceed."

Where a trustee in bankruptcy obtained an order from the referee fixing the amount of the government's claim, he was precluded from filing a claim for refund of part of the amount so fixed, three weeks later. The government in the same case, was prevented from filing an amended claim because its claim was finally adjudicated by the original order of the referee. More recently it was held in Cohen v. United States that the trustee cannot pay a tax claim without contesting it and later sue for a refund, because, once the proof of claim was filed, the bankruptcy court had exclusive jurisdiction to resolve the claim. If the court of bankruptcy has jurisdiction to pass upon the validity and the

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30Id. at 398-399. Cf. In re Stavin, 12 F. (2d) 471 (S. D. N. Y. 1925), where it was held that inasmuch as § 64(a) requires taxes to be paid before dividends are declared, a referee may order the tax collector to file his claim in less than one year as provided in § 57(n) because it is a purpose of the Act to expedite the settlement of the estate. See also In re Mutual Parlor Suite Co., 11 A. B. R. (N. S.) 116 (1927).
31In re Universal Rubber Products Co., 25 F. (2d) 168 (W. D. Pa. 1928), aff'd, 28 F. (2d) 253 (C. C. A. 3d, 1928). "There ought to be a time in the course of legal proceedings when the orders of court become final, and when the litigation in a particular matter is ended." Id. at 169.
32Id. at 170.
33115 F. (2d) 505 (C. C. A. 1st, 1940).
merits of the government's claim for taxes, as seems to be well established by the cases, it would seem fitting and logical that upon assuming such jurisdiction its decision ought to be final unless the trustee avails himself by proper methods to have the decision reviewed. Especially does this seem true in the light of the purpose of Section 64(a) to aid the prompt settlement of the estate.

Although the holding of the Cohen case on the basis of the question at issue conforms to the pattern of the previous decisions, certain statements of a doubtful character were made in that opinion. In one place it was stated that the question has never before arisen as to whether the statutory provision for determining tax liability before the referee is exclusive. In another place it criticized In re Clayton Magazines, Inc.24 for stating that the bankruptcy court has exclusive jurisdiction of new claims for taxes if a deficiency is assessed after bankruptcy.

The court in the Cohen case contended it could not see any legitimate distinction between taxes assessed before or after bankruptcy where proof of claim must be filed in the bankruptcy proceedings. But the criticized statement in the Clayton case was made with reference to Section 274 of the Revenue Act25 which provided that whenever a taxpayer became bankrupt, claims for deficiencies may be presented for adjudication to the bankruptcy court, despite the pendency of proceedings in pursuance of a petition to the Board of Tax Appeals, but that no petition shall be filed with the Board after the adjudication. This statement was dictum. Presumably, the court in the Cohen case knew what Section 274 of the Revenue Act provided, and that the statement in the Clayton case related to this section. This presumption is strengthened by the fact that part of this statement is quoted in the Cohen case, and in the next succeeding paragraph a discussion of what Congress intended under Section 274 is made (which by no means supports the criticism directed against the Clayton case). What then did the court mean by these dicta? Did it mean that as soon as petition in bankruptcy is filed all taxes assessed against the bankrupt must be claimed, and submitted to the exclusive jurisdiction of the bankruptcy court regardless of whatever stage of proceeding the tax dispute may be at in another tribunal?

2545 Stat. 856 (1928), 26 U. S. C. § 274 (1934). Obviously the court in the Clayton case referred to the wrong section of the 1926 Act, 44 Stat. 62, which was then § 282(a) of the Revenue Act. Ever since it has been § 274(a) in subsequent Revenue Acts. Sec. 274 of the 1926 Act is completely irrelevant, although it is the correct section of the Revenue Code.
In *Kelly v. United States*,\(^2^6\) affirming *In re Carlisle Packing Co.*,\(^2^7\) it was held that a decision of the Board of Tax Appeals which did not become final until after adjudication in bankruptcy was *res judicata* when the period in which to file appeal had elapsed, and no action had been taken by the trustee during that time. The effect of this decision is that if a Board of Tax Appeals decision has become final at any time, either before or after petition in bankruptcy is filed, it cannot be reopened in the bankruptcy court,\(^2^8\) which would seem to conflict with the inferences reasonably to be drawn from the aforementioned statements in the *Cohen case*.

*Plains Buying and Selling Association v. Commissioner of Internal Revenue*\(^2^9\) is authority for the statement that the Board of Tax Appeals has concurrent jurisdiction with the court of bankruptcy where the petition to the Board is filed *prior* to adjudication in bankruptcy. The legislative history of Section 274, then Section 282(a) of the Revenue Act of 1926, was shown in this case to support its conclusion. The Senate Finance Committee offered an amendment to the House bill,\(^3^0\) which provided that if any proceeding is pending before the Board at the time of adjudication, it should be dismissed. But when the bill went back to conference the language of the Senate amendment was changed, and the bill was enacted with the provisions of Section 282(a) substantially the same as they are today in Section 274. Moreover, the Conference Report\(^3^1\) clearly indicated that the Board would have concurrent jurisdiction. Unfortunately, there are very few decisions on jurisdictional disputes between the Board of Tax Appeals and the bankruptcy courts, but in the light of the *Kelly case* and the *Plains Buying case*, the dicta of the *Cohen case* have very questionable implications.

**NON-FEDERAL TAXES**

It is in the field of non-federal tax disputes that the widest divergence of judicial opinion is found in the interpretation of Section 64(a). The taxes range from municipal real estate taxes to state corporate franchise

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\(^2^6\)90 F. (2d) 73 (C. C. A. 9th, 1937).
\(^2^7\)12 F. Supp. 11 (D. Wash. 1935).
\(^2^8\)"Congress provided . . . that review of the Board’s decisions should be by courts comprised of more than one judge. . . . To reach the conclusion that a deficiency determined by the Board . . . may be re-examined and redecided by . . . a District Court . . . is, on its face, inconsistent with the intent and purpose on the part of Congress. . . ." *In re Carlisle Packing Co.*, 12 F. Supp. 11, 14 (D. Wash. 1935).
\(^2^9\)5 B. T. A. 1147 (1927); accord, Matter of Cunningham, 20 B. T. A. 428 (1930).
\(^3^0\)H. R. 1, Rep. No. 52, 69th Cong., 1st Sess. (1926).
fees; and the type of tax which seems to provoke the most controversy is that which involves the assessment of a valuation by a local board or agent. The cases fall into three principal categories—(1) those which hold the bankruptcy court has complete jurisdiction to determine the amount or legality of the tax, and is in no way concluded by the findings of the tax authorities;\(^3\) (2) those which contend that the bankruptcy court has only a limited jurisdiction in reviewing a disputed claim;\(^3\) and, (3) those which deny any special jurisdiction to the bankruptcy court by virtue of the provisions of Section 64(a).\(^3\)

The vast majority of decisions fall in the first group and follow *New Jersey v. Anderson\(^3\)* quite faithfully. They make no attempt to narrow the implications of that case. Thus where a county tax collector sought to challenge the power of the referee in bankruptcy to reduce an assessed valuation, it was held that the action in the bankruptcy proceedings was not a review of the findings of the tax authorities, but rather an independent determination under the statute of the proper amount of tax which should be paid.\(^3\) But in exercising this power, the bankruptcy court has a duty to hear and determine whether the assessed valuation is proper and correct according to the local taxing statute.\(^3\)


\(^3\)203 U. S. 483 (1906). See notes 8 and 10 supra.\(^3\)


It has also been held that the power of the bankruptcy court is not limited to such questions as the bankrupt might still have raised against the tax at the date of the bankruptcy proceedings;\(^{38}\) that the trustee is not estopped by any action or inaction of the bankrupt concerning the valuation assessed;\(^{39}\) and, that the court is not bound by the taxing authorities because the bankrupt taxpayer failed to exhaust his administrative remedies.\(^{40}\) Yet, from the facts stated in the decisions examined, nowhere does it appear that the bankruptcy court has made an independent determination of the proper amount of tax to be paid, when the bankrupt taxpayer had previously been accorded a hearing, whether judicial or quasi-judicial.\(^{41}\)

Acutely sensitive of the limitations to the sphere of their judicial influence, the courts have, from time to time, shown a reluctance to re-examine the fact-findings of administrative bodies. Especially squeamish do they appear to be when the levying and assessing of local taxes are concerned. Illustrative of this propensity is the case of In re Gould Manufacturing Co.\(^{42}\) On at least one previous occasion it had been declared that an assessment of property for taxation can be validly made only by an official or body designated by law to make it, and that the true province of the bankruptcy court was, as a court of equity, to protect the estate from a fraudulently excessive assessment.\(^{43}\)

\(^{38}\)In re E. C. Fisher Corp., 229 Fed. 316 (D. Mass. 1915). The reason advanced is that the bankrupt is not so interested in protecting the estate, and so may be careless in availing himself of whatever administrative remedy there may be.

\(^{39}\)In re Gustav Schaefer Co., 103 F. (2d) 237 (C. C. A. 6th, 1939). "In the case of corporations, compelled by statute to make a public return of their financial condition, there is a great temptation to give that return an appearance favorable to the corporation...in the hope of not impairing its credit." In re E. C. Fisher Corp., 229 Fed. 316, 318 (D. Mass. 1915).

\(^{40}\)In re Thermodyne Radio Corp., 26 F. (2d) 716. (D. Del. 1928). But cf. In re Perlmutter, 256 Fed. 860 (D. N. J. 1919), where under state law the amount of debts owing to state residents could be deducted from the taxable valuation of property, if claim for such reduction were filed by a certain date. The bankruptcy court refused to permit the trustee to make such deductions, since the time in which to file the claim had elapsed.

\(^{41}\)In 6 Remington, Bankruptcy (4th ed. 1937) § 2805, it is stated that "The determination, after due hearing, before bankruptcy, by the State Board of Assessment or other state tribunal having in charge the settlement of disputes over the amount of taxes, is not res judicata in bankruptcy." [italics supplied]. This statement does not seem to be borne out by the facts set forth in the decisions which are cited to support it.

\(^{42}\)11 F. Supp. 644 (D. Wisc. 1935); see Note (1936) 45 Yale L. J. 734, approving the decision.

\(^{43}\)See Cross v. Georgia Iron and Coal Co., 250 Fed. 438 (C. C. A. 5th, 1918). This case seems to be the first aberration from New Jersey v. Anderson; see note 32 supra.
The Gould case, in effect, has rejected New Jersey v. Anderson insofar as that case stands for the proposition that a court of bankruptcy has the power under Section 64(a) to disregard completely the findings of local tax authorities, and to determine for itself what the correct amount should be. It contended that the New Jersey case restricted the jurisdiction of the bankruptcy court to a determination only of the "legality" of a tax. It then went on to say that if a tax was "legally due and owing" by the bankrupt, it was the duty of the trustee to pay the tax, provided it measured up to tests of "legality" prescribed by the law of the taxing sovereignty; that no power was given under Section 64(a) to revise the assessment of a local tax authority merely on the ground it was excessive; and that if the issue of excessiveness were triable at all, it would necessitate proof which would completely break down the original assessment.

The argument is made in this second group of authorities which follow the Gould case that, inasmuch as the local assessors presumably know the facts better, they are more qualified than the courts to make assessments, and that "the assessments were made by an honest, capable and disinterested auditor. . . ." It is denied that the bankruptcy court should act as a board of revision to supervise the legally constituted assessing body. To complain that the local assessment was merely excessive is not enough; it must be so grossly excessive as to be tantamount to fraud, or so lacking in uniformity as to amount to discrimination. Also, the bankruptcy court should refuse jurisdiction if neither the bankrupt nor the trustee had availed himself of the appropriate administrative remedy to review the assessment.

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"See note 10 supra.
"See note 3 supra, for the language of § 64(a). The court seems to have regarded the last sentence of this section as referable to the second sentence only. In re Gould Manufacturing Co., 11 F. Supp. 644, 649 (D. Wisc. 1935).
"In re Lang Body Co., 92 F. (2d) 338, 341 (C. C. A. 6th, 1937); see Note (1938) 16 CHI. KENT REV. 171, wherein the jurisdiction of the bankruptcy court is likened to that of a court of equity; and it is believed that an assessment should not be set aside unless special facts are adduced, or unless it is so excessive as to amount to fraud.
"In re Schach, 17 F. Supp. 437 (N. D. Ill. 1936).
"In re Lang Body Co., 92 F. (2d) 338 (C. C. A. 6th, 1937); cf., In re 168 Adams Building Corp., 27 F. Supp. 247 (N. D. Ill. 1939) (bankrupt alone had failed to use administrative remedy, and so it was held res judicata); In re Eldredge Brewing Co., 32 F. Supp. 604 (D. N. H. 1940).
Distinguished from the view which holds that the court of bankruptcy should not upset the findings of the tax assessor without a showing of special circumstances, is that which believes that the findings may be revised, but only if there is clear and convincing evidence contravening them. Similar expression to this thought was made in the Gould case, but there the court found it unnecessary to decide the issue of “excessiveness.”

It is well established that the courts will not disturb the findings of fact of administrative agencies if they are supported by substantial evidence; but the application of this rule normally presupposes that the findings resulted from a quasi-judicial hearing. In none of those cases, however, which give such limited power to the bankruptcy court with respect to the reassessment of taxes, was there a previous hearing in which the taxpayer participated. An authority in bankruptcy law states that the older cases seem to have given unlimited jurisdiction to the bankruptcy courts, and then hints that this may no longer be true, citing the Gould case to illustrate the point.

All the cases which deny any special jurisdiction to the bankruptcy courts by virtue of Section 64(a) involve corporate reorganizations. In Springfield v. Hotel Charles Co., the power of the court under Section 64(a) to reexamine claims for municipal taxes was not doubted, but it was held that this power is not extended to cases under Section 77B until an order to liquidate is entered. It therefore refused to reconsider an assessed valuation on the ground that the state law remedies to rectify improper taxes had not first been exhausted.

Conversely In re Adams Building Corp. holds that Section 64(a) is applicable to cases under Section 77B by implication, but denies the

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62"But the extent of the power of the bankruptcy court to disregard administrative findings of fact and to revise claims is uncertain." Id., at 1015.
6627 F. Supp. 247 (N. D. Ill. 1939). This case was affirmed in 105 F. (2d) 704 (C. C. A. 7th, 1939) but in doing so the higher court held that either § 64(a) applies by implication or that the bankruptcy court of necessity must have jurisdiction to decide questions on the legality of taxes under its general equity powers.
power of the court to make an independent determination of the assessment. As a practical matter the results would probably be the same when the principles enunciated in these two cases are applied to a given set of facts, because the court in the former case would undoubtedly exercise its general equity powers whenever a valuation might be encountered which was so grossly excessive that it would be tantamount to a fraud, or so lacking in uniformity as to amount to discrimination. Quite recently it was held\(^57\) that Section 64(a) was applicable to railroad reorganizations under Section 77\(^58\) and so the court had jurisdiction to hear and determine the amount and validity of a disputed tax, whether or not the bankrupt had exhausted its administrative remedies as provided for under state law.

Chapter X of the Chandler Act\(^59\) has displaced Section 77B, and in Section 102 of the present act it is expressly provided that Section 64 is not applicable to corporate reorganizations. This would seem to indicate that the *Springfield* case now states the correct law. But one of the active draughtsmen of the Chandler Act in commenting\(^60\) on this section says that Section 64 is excluded from Chapter X because priority of claims in liquidation obviously has no relevance to a corporate reorganization. If this is the only reason for excluding Section 64, it is possible that the jurisdictional powers vested in the bankruptcy court under Section 64 may be applicable to corporate reorganization proceedings.\(^61\)

As previously observed, however, there may be no substantial difference in results achieved whether one applies the principles of the *Springfield* case, or those of the *Adams Building* case, to a given set of facts, and if so, it does not really matter whether Section 64 applies to reorganization proceedings.

There is a fourth class of non-federal tax case which should be mentioned—where concurrent jurisdiction is permitted on grounds of comity.\(^62\)

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\(^61\) It is understood that the question whether the bankruptcy court has been deprived of jurisdiction to decide tax disputes by virtue of the express exclusion of § 64 from applying to c.X proceedings, is now before the court in the western district of Pa. under the title of *In re* Keystone Realty Holding Co.
These cases are few, and moreover, they do not seem to present any particular problem.

**IN CONCLUSION**

When a federal tax case is taken before the Board of Tax Appeals, it is heard *de novo*. The taxpayer in his petition can raise any issues he desires, irrespective of whether or not they were raised before the Commissioner of Internal Revenue. But the determination of the Commissioner in the notice of deficiency is *prima facie* correct as a matter of law. When, therefore, a deficiency is assessed against a bankrupt taxpayer in federal tax cases, the court of bankruptcy assumes jurisdiction as extensive as that of the Board of Tax Appeals. Since the bankruptcy court is not concluded by the findings of the Commissioner of Internal Revenue, is there any valid reason why in the non-federal tax case the court should refuse to re-examine the findings of local tax authorities, when no previous hearing has been accorded the bankrupt taxpayer? Should a distinction be made because the one is a federal administrative agent and the others are local bodies upon which the federal courts should feel less free to make encroachments?

Nearly all the non-federal claims are based on *ad valorem* taxes. The local assessor in arriving at a valuation of the property to be taxed, whether it be real estate, personal property, or stated value of capital stock, should therefore be in a better position to know the facts, and because of his expertness in these matters, should be more qualified than the courts to make assessments. But, a federal income tax dispute may be founded upon a depreciation deduction, for example, where the issue might be not as to the proper rate, but as to the correct valuation to be given the property against which the depreciation charge has been made. Applying the same reasoning, it should be admitted that the Commissioner has better acquaintance with the facts and is more qualified in matters of valuation in depreciation problems than are the courts. Neither the Board of Tax Appeals, nor the bankruptcy court, however, is in any way concluded from going into the facts *de novo*, except that the Commissioner’s claim is considered *prima facie* correct.

An eminent authority has said that if the question of valuation could be litigated by every taxpayer, there would not be that amount of ad-

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63 *Matter of Barry*, 1 B. T. A. 156 (1924) and others.
64 *Avery v. Commissioner*, 22 F. (2d) 6, 8 (C. C. A. 5th, 1927).
ministrative finality which is desirable in order that uniformity may be approached, and the tax burden equitably distributed. On the other hand there is much primary authority for the principle that an opportunity to be heard should be granted the taxpayer sometime before liability for the tax becomes fixed with finality, whenever an *ad valorem* tax has been levied.

Thus, the question is introduced whether the bankrupt taxpayer should be accorded a hearing, or merely have had an opportunity to be heard. Many of the decisions which so strongly opined that the bankruptcy court had no power to determine for itself the proper assessment, are cases where the bankrupt had failed to exhaust his administrative remedies, and the time to petition for review had long since expired. When a deficiency has been found in federal income taxes, the taxpayer is given ninety days within which to petition the Board of Tax Appeals, and if he fails to act within that time, the assessment is made and the taxpayer is forever barred from petitioning the Board. But, unlike many non-federal tax laws, the federal revenue law, gives a second remedy to the taxpayer, namely, to pay the deficiency assessment and then sue for refund anytime within two years.

There evidently are no federal cases wherein the bankrupt had failed to petition the Board within the ninety day period, and the Commissioner thereafter challenged the jurisdiction of the court of bankruptcy to review the facts because the taxpayer had not exhausted his administrative remedy. It seems unlikely that there would be such a case in view of the fact that the trustee is deprived of the second remedy, *i.e.*, the suit for refund. Inasmuch as this alternative remedy is surrendered by the trustee, it seems fair that the court should grant him a full hearing in the matter even though the bankrupt is barred from petitioning the Board for a hearing.

If, under a non-federal tax law, the trustee has no such remedy, to pay the tax and sue for refund, he does not surrender any right on account of the status of bankruptcy, as is the case under the federal revenue law; so there would appear to be no reason why he should be given a new hearing if the bankrupt had not exhausted his administrative

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66Cohen *v.* United States, 115 F. (2d) 505 (C. C. A. 1st, 1940).
remedies. But opposed to this argument is the one which holds that the trustee, as representative of the creditors, should not be bound by the non-feasance of the bankrupt who, by that time had probably lost interest in preserving his estate intact.\textsuperscript{71} Over and above an application of principles of administrative law is Section 64 itself; and it is by no means necessary to distort the statutory language therein contained to maintain that any question arising as to the amount or legality of any tax claim "... should be heard and determined by the court."\textsuperscript{72}

\textbf{AUSTIN P. SULLIVAN}

\textsuperscript{71} The power explicitly given to the bankruptcy court to hear and determine 'any question' as to the 'amount or legality' of the tax would seem to imply that it is not bound by the action of the taxing authority, but may decide the question for itself; and the right is not limited by the statute to such questions as the bankrupt might still have raised against the tax at the date of the bankruptcy proceedings." \textit{In re E. C. Fisher Corp.}, 229 Fed. 316, 317 (D. Mass. 1915).

RECENT DECISIONS

COMMERCE—The Power of Congress to Control Wages and Hours

The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. (Supp. 1940) § 201 et seq., promulgated a minimum wage and maximum hour labor standard which was binding on all employers who produced goods which were destined for interstate shipment. In testing the constitutionality of the act, this case presented two questions. First, does Congress have the constitutional power to prohibit the shipment in interstate commerce of those articles which are manufactured in violation of the labor standards created by law? Second, and more directly, does Congress have the power to establish standards for the employment of workmen who are engaged in producing goods for interstate commerce? Held, the power to regulate interstate commerce necessarily includes incidental powers to regulate those intrastate activities which indirectly affect interstate commerce. The above two questions were answered in the affirmative, and the Fair Labor Standards Act was held valid. United States v. Darby Lumber Co., 61 Sup. Ct. 451 (1941).

This historic decision follows in logical sequence a series of other recent decisions, such as National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 38 (1937) and National Labor Relations Board v. Fainblatt, 306 U. S. 601 (1939). All these cases have added new territory to the spacious field of federal regulation. They have paved the way for Congress to pass new social legislation. In addition, the instant case expressly overruled Hammer v. Dagenhart, 247 U. S. 251 (1918), which for 22 years had stood as a last barrier to the overwhelming flood of new social legislation based on the commerce power.

There is no doubt that the framers of the Constitution intended that the commerce clause should serve no greater purpose than to enable Congress to keep the channels of trade and commerce between the states free from local regulation. This is evident by the fact that for almost one hundred years Congress did not pass a single affirmative regulatory statute on the strength of that clause. 2 Willoughby, Constitution of the United States, (2d ed.) 721. Gradually, however, Congress perceived its latent possibilities, and began to use it to control a multitude of new subjects. "The reasons which may have caused the framers of the Constitution to repose power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself." Addyston Pipe and Steel Co. v. United States, 175 U. S. 211 (1899). And so, by a process of interpretive accretion, the commerce clause has acquired new meanings and has conferred new powers on Congress. The remainder of the article will attempt to delineate the boundaries with which the Supreme Court has circumscribed the powers of Congress over interstate commerce.

First, the power of Congress over interstate commerce is plenary. This principle was first enunciated by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 196 (U. S. 1821) in the following language, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the Constitution itself." See instant case at 457, 458; Kentucky Whip and Collar Co. v. Illinois Central R. R., 299 U. S. 334 (1937).

Second, the power to regulate includes the power to prohibit. In the instant case
the Court said, "It extends not only to those regulations which aid, foster and protect commerce, but embraces those which prohibit it." 61 Sup. Ct., at 456. See also *Hooke v. United States*, 227 U. S. 308 (1913); *Champion v. Ames*, 188 U. S. 321 (1903); *Reid v. Colorado*, 187 U. S. 137 (1902).

Third, Congress has a residuary "police power" to regulate working conditions, business practices, control of transportation, prices, interstate racketeering, and a host of other things, provided such police power is incidental to a legitimate exercise of the power over interstate commerce. This principle was expressed by the Supreme Court in *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, supra, which upheld a federal statute that made it unlawful to ship convict-made articles across state boundaries in contravention of state laws. "We have frequently said that in the exercise of its control over interstate commerce, the means employed by Congress may have the quality of police power." *Id.* at 347. Later, the Court, in upholding Congress' right to close the channels of interstate commerce to the spreading of crime and corruption, said "In doing this, it is merely exercising the police power for the benefit of the public, within the field of interstate commerce." *Brooks v. United States*, 267 U. S. 432, 436, 437 (1925). Other examples of this principle are Congress' right to prohibit the transportation of kidnapped persons, *Gooch v. United States*, 297 U. S. 124 (1936), and the transportation of lottery tickets, *Champion v. Ames*, supra.

Moreover, it has been well settled that when the policy of the national Government contravenes that of the state the latter must yield to the former. *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911); *Reid v. Colorado*, supra. This principle has been clearly enunciated in a recent case wherein the federal alien registration statute overruled a Pennsylvania registration act which was conflicting in policy. *Hines v. Davidowitz*, 61 Sup. Ct. 499 (1941), Note (1941) 29 THE GEORGETOWN LAW JOURNAL 755.

This federal supremacy is important in commerce matters. For example, in the instant case the fact that the state of Georgia, where the defendant lumber company conducted its business, had chosen not to regulate hours and wages, could not limit the effect of the federal statute. If Congress otherwise had the power to regulate, that power would not be denied merely because it contradicted local policy.

The Court has, of course, not gone as far as to allow Congress to exercise a police power as such. In the famous Agricultural Adjustment Act case, *United States v. Butler*, 297 U. S. 1 (1936), the government's agricultural program was declared unconstitutional because it attempted, by an unjustifiable use of a processing tax, to control crop production and prices *per se*. Yet in *Mulford v. Smith*, 307 U. S. 38 (1939), a subsequent act, which accomplished virtually the same thing as the original A.A.A. Act, was held valid because the control of crop production was ostensibly subordinate to, and resulting from, the control over interstate commerce. The difference between indirect police control and police control *per se* may appear unsubstantial, but it is one which the Court has not seen fit to ignore. The technique of police power regulation under the commerce clause becomes clear in the light of these two cases.

So the theory upon which the instant case was decided was that unfair competition, coming from unscrupulous producers, *affected interstate commerce* and could be controlled. Whether the motives of Congress were to regulate labor conditions
through regulation of commerce, or vice versa, the Court considered immaterial. If the law was ostensibly a regulation of commerce, it mattered not that its apparently incidental effect was to raise wage standards throughout the nation. Said the Court: "Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited, unless by other constitutional provisions."
61 Sup. Ct. at 457.

Fourth, Congress’ power to control interstate commerce does not stop with those who are engaged in interstate commerce, but extends to control over those who produce for interstate commerce. The magnitude of this assertion is difficult to comprehend. Certainly the majority of the large industries do produce for interstate commerce, and are thereby placed under the regulatory power of the national Government. According to the Court in the instant case, an employer is in interstate commerce if he, being engaged “in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation, that according to the normal course of his business, all, or some part of it will be selected for shipment to those customers.” Id. at 458-459. It must follow, therefore, that Congress can control or prohibit altogether the manufacture of goods, even before they are shipped in interstate commerce, if it is reasonably apparent that they will be so shipped when manufactured. National Labor Relations Board v. Fainblatt, supra. In that case a clothing factory shipped goods across state boundaries to an agent in another state. The agent delivered the goods to a processor. The processor returned the goods to the agent, who sent them back to the original producer. This processor was found to be engaged in interstate commerce, notwithstanding the fact that he may not have moved an inch during the transaction.

The Court held that when a manufacturer produces goods, a small part of which are to be shipped in interstate commerce, the manufacturer is considered to be engaged in interstate commerce. Santa Cruz Packing Co. v. National Labor Relations Board, 303 U. S. 453 (1938). Theoretically, if a factory turns out 99% of its goods for a local market and 1% for an interstate market, the whole output will thereby be subject to the regulation of Congress, at least for purposes of labor regulation. “Production for commerce . . . includes at least production or goods, which at the time of production, employer, according to the normal course of business, intends or expects to move in interstate commerce, although, through the exigencies of business, all of the goods may not thereafter actually enter interstate commerce.” 61 Sup. Ct. at 459.

The total field of regulation can be divided into three clear cut fields of jurisdiction. First, there is that activity which is exclusively interstate, over which Congress has exclusive jurisdiction. Then there is the activity which is purely intrastate, and over which the states have exclusive jurisdiction. Then there is that activity which, although intrastate, nevertheless influences interstate commerce. In that field the federal Government has preferential jurisdiction. If Congress chooses not to act the states may go ahead. But if Congress does choose to legislate in this field, then such legislation must take precedence over any conflicting state laws. Wisconsin Railroad Commission v. Chicago B. & Q. Ry., 257 U. S. 563 (1922); Shreveport Case, 234 U. S. 342 (1914).

Fifth, any method of regulating which is reasonably adapted to a constitutional
end is also constitutional, unless it is specifically forbidden. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exercise of the power over it as to make regulation of them appropriate means to attainment of a legitimate end, the exercise of the granted power of the Constitution to regulate interstate commerce." 61 Sup. Ct. at 459.


From these cases an involved formula might be set out. A commodity is considered to be involved in interstate commerce for purposes of congressional regulation if it will or has crossed a state boundary, if it might reasonably cross a state boundary, if it is associated with, affects, or influences anything that crosses state boundaries, if it is produced along with similar articles that cross state boundaries, or if it has any reasonable connection with anything that crosses state boundaries. Thus an innocuous and once-unimportant clause in the Constitution has been fashioned by interpretation into the national government’s most powerful weapon to solve national problems with national remedies.

DAVID S. KING

CONSTITUTIONAL LAW—Equitable Considerations in Impairment of Contracts

Appellant held a mortgage of defendant's property executed in December, 1932. At the time of execution Section 1083 of the New York Civil Practice Act provided that the measure of a deficiency judgment be the difference between the amount of the debt and the amount realized upon the foreclosure sale. Judgment of foreclosure was entered in November, 1938, and the property sold in December, 1938, appellant mortgagee purchasing. Prior to the foreclosure and sale, on April 7, 1938, section 1083 was amended by Chapter 510 of N. Y. Laws of 1938. The amendment provides that the measure of a deficiency judgment in foreclosure of mortgages executed after July 1, 1932 shall be the difference between the amount of the debt and the market value of the property as determined by the court or the sale price, whichever is higher, and that: "If no motion for a deficiency judgment shall be made as herein prescribed, the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." Appellant's motion for a deficiency judgment, granted by the Special Term, was denied by the Appellate Division because not made in accordance with the provisions of section 1083 as amended. On appeal, held that section 1083 as amended is an unconstitutional impairment under the Federal Constitution Art. I, § 10 of the obligation of mortgage contracts made prior to its passage and that as to such contracts the former section 1083 is in force and effect. National City Bank of New York v. Gelfert et al., 284 N. Y. 13, 29 N. E. (2d) 449 (1940).
The decision blocks, insofar as retroactive action is concerned, an attempt of the legislature to enact into permanent law the provisions of section 1083-a of the New York Civil Practice Act. That section applies an identical procedure for obtaining deficiency judgments on mortgages contracted prior to July 1, 1932. Enacted in 1933, it was directed to a declared public emergency and limited in its operation to a year, although, as a matter of fact, it has been extended each year since for a further period of a year, the present year ending July 1, 1941. N. Y. Laws of 1940, Chs. 566, 567. It was upheld under the doctrine of Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 (1934), as a constitutional exercise of the reserved powers of the state to subject private rights to urgent public necessity. Klinke v. Samuel 264 N. Y. 144, 190 N. E. 324 (1934). Its constitutionality was sustained also by the Supreme Court, in Honeyman v. Jacobs, 306 U. S. 539 (1939). However, that court, in its opinion written by Chief Justice Hughes, did not confine itself to the narrow ground of police power. It held that the act did not impair contractual rights because it was no more than a statutory pronouncement of standard equity practice, saying at p. 543: "Section 1083-a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. [Citing cases]. In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed. See Monaghan v. May, 242 App. Div. 64, 67: 273 N. Y. Supp. 475."

In Monaghan v. May, supra, an Appellate Division of New York took judicial notice of the emergency, to which section 1083-a was directed, and determined that a deficiency judgment upon a foreclosure and sale, which took place prior to its enactment, in harmony with its provisions, was an exercise of the inherent powers of equity. The Court of Appeals reversed a similar ruling in Guaranteed Title and Mortgage Co. v. Schefres, 275 N. Y. 30, 9 N. E. (2d) 764 (1937); and in the principal case, it criticized the Monaghan case, saying that the discretion of equity was not that of one man but was a controlled discretion, and that the proper interpretation of section 1083, which was in effect when the contract was made, allowed no room for the play of equitable considerations. "Liability for a deficiency was to be finally determined by the judgment of foreclosure and sale. The subsequent docketing of a deficiency judgment was a merely clerical act." 29 N. E. (2d) 452.

However, it should be pointed out, as it was in Monaghan v. May, supra, at 242 App. Div. 66, 273 N. Y. Supp. 479 that section 1083 provides that "the final judgment may award payment by him (mortgagor) of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein." The statute says 'may' not 'must'. The granting of this relief is not mandatory on a court of equity."

The Supreme Court, in reaching its decision in the Honeyman case, supra, relied upon its former holding in the case of Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U. S. 124 (1937), as did the joint legislative committee upon whose recommendation the amending N. Y. Laws of 1938, ch. 510, was enacted. The report reads, in part, "it would seem that the present provisions with respect
to deficiency judgments, namely, section 1083-a of the Civil Practice Act, are fair both to the mortgagor and mortgagee, both in times of emergency and in normal times, and that by appropriate amendment it might well be continued beyond the emergency period as a permanent part of the Civil Practice Act with respect to existing mortgages." Report of the Joint Legislative Committee on Mortgages, Moratorium and Deficiency Judgments. Leg. Doc. (1938) No. 58, P. 35.

In Richmond Mortgage & Loan Corp. v. Wachovia Bank, supra, the Supreme Court held constitutional a North Carolina statute which allowed the mortgagor to set off the determined value of the property against the claim or a deficiency arising out of a trustee's sale to the mortgagee. The court in the instant case distinguished that case on the ground that the North Carolina statute extended only to foreclosures under powers of sale and did not apply to sales made by court order, nor to sales at which third parties were purchasers.

It is submitted that the distinction drawn does not touch a major point of difference between the courts as to the limits of equity's inherent powers.

The decision in the instant case finally turned on the question of the remedies remaining to the mortgagee, and on this question the court split, one judge dissenting.

"If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority." Ettor v. Tacoma, 228 U. S. 148, 155 (1913). "And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." Bronson v. Kinzie, 1 How. 311, 316 (U. S. 1843).

The majority held that the mortgagee still had a common law action for the debt, as if no mortgage secured it, but stated at 29 N. E. (2d) 453 that it was not a fair equivalent, "inasmuch as the judgment debtor's equity of redemption cannot be sold under an execution issued upon a judgment for the mortgage debt or any part thereof." And that section 1078 of the Civil Practice Act gave the courts discretion to allow a separate action for a deficiency judgment under certain circumstances, but that it "could not be made an effective instrumentality for the replenishment of the rights which section 1083 has now taken away from mortgagees." Id. at 454.

The position of the dissenting justice will appear from the following quotation from his opinion, 29 N. E. (2d) 457: "But the mortgagee still retains the right to recover the full deficiency on a mortgage executed after July 1, 1932, where the person liable was not joined as a defendant and personally served. The mortgagee also retains the right to recover in a separate action, subject to section 1078 of the Civil Practice Act, the difference between the amount recovered in the foreclosure action and the amount of the mortgage debt, provided in the foreclosure action he had joined the person liable as a defendant and served him personally, and has asked for a deficiency judgment pursuant to the amended section 1083."

The practical effect of the decision is that in all mortgage foreclosures and sales, in which the person liable for the debt is made a defendant and he appears or is personally served, involving mortgages executed prior to July 1, 1932, or subsequent to April 7, 1938, the determined value of the property will figure in the measure of the deficiency judgment, and in all cases involving mortgages executed between those dates the measure of the deficiency will be the difference between the sale price and the debt.
This anomalous position could have been avoided had the court been willing to accept the view of the Supreme Court of the United States in *Honeyman v. Jacobs*, *supra*, and that of some of the lesser courts of the state. See *Tomkins County Trust Co. v. Herrick*, 171 Misc. 929, 13 N. Y. S. (2d) 825 (1939) and *Otselic Valley National Bank v. Dapson*, 170 Misc. 514, 10 N. Y. S. (2d) 588 (1939).

JOHN J. BOWLER

**CONTEMPT—Direct—Presence in Federal “Inferior” Courts**

On July 13, 1940, the United States Attorney for the Central Division filed in the three-judge court of the Western District of Missouri an information charging Thomas J. Pendergast, Robert Emmett O’Malley and A. L. McCormack with contempt of this statutory court. In the information it was alleged that, a temporary injunction restraining the superintendent of insurance from interfering with certain rates filed by insurance companies having been issued, by bribery of the superintendent of insurance and by filing a stipulation representing that a settlement had been honestly arrived at by the parties, Pendergast, O’Malley and McCormack procured from the court on February 1, 1936, a decree in accordance with the stipulation, distributing approximately $8,000,000 in impounded funds as agreed to by the parties. It was further alleged that within three years before the information was filed the named individuals by affirmative acts continued to conceal their deception and fraud on the court (that McCormack, for example, committed perjury to prevent discovery of the truth). Pendergast, O’Malley and McCormack filed motions to abate and quash the information, arguing: first, that the court lacked jurisdiction; secondly, that the acts done outside the court did not disturb the order and decorum thereof; and thirdly, that the three-year statute of limitations, Rev. Stat. § 1044 (1875), 18 U. S. C. § 582 (1934), applied to this contemt proceeding. Held, obtaining the decree by false representations amounted to direct contempt within the court’s jurisdiction and without the statute of limitations. *United States v. Pendergast*, 35 F. Supp. 593 (W. D. Mo. 1940).

Although it was pointed out in the opinion in this case that if there were any applicable statute of limitations, it would have begun to run only when affirmative acts of concealment were discontinued, nevertheless, in view of the third argument in support of the motion to abate or quash the information, and the decision of the Supreme Court in *Gompers v. United States*, 233 U. S. 604 (1914), holding expressly that the three-year statute of limitations did apply to constructive contempts, and holding by implication that it did not apply to direct contempts, the court in the principal case was careful to classify the contemnors’ conduct as direct contempt in the presence of the court within the meaning of Rev. Stat. § 725 (1875), 28 U. S. C. § 385 (1934).

The importance of the distinction between direct and constructive contempts invites consideration of the test of direct contempt. In this connection, as far as the jurisdiction of the inferior federal courts is concerned, Rev. Stat. § 725 (1875), 28 U. S. C. § 385 (1934), controls, whether considered in accordance with the
statement of Chief Justice White that it "conferred no power not already granted and imposed no limitations not already existing," in Toledo Newspaper Co. v. United States, 247 U. S. 402, 418 (1918) (criticized in Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—a Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010, 1029), or in accordance with the view of Mr. Justice Field, dissenting in Ex parte Wall, 107 U. S. 265, 302 (1882), that "The act . . . limits the power of the courts of the United States." The Act (28 U. S. C. § 385, supra) includes among the three classes of contempt for which summary punishments may be inflicted "misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice."

The construction of the "presence" test is left to the courts and has been broadly interpreted by them. The proposition that contempt committed in the court room while the court is in session is in the "presence" of the court is self-evident. The Supreme Court, holding that an attempt to induce a witness not to testify, made in the jury room temporarily used as a witness room, was within the "presence" of the court, said: "The court . . . is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court . . . [A] difference in procedure [summary or otherwise] does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court." Savin, Petitioner, 131 U. S. 267, 277 (1889).

The Ninth Circuit Court of Appeals, affirming a district court decision holding the publication of a newspaper article, copies of which would be seen by the jurors, attacking the character of the defendant on trial, to be in the "presence" of the court, held that the physical nearness to the place where the court is in session of the actual commission of the act charged is not important. "Like the law of constructive presence in criminal cases, the misbehavior is committed where it takes effect." In re Independent Publishing Co., 240 Fed. 849, 857 (C. C. A. 9th, 1917).

And what is this "effect" but the obstruction of the administration of justice? As the Supreme Court has said, "There may be misbehavior in the presence of a court amounting to contempt, that would not, ordinarily, be said to obstruct the administration of justice. So there may be misbehavior, not in the immediate presence of the court, but outside of and in the vicinity of the building in which the court is held, which, on account of its disorderly character, would actually interrupt the court, being in session, in the conduct of its business, and consequently obstruct the administration of justice." Savin, Petitioner, supra, at 276. Abuse of a court by deception has been held obstruction of the administration of justice. In United States v. Karns, 27 F. (2d) 453 (N. D. Okla. 1928), afd. sub nomine, Karns v. United States, 33 F. (2d) 489 (C. C. A. 8th, 1929), cert. denied, 280 U. S. 592 (1929), one of the defendants had offered in evidence a false instrument of lease. Her action was held contemptuous, not as constituting perjury or interfering with order in the court room, but because its inherent effect was to impede the administration of justice. In Bowles v. United States, 50 F. (2d) 848 (C. C. A. 4th, 1931), cert. denied, 284 U. S. 648 (1931), a disbarred attorney's representation
that he was a practicing attorney in good standing, though not productive of disorderly consequences, was held to be contempt as an interference with judicial functions. Merely evading frank answers and withholding the truth has been held likewise insufficient regard for the demands of justice. *Haimssohn v. United States, 2 F. (2d) 441 (C. C. A. 6th, 1924); In re Schulman, 177 Fed. 191 (C. C. A. 2d, 1910); In re Bronstein, 182 Fed. 349 (S. D. N. Y. 1910); In re Gitkin, 164 Fed. 71 (E. D. Pa. 1908); In re Fellerman, 149 Fed. 244 (S. D. N. Y. 1906). Where the parties by collusion or concealment presented a case for the opinion of the court, there being no actual controversy, the Supreme Court held "the whole proceeding was in contempt of court." *Cleveland v. Chamberlain, 1 Black 419, 426 (U. S. 1861); *Lord v. Veazie, 8 How. 250, 255 (U. S. 1850).

Decisions on the classification, as direct or constructive, of contempts committed by publication are not so consistent. Contempts by publication have been treated as constructive, *Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95 (C. C. E. D. N. C. 1904); *Morse v. Montana Ore-Purchasing Co., 105 Fed. 337 (C. C. Mont. 1900); *Ex parte Poulson, 16 Fed. Cas. 1205, No. 11,350 (C. C. E. D. Pa. 1835); and as direct, *Toledo Newspaper Co. v. United States, supra; In re Independent Publishing Co., supra; *United States v. Sanders, 290 Fed. 428 (W. D. Tenn. 1923); *United States v. Providence Tribune Co., 241 Fed. 524 (D. R. I. 1917). (Whether the proper test of obstruction of the administration of justice in these cases is the "clear and present danger" rule or the "actual obstruction" principle, as argued in the Petitioner's Brief, p. 5, *et seq., in the case of *Harry Bridges v. State of California, now before the United States Supreme Court, or the "reasonable tendency to interfere" as argued in the Supplemental Brief on Behalf of Respondent, p. 8, *et seq., presents an interesting particularization of this question.)

Though the power of federal inferior courts to punish for constructive contempts may not be inherent, Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, supra, throughout the decisions it is evident the courts have so regarded their power in direct contempts and have jealously guarded their jurisdiction not only to define but also to regulate the proceedings in direct contempts.

However, since the decision of the principal case, the Supreme Court, in *Nye v. United States, 9 U. S. L. Week 4280 (April 14, 1941), has reversed the rule of the Toledo Newspaper case, supra, and has held that acts constituting an obstruction to justice, not done within the vicinity or near physical proximity to the court, are not grounds for summary contempt proceedings. The Nye case is closely in point with the principal case in that it involved a conspiracy to obstruct the trial of a pending case. It therefore appears that it clearly foreshadows the reversal of the decision of the principal case if the latter be appealed.

JOSEPH F. GOETTEN

COURTS—Attachment of Foreign Judgment as Means of Acquiring Jurisdiction over Non-resident Defendant

The Lincoln Mine Operating Company, an Idaho corporation, recovered a judgment in the district court for Idaho against the Huron Holding Corporation, a New York concern. Pending appeal from this judgment, a New York creditor of Lincoln
brought suit in a state court of New York against Lincoln on a promissory note, and in accordance with the laws of that state, Lincoln’s judgment against Huron was attached as property belonging to it within the state, summons being served on Lincoln in Idaho. Upon affirmance of the judgment in the circuit court of appeals, the New York court rendered a judgment against Lincoln in the suit on the promissory note, and ordered satisfaction out of the judgment obligation of Huron to Lincoln. The district court for Idaho thereupon held that Lincoln’s judgment against Huron had been fully satisfied. The Circuit Court of Appeals for the Ninth Circuit reversed, and Huron petitioned the Supreme Court for certiorari. Held, for the petitioner. The judgment rendered in Lincoln’s favor in the district court for Idaho was subject to attachment in the courts of New York in accordance with the laws of that state. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 61 Sup. Ct. 513 (U. S. 1941).

The holding stands for the proposition that a court which has jurisdiction over a party against whom a judgment has been rendered in a foreign jurisdiction, may, under appropriate statutory authorization, permit the attachment of that judgment as property within its jurisdiction belonging to a defendant in a suit brought before it. In other words, it lays down the rule, that the court in attachment proceedings, having jurisdiction over the party who owes the judgment debt, also has jurisdiction over the debt, and may act upon it just as it might upon any other property within its geographical boundaries.

The great majority of the decisions lay down the rule that property in *custodia legis* is not subject to attachment. *Freeman v. Howe*, 24 How. 450 (U. S. 1861); *Harris v. Dennie*, 3 Pet. 292 (U. S. 1830); *The Orpheus*, 15 Fed. Cas. No. 8330 (D. Mass. 1858); *Moore v. Withenberg*, 13 La. Ann. 22 (1858); *Todd v. Thornton*, 5 Tyng, 271 (Mass. 1809). All of these cases, however, as well as those cited and distinguished by the Court in the principal case, namely, *Wabash Ry. Co. v. Tourville*, 179 U. S. 322 (1900), and *Wallace v. M’Connell*, 13 Pet. 136 (U. S. 1839), deal with a situation in which the property has already been attached by one court, and to permit the attachment would be to bring about a conflict of jurisdiction between the two courts. But other cases have gone further, and hold that property in the hands of a clerk of court or of a sheriff, which belonged to a party by virtue of a judgment in a former suit, was not subject to attachment. *Hunt v. Stevens*, 25 N. C. 365 (1843); *Ashton & Co. v. Clay*, 3 N. C. 171 (1802). And in *Thomas v. Woodridge*, 2 Woods 667 (C. C. Mo. 1875), a case very much in point with the principal case, except that no question of jurisdiction was there presented, it was held that a judgment of the United States Circuit court for the state of Mississippi could not be attached by process issued out of the state court against the plaintiff holding the judgment. This view was upheld in *Henry v. Gold Park Mining Co.*, 15 Fed. 649 (C. C. Colo. 1883), and in *Alabama Gold Life Ins. Co. v. Girardy*, 9 Fed. 142 (C. C. La. 1881). *Accord, Loomis v. Warrington*, 18 Fed. 97 (C. C. Mich. 1883); *Hammill v. Peck*, 11 Colo. App. 1, 52 Pac. 216 (1898); *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275, 5 N. W. 311 (1880); *Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46 (1895); *Mc Nish v. Burch*, 49 S. D. 215, 207 N. W. 85 (1926); *Clodfeller v. Cox*, 1 Sneed 330 (Tenn. 1853); *Townsend v. Fleming*, 64 S. W. 1006 (Tex. Civ. App. 1901). The decisions in all these cases were grounded on the principle that to permit the attachment would lead to great inconvenience and to
serious conflicts of jurisdiction. All, however, were decided on the point that local statutory enactments did not confer upon one court the power to garnish judgments issued out of other courts. As the court said in the Sievers case, supra: “We have no doubt that the garnishee law does not apply to enable a judgment before one justice to be garnished in proceedings before another. If any such power had been intended to be given, we must assume that the statute would have pointed out in what way it could be carried out without confusion.” (P. 278).

In deciding the principal case, the Court was, therefore, confronted with two difficulties. It was necessary that it find, firstly, that the statutes of New York conferred upon the courts of that state the power to attach a judgment of another court, and secondly, that the New York court had such control over a res as to give it jurisdiction to attach the judgment. In answering the first objection, the Court relied upon the decision of the state court, holding that the New York statute did give it the power to attach a judgment, for “By its action [in rendering the judgment] the New York court necessarily decided that the judgment debt was within the scope of New York’s attachment laws.” (P. 515). The question of jurisdiction was settled by the Court by a reiteration of the principle that “property and persons within the state can be subjected to the operation of local law; [for] power over the person who owes a debt confers jurisdiction on the courts of the state where the writ of attachment issues.” (P. 517). See, 9 Rose’s Notes on U. S. Repts. (1st Ed. 1918) 1115-1120, and (2d Ed. 1932) 702-704; see also, Howard v. Marlin-Rockwell Corp., 156 Misc. 358, 281 N. Y. Supp. 666 (Sup. Ct. 1935); Clark v. Wells, 204 U. S. 164 (1906).

As a further means of justification for its position, the Court took pains to point out that the attachment of the Idaho judgment in New York did not, in any manner, interfere with the jurisdiction of the Idaho court. And this was true, for similar issues were not pending before the two courts at the same time, and there was therefore no possibility of collision between them, as there was in the Wallace and Wabash Ry. Co. cases, supra. Moreover, the Idaho court would not have issued execution on its judgment if it had already been paid directly to Lincoln, and by a parity of reasoning, it should not do so when the money has been paid to Lincoln’s creditors by reason of a valid attachment proceeding. Such action would be to exercise the jurisdiction of a federal court to render ineffective that protection which a garnishee should be afforded by reason of having obeyed a judgment rendered by a state in the exercise of its constitutional power over persons and property within its territory. Cf., (P. 518)

In its distinguishing and restating the principles of the older decisions, the United States Supreme Court has added another contribution to the rapidly developing movement toward the elimination of jurisdictional difficulties arising from the mobility of persons and property across multiple state lines. The conclusion of the Court’s opinion, rendered by Mr. Justice Black, is significant: “These later decisions are but a recognition of the greatly developed statutory use of attachment by the states, a development brought about by the increased nobility [mobility?] of persons and property and the expanded area of business relationships. Whatever may have been the necessity for the rule [that forbidding the attachment] in other times, it does not fit its present day environment.” (P. 518). Cf., Milliken v. Meyer, 61 Sup. Ct. 339 (1941); and see (1941) 29 The Georgetown Law Journal 784.
EQUITY—Class Suits—Due Process

An action was brought to enjoin the defendants from breaching an agreement allegedly entered into by five hundred property owners of a particular district. This agreement, which was not to be effective unless signed by ninety-five per cent of the five hundred owners concerned, prohibited the sale or transfer, to negroes, of any of the property in the district for a period of twenty years. This requirement for the validity of the agreement was not fulfilled. The lower court gave judgment for the plaintiffs, basing this action on the decision in Burke v. Kleiman, 277 Ill. App. 519 (1934), which was considered a representative suit, and therefore res judicata of the present controversy. Although informed of the fact that the required number of signatures had not been secured as had erroneously been represented in Burke v. Kleiman, supra, the court in the present case considered this matter to have been within the jurisdiction of the court in the previous case and that its finding in this respect could not be attacked collaterally, but could be set aside only in a direct proceeding. This decision was affirmed by the Supreme Court of Illinois. Lee v. Hansberry, 372 Ill. 369, 24 N. E. (2d) 37 (1939). On a grant of writ of certiorari by the United States Supreme Court, held, Burke v. Kleiman, supra, was not a valid representative suit and the decision of the lower court based on this premise constituted a denial of due process. Hansberry v. Lee, 311 U. S. 32 (1940).

It is a familiar doctrine that a person is not bound in an in personam proceeding unless he is a party to the suit or is made a party to it by appropriate service of process. Penmoyer v. Neff, 95 U. S. 714 (1877). It is fundamental that any such judgment is unconstitutional because it violates the due process clause of the Fourteenth Amendment to the Federal Constitution. Postal Telegraph Co. v. Newport, 247 U. S. 464 (1918); Hall v. Lanning, 91 U. S. 160 (1875). The class suit constitutes an exception to these general propositions. Plumb v. Goodnow's Adm'r, 123 U. S. 560 (1887); Bryant Electric Co. v. Marshall, 169 Fed. 426 (C. C. Mass. 1909). If Burke v. Kleiman, supra, had been a valid representative suit then judgment against those members of the class actually participating in the suit would have unquestionably bound all other members of the class and would have been in accordance with due process. Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356 (1921); Hartford Life Ins. Co. v. Barber, 245 U. S. 146 (1917); Smith v. Swormstedt, 16 How. 288 (U. S. 1853).

The rule of law upon which this case was decided is the well known tenet of equity that any group of a class, which is so large as to make joinder impractical, may bind the entire class in the adjudication of a right or obligation that is common or joint, provided that the interests of the absent parties are adequately represented. In the case of Supreme Tribe of Ben-Hur v. Cauble, supra, the Court held that the members of a fraternal benefit association could properly be said to constitute a class and that the decree in a suit brought by some members against the organization and its officers in behalf of all the members would bind the entire group. It was also decided by the Supreme Court that an incorporated association of newspapers, organized for the purpose of gathering and distributing news, was a proper representative of the entire group in a suit to protect the interests of the group against the illegal acts of a rival organization. Inter-National News Service v. Associated Press, 248 U. S. 215 (1918). In the present case the Court decided that the agreement regarding
disposal of the property did not constitute the signers a class nor did it establish a joint or common obligation binding the group as a whole, but rather a several obligation operating on the individual signers.

The Court held that since the property holders owned their property as individuals, since the obligations ran severally to each member, since each had a duty to live up to the agreement and the right to expect the other to do likewise, and finally since it might be to the best interest of one to assert the right and another to challenge it, even as in the instant case, that the signers could not be considered as a class with the prerogative of binding by suit other signers not parties to the suit simply because they were signers. While the Court admitted the propriety of a group of a class representing the rest of the class when the matter being adjudicated was a common right or obligation, (Supreme Tribe of Ben-Hur v. Cauble, supra; Smith v. Swormstedt, supra; Groves v. Farmers State Bank, 368 Ill. 35, 12 N. E. (2d) 618 (1937)), it felt that this principle could not be extended to the instant case where the signers are bound only by the fact that they signed and where their individual interests might be very much opposed. Weidenfeld v. Northern Pacific Ry. Co., 129 Fed. 305, 310 (C. C. A. 8th, 1904); Terry v. Bank of Cape Fear, 20 Fed. 777, 781 (W. D. N. C. 1884). The Court compared such a situation to a trial before a judge who has a financial interest in the outcome of the controversy. Tuney v. Ohio, 273 U. S. 510 (1927).

The decision of the United States Supreme Court accords with the vigorous dissent to the majority opinion of the Illinois Supreme Court by Justices Shaw and Murphy, in which they outlined the same reasons as those subsequently advanced by the United States Supreme Court for holding the Burke case not to have been a valid representative suit. Justices Shaw and Murphy also held that since there was evidence of fraud in the Burke case and since this fraud impaired or prevented jurisdiction, it could always be attacked collaterally. The United States Supreme Court found it unnecessary to pass upon this phase of the case. Cf. United States v. Throckmorton, 98 U. S. 61 (1878); Publicke v. Sholleross, 106 F. (2d) 949 (C. C. A. 3d, 1939), cert. denied, 60 Sup. Ct. 379 (1940).

MARTIN J. MCMANUS, JR.

FEDERAL RULES OF CIVIL PROCEDURE—Validity of Rule 35—Power to Order Physical Examination

The plaintiff was injured in an automobile accident in Indiana. She brought suit against the defendant in the District Court for Northern Illinois, and refused to comply with that court's order to submit to a physical examination for the purpose of determining the extent of her injuries. On an order to show cause why she should not be committed for contempt, the plaintiff challenged the validity of Rule 35 (a) of the Federal Rules of Civil Procedure and denied the court's authority to make such an order. The grounds for this defense were that prior to the adoption of the Rules the court had not had such authority, and, since the right to be free from physical examination was a "substantial" right, the Rule fell within the legislative restriction expressed in the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. §§ 723 b, c (1934), which provided that the Rules should "neither abridge, enlarge, nor modify the substantive rights of any litigant." The District Court
committed the plaintiff for contempt and on appeal the Circuit Court of Appeals decided that the order was valid and affirmed the judgment. *Sibbach v. Wilson & Co., Inc.*, 108 F. (2d) 415 (C. C. A. 7th, 1939). *Held*, Rule 35 is a rule of procedure and is therefore valid as being within the authority conferred upon the Supreme Court by the Enabling Act. The legislative enactment necessary to confer this new authority on the courts was found in the Enabling Act itself. The Court decided that since Rule 35 had been submitted to Congress in accordance with § 2 of the Act, it became law along with the other Rules by automatic operation of the Act. Section 2 of the Act adopted this method of automatic enactment by providing that the Rules as promulgated by the Supreme Court should take effect at the end of the session at the beginning of which the Rules had been submitted to Congress. The judgment committing the appellant for contempt was reversed, however, since § b (2) (iv) of Rule 37 specifically exempts from punishment as for contempt a person who has refused to obey an order to submit to a physical examination. *Sibbach v. Wilson & Co., Inc.*, 61 Sup. Ct. 422 (1941).

Under Rule 37 (b) (2) (i) it would seem that instead of committing the appellant for contempt the trial court should have assumed the truth of the claims of the defendant which were sought to be proved by the physical examination.

The factual situation in this case made the decision of the Supreme Court rather disappointing, for the appellant, caught in a dilemma, found it necessary to admit that Rule 35 embraced a procedural change, and the Court, though agreeing by way of *dictum* with the appellant’s admission, was thereby relieved of the necessity of distinguishing between substance and procedure. Mr. Justice Roberts, noticing the appellant’s dilemma, pointed out that the law of Indiana, the state where the cause arose, gives the power to the state courts to order a physical examination, and if the appellant had insisted that her right was one of substance, she would have thereby made herself subject to the examination, for the Rules of Decision Act, REV. STAT. § 721 (1875), 28 U. S. C. §§ 725 (1934), would have required the district court, though sitting in Illinois, to apply the substantive law of Indiana. Thus the appellant was forced to adopt the rather tenuous argument that the phrase “substantive rights,” as used in the Enabling Act, means “important” or “substantial” rights. This view was rejected by the majority of the Court.

Probably the most significant thing about the decision is the fact that the Court was divided, five to four, the minority viewing the Rules as invalid for want of a sufficient legislative enactment. “... To draw any inference of tacit approval from non-action by Congress,” said Mr. Justice Frankfurter in his dissenting opinion, at 61 Sup. Ct. 428, “is to appeal to unreality.” His opinion did not record the fact that the question of the procedural or substantive nature of Rule 35 had been specifically noticed by the Subcommittee of the Senate Judiciary Committee during hearings on the Rules. *Hearings before Committee on the Judiciary on S. J. Res. 281, 75th Cong., 3d Sess. (1938) 29 et seq.* In the absence of direct legislation, the minority believed that such an important right should not be abrogated by what purported to be merely a procedural reform. The closeness of the split and the willingness of the minority to invalidate a Rule promulgated by their own body casts a considerable shadow on the view that the Court has predetermined the nature of the Rules to be wholly procedural in their scope.

Plainly, the Court precluded any argument that a Rule may be valid even though
it deals with substance. The Rules of Decision Act, supra, which was restored to its pristine effectiveness by Erie R. R. v. Tompkins, 304 U. S. 64 (1938), was in effect regarded as a correlative of the Rules, and it appears that each questionable Rule must be tested for its procedural character.

But how? "The test must be whether a rule really regulates procedure," said Mr. Justice Roberts at 61 Sup. Ct. 426, and he added that procedure is, "—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." This definition is not very helpful, for it involves the use of the term which is to be distinguished.

At the present date, then, the courts are thrown back on their decisions under the Conformity Act, Rev. Stat. § 914 (1875), 28 U. S. C. § 724 (1934), for authority as to whether a Rule embraces procedure or substance. But these decisions followed former decisions of the state courts, and all were handed down with special purposes in view. To require adherence to these decisions for the purpose of interpreting the Rules is to lead the courts into a hopeless maze of conceptualistic non-conformity. See Tunks, Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins (1939) 34 Ill. L. Rev. 271.

ROBERT D. SCOTT

INTERSTATE COMMERCE—Registration Fee For the Use of State Roads Cannot Discriminate in Favor of Domestic Auto Dealers

By a disingenuous amendment to the Uniform Motor Vehicle Anti-Theft Act, the Illinois legislature sought to keep all local new-car sales for home dealers. Sec. 4(b) was amended to provide that any Illinois resident who purchases a "current model" outside the state and wishes to register it before he has owned it ninety days, must pay a special fee of $25.00 for examination of his title. Ill. Rev. Stat. (Smith-Hurd, 1939) c. 95½, § 77(b). The parties stipulated that the total cost of enforcing this section for a period of six months was $12,500, while revenue of $21,000 was derived. The receipts went into the state's general fund. Plaintiff showed that during 1938 and 1939 Chicago police records indicated that only about ten per cent of the cars stolen were current models. Held, the charge violates the commerce clause. It is a direct burden on interstate commerce, and the state failed utterly to sustain the burden of showing that the legislative purpose was the exaction of a fee for the maintenance and regulation of the highways. Aside from that, the charge was manifestly excessive even if a fee. Clements v. Hughes, 375 Ill. 170, 30 N. E. (2d) 643 (1940).

Factors strongly influencing the court were the exorbitant size of the fee—especially since most of the costs mentioned were capital outlays unnecessary in subsequent periods—and the exemption of non-residents' cars and used cars, which were just as frequently stolen. Perhaps there was sub rosa judicial notice of the prevalence in the Middle West of the practice of travelling to Detroit to buy new cars to save transportation costs, and the consequent anger of the politically potent local dealers.

the Supreme Court, speaking through Mr. Justice Stone, sustained a fee of $15 under the California “Caravan Act” on each vehicle in an interstate caravan. But the record showed that “caravans” (two or more cars lashed bumper-to-bumper and operated by a single driver in the leading car) imposed extra costs on the state for policing the traffic and for highway maintenance roughly equal to the receipts from the fee.

The “caravan cases” are a recent application of the time-honored doctrine of Hendrick v. Maryland, 235 U. S. 610 (1915). Interstate motor traffic must bear its fair share of the cost of state highways and of the regulation of traffic. This is not a tax on interstate commerce, but a fee or "toll" for the use of the roads. See Lockhart, State Tax Barriers to Interstate Trade (1940) 53 Harv. L. Rev. 1253, 1264-71; Kauper, State Taxation of Interstate Motor Carriers (1933) 32 Mich. L. Rev. 1, 171, 351; Note (1933) 42 Yale L. J. 402. The doctrine has narrow limits. The burden is on the state to show that the purpose of the charge is the one suggested, and not a convenient disguise for a trade barrier. "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as a compensation for the use of the highways or to defray the expense of regulating motor traffic." Brandeis, J., speaking for the Court in Interstate Transit Co., Inc. v. Lindsey, 283 U. S. 183, 186 (1931) (where the Court overthrew a Tennessee "privilege tax" of $500 a year on busses seating 20-30 passengers as applied to an interstate bus). The prohibited purpose appeared from the absence of any provision for the graduation of tax according to the degree of highway use, from the fact the tax appeared in a general revenue bill in a context of occupation taxes, and from the fact the proceeds were not segregated for the highway fund. No one of these features is absolutely conclusive: thus, a closely similar $400 annual charge based on seating capacity was sustained when the proceeds went to the highway fund. Hicklin v. Coney, 290 U. S. 169 (1933). But see criticism of this case in Brown, State Taxation of Interstate Commerce (1936) 24 The Georgetown Law Journal 584, as a judicial "quandoque dormitai homerus." The same factor, however, was persuasive to sustain the charge in Kane v. New Jersey, 242 U. S. 160 (1916). On the other hand, an annual charge of $50 by a city was invalidated in Sprout v. South Bend, 276 U. S. 163 (1928), by reason of two adverse factors, (1) no graduation to amount of highway use, (2) proceeds going to general fund.

When it appears that the charge is laid for the legitimate purpose, the burden then shifts to the challenging highway user to show that the amount is excessive and represents manifestly more than his fair share of the cost of the facilities furnished, and so actually operates as a general revenue measure. Clark v. Paul Gray, Inc., 306 U. S. 583, 599 (1939); Ingels v. Morf, 300 U. S. 290 (1937) (burden sustained by showing proceeds of a caravaning statute to be roughly 60% greater than cost); Morf v. Bingaman, 298 U. S. 407, 410 (1936); Interstate Busses Corp. v. Blodgett, 276 U. S. 245 (1928); Interstate Transit Co., Inc. v. Lindsey, supra; Kenosha Auto Transport v. Cheyenne, 100 P. (2d) 109 (Wyo. 1940).

In McCarroll v. Dixie Greyhound Lines, 309 U. S. 176 (1940), Note (1940) 28 The Georgetown Law Journal 1076, the challenger's burden was sustained by showing that, to start on his journey with full tanks as was his practice, he must on entering the state in question pay tax on 57 gallons, of which only 16 gallons was
used in the state. This suggests that a charge proportioned to gasoline actually used in the state, being a rough-and-ready approximation of ton-mileage which is the real highway wear basis, is the fairest and hence the least subject to court censure. Lockhart, supra at 1266.

It will be noted that in all these cases the starting point is the now questionable old doctrine that a state could not tax interstate commerce directly. That was once so thoroughly settled as to be a truism. Once, the great Chief Justice Marshall suggested, by way of dictum, that a state could not tax interstate commerce indirectly. Brown v. Maryland, 12 Wheat. 419 (U. S. 1827) (dictum). This yielded to Taney’s view, which became the classic doctrine, in Woodruff v. Parham, 8 Wall. 123 (U. S. 1868). Around the time the “fee” exception was first invoked, it was “well-nigh universally assumed by courts and commentators” that a tax on an integral part of an interstate sale was invalid even if non-discriminatory. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 908, 909. Cf. Hughes, dissenting in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 59 (1940), (1940) 28 The Georgetown Law Journal 932: “If the question now before us is controlled by precedent the result would seem to be clear” (i.e. invalidity), id. at 63. But the Berwind-White case, supra, seems to establish a different rule in practice, if one not wholly avowed in theory. A direct tax on interstate commerce is not now invalid provided it is non-discriminatory, at least when imposed by the buyer’s state. Lockhart, Sales Tax on Interstate Commerce (1939) 52 Harv. L. Rev. 617, 627. A lover of fictions and subtleties may say that “delivery” to the buyer in New York was a “taxable event” separable from the interstate sale; but why thus strive to preserve the shadow of a rule that no longer has substance? Only state taxation designed to put extrastate commerce at a “competitive disadvantage” will now be struck down by the Court. Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 15; and see Lockhart, State Tax Barriers to Interstate Trade, supra, at 1258. “Use taxes and sales taxes are in substance impositions on the transfer of property and should be looked at as taxes on transactions rather than on a lesser incident of ownership. . . . We should face these taxes as taxes on trade or we do not face them fairly.” Powell, supra, at 939 (Italics supplied); And see Note (1941) 29 The Georgetown Law Journal 755, 758, 768; Dravo Contracting Co. v. James, 114 F. (2d) 242 (C. C. A. 4th, 1940), cert. denied, Jan. 13, 1941, (1941) 29 The Georgetown Law Journal 525; Note (1940) 28 The Georgetown Law Journal 970, 984.

Assuming, therefore, that a direct tax on interstate commerce is now valid provided it does not create or tend to create a tariff wall, the instant case provides a perfect example of precisely what the commerce clause still forbids—to wit, provincial attempts to insulate the taxing state’s commerce from national competition. Nor does the Dixie-Greyhound case, supra, invalidate this explanation. That tax was as hostile and unreasonable to extrastate commerce as the present one.

TIMOTHY PETER ANSBERRY

PERPETUITIES—Future Interests in Chattel Property—A Questionable Exception in Favor of a Charitable Bequest

By will probated in 1897 testatrix, last surviving grandchild of Capt. James Lawrence, revolutionary hero and author of the now-famous statement, “Don’t
give up the ship,” devised a Gilbert Stuart portrait of Capt. Lawrence to her son and his heirs, provided that if he “shall die leaving no descendants . . . the portrait shall go and is hereby bequeathed to the New Jersey Historical Society.” Her executors gave the portrait to the Historical Society. The son died in 1938, devising all property to his wife and on her death to his children. Wife and children sue in chancery for construction of the will and restitution of the portrait. Held, complainants entitled to possession. Applying the law of Rhode Island, where testatrix resided at her death, or of New Jersey, the court construed the will to give the son a fee simple title to the portrait, subject to be divested upon an indefinite failure of his descendents by a gift over to the Historical Society. The Society’s future interest was not void under the rule against perpetuities, since there is an exception to the rule where the bequest is charitable. Redmond v. New Jersey Historical Society, 18 A. (2d) 275 (N. J. Ch. 1941).

In a devise of real property the words used by the testatrix here would create an estate tail by implication, the common law regarding the net effect as the same where a devise is to a man and his issue and where it is to a man and his heirs with a limitation over to another on the failure of direct descendents, the second estate taking effect as a remainder. The common law, however, did not, and does not, allow estate tail in mere chattels. Williamson v. Daniel, 12 Wheat. 586 (U. S. 1827); Webbe v. Webbe, 234 Ill. 442, 84 N. E. 1054 (1908); Albee v. Carpenter, 12 Cush. 382 (Mass. 1853); Paterson v. Ellis’ Executors, 11 Wend. 259 (N. Y. 1833); Executors of Condit v. King, 13 N. J. Eq. 375 (1861); Langworthy v. Clark, 53 R. I. 418, 167 Atl. 127 (1933); 2 Kent, Commentaries 352. Cf. Talbot v. Snodgrass, 124 Iowa 681, 100 N. W. 500 (1904). Consequently, it is held that where there is an attempt to create an estate tail in personalty, a limitation over on an indefinite failure of issue—i.e., on the extinction of the whole line of direct descendents of the first taker—is void, and the same words which, if applied to realty, would entail the property give the first taker, when applied to personalty, an absolute estate. Williamson v. Daniel, supra; Hudson v. Wadsworth, 8 Conn. 348 (1861); Davies’ Adm’r v. Steele’s Adm’r, 38 N. J. Eq. 101 (1860); Cook v. Bucklin, 18 R. I. 335, 58 Atl. 849 (1894).

Although at early common law there could be no future estate in chattels (Manning’s Case, 8 Co. 94b, 95a, 97 Eng. Rep. R. 315, 316 (K. B. 1610)), the strict rule was later relaxed and a life estate was allowed with a limitation over of what in real property law would be the remainder. Hastings v. Douglas, Cro. Car. 343, 79 Eng. Rep. R. 901 (K. B. 1633); Hyde v. Parratt, 1 P. Wms. 2, 24 Eng. Rep. R. 269 (Ch. 1695). Under such a concept the courts, where possible, construed such a bequest as was made in the principal case as importing a definite failure of issue—i.e., that the second estate was to take effect only if the first taker died without issue surviving him—and it was then valid as an executory interest after a life estate in personalty, to vest, if at all, within the span of a life or lives in being at the death of the testator and 21 years and some months afterwards; thus it was no offense against the rule against perpetuities, and by holding the limitation valid in such cases the courts could give effect to the intention of the testator without violating any rule of law. Cleveland v. Havens, 13 N. J. Eq. 101 (1860); Cook v. Bucklin, supra; Hudson v. Wadsworth, supra; Moffat’s Executors v. Strong, 10 Johns. 12 (N. Y. 1813).
The New Jersey court, therefore, in the instant case seemed called upon to construe the terms of the testatrix' bequest of the painting. If this is held to be on an indefinite failure of issue of the son, the limitation over to the Historical Society after the estate of the son and the whole line of his direct descendents was invalid, (1) as an attempted estate tail in personalty, or (2) as a remote executory interest, since the contingency upon which it was to vest, failure of direct descendents, might not occur until after the period allowed for vesting by the rule against perpetuities. Under either theory the son, as first taker, held absolute title. Or, if the words of the will, "die leaving issue," could be construed to import definite failure of issue, as the court thought they might under New Jersey precedent (Woodward's Adm'r v. Woodward's Executors, 16 N. J. Eq. 83 (1863)), then, even though the executory devise to the Society was good, yet it was defeated when issue survived the son, and under the common law doctrines they took the whole estate. The court, however, sought to avoid the horns of the dilemma thus posed, on the ground that, even if indefinite failure of issue was intended, the gift to the Society nevertheless would be good since, "It is a charitable bequest and valid under the well recognized exception to the Rule against Perpetuities." P. 278. In so holding, the New Jersey court is in conflict with the overwhelming weight of common law authority.

The statement seized by the court, that an exception to the prohibition of perpetuities exists in favor of charitable bequests, is to be found in the cases, but, it is submitted, as so used "perpetuity" is to be understood in its primary sense, as meaning the duration of the estate during which the power of alienation is suspended. It was so regarded in Ould v. Washington Hospital, 95 U. S. 303 (1877); Odell v. Odell, 10 Allen 1 (Mass. 1865); Brooks v. Belfast, 90 Me. 318, 38 Atl. 222 (1897); I Tiffany, Real Property (1903) § 158; Gray, Rule against Perpetuities §§ 589-590; Note (1924) 30 A. L. R. 594. The law will allow such an inalienable estate, which in a private person would be objectionable for taking property out of commerce forever, in consideration of the beneficial results flowing from such length of use by a charity. Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141 (1887). But the rule against perpetuities is aimed at remoteness of the contingency upon which a future estate by way of executory devise is to vest, and in this application of the rule the exception in favor of charities is extremely limited, a remote vesting in a charity being allowed only when the first taker is also a charity, for the reason that the estate can be no more perpetual in two charities successively than in one continuously, and the evil, therefore, can be no greater. Jones v. Habersham, 107 U. S. 174 (1882); Storrs Agricultural School v. Whitney, supra; Odell v. Odell, supra; McKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027 (1908); Webster v. Wiggin, 19 R. I. 73 (1895); Christ's Hospital v. Grainger, 16 Sim. 83, 60 Eng. Rep. R. 804 (Ch. 1848). Cf. Gray, op. cit. supra, §§ 599-600 (rule criticized). And the law will indulge in such favor to charity even though the charity may not come into existence, and so cannot take the bequest, until a remote time. Russell v. Allen, 107 U. S. 163 (1882); Ould v. Washington Hospital, supra; Odell v. Odell, supra; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561 (1897); Almy v. Jones, 17 R. I. 265, 21 Atl. 616 (1891).

But the exception is limited to such cases of remote shifting use from one charity
to another, where the remotely vesting executory interest is limited after an estate of a private person, as in the principal case, it is void under the rule against perpetuities and the whole estate vests indefeasibly in the first taker, notwithstanding the charitable purpose which the testator intended. Russell v. Allen, supra; Easton v. Hall, 323 Ill. 397, 154 N. E. 216 (1926); Merritt v. Buckname, 77 Me. 253 (1885); American Nat. Bank v. Morgenweck, 114 N. J. Eq. 59, 168 Atl. 598 (Ch. 1933); Leonard v. Burr, 18 N. Y. 96 (1858); Ledwith v. Hurst, 284 Pa. 94, 130 Atl. 315 (1925); Bliven v. Borden, 56 R. I. 283, 185 Atl. 239 (1936) (cited in principal case); Village of Brattleboro v. Mead, 43 Vt. 556 (1870); I Tiffany, loc. cit. supra; Gray, op. cit. supra, §§ 594-596; Leach, Perpetuities in a Nutshell (1938) 51 Harv. L. Rev. 638, 668-669. Similarly, where the first gift is to a charity with a limitation over to a private person on a remote contingency, the limitation over is void. Brattle Square Church v. Grant, 3 Gray 142 (Mass. 1855); Palmer v. Union Bank, 17 R. I. 627, 24 Atl. 109 (1892); Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087 (1898); I Tiffany, loc. cit. supra; Leach, loc. cit. supra.

The future interest which the court allowed to the Historical Society, it is submitted, therefore, is not held valid by the common law rules which the Vice Chancellor invoked as being still in force in Rhode Island and New Jersey. Two of the cases cited in support of the exception, Almy v. Jones, supra, and Mills v. Davison, supra, are distinguishable on their facts, the bequests being to charitable uses in the first instance, vesting unconditionally with no intermediate estate to a private use. The third, Bliven v. Borden, supra, held that an executory devise would vest in the charity, if at all, within the period allowed by the rule against perpetuities for the vesting of any future estate in personalty. Not cited was the recent New Jersey case, American Nat. Bank v. Morgenweck, supra, where a devise of a trust fund income over to hospitals, after the death of the last individual beneficiary named, was held void for remoteness.

To sustain the limitation over in the principal case as a new exception in favor of charities, and to give the complainants only a defeasible estate is, we submit, to pave the way for testators to create, under another name, what are virtually estates tail in personalty by the simple expedient of devising over to a charity on an indefinite failure of direct descendants. Because the estate is not technically a fee tail, but a conditional limitation, sale by the heirs would not bar the executory devise, in the manner that alienation of realty would bar the entail, but would pass only the defeasible interest. Unless some method be provided for record notice to all the world of the defeasible nature of the title to all such chattels, this holding jeopardizes transactions involving sale of personality and opens the door to frauds on purchasers. An innocent successor to the title might at some remote time find himself divested of the property by extinction of a family line which he perhaps did not know existed.

W. BARRETT MCDONNELL

TAXATION—Application of Declaratory Judgments

The plaintiffs protested the assessment of taxes against them under the Wyoming Sales and Use Tax Statutes on the ground of unconstitutionality for lack of "due
process”. The state board of equalization refused them a hearing since they had not yet paid the taxes at the time the hearing was demanded. The refusal was predicated upon state statutes which provided for a hearing before the board and an appeal to the courts only in the event the tax had been paid. All collections from taxes had to be transferred to the State Treasurer; there were no provisions made by which the board could set aside any of the collected funds for the purpose of making refunds, nor was any method devised by which the Treasurer could be compelled to make restitution. The plaintiffs sought relief from the assessment in the federal district court under the Federal Declaratory Judgment Act, and also sought equitable relief by way of an injunction on the ground of irreparable injury since the state courts were prohibited by statutes from enjoining the collection of the taxes unless the statutes questioned had been declared unconstitutional. Held, under the Federal Declaratory Judgment Act, that the provisions of the statutes, requiring a prepayment of the tax before a hearing was allowed and the tax became irrevocably fixed, coupled with the absence of any provision to compel the refund of a determinedly illegally assessed tax, constituted lack of due process. *Morrison-Knudsen Co., Inc. v. State Board of Equalization*, 35 F. Supp. 553 (D. Wyo. 1940).

In 1934 the Federal Declaratory Judgment Act was passed, purporting “in cases of actual controversy” to empower the federal courts “to declare rights and other legal relations of any interested party . . . whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.” 48 STAT. 955 (1934), 28 U. S. C. § 400 (1934). The Act is a purely remedial statute and does not add to the content of the jurisdiction of the federal courts; to invoke it there must be diverse citizenship or a federal question. *Harry v. United Electric Coal Co.*, 8 F. Supp. 655 (E. D. Ill. 1934). It merely provides the prophylactic remedy of a declaration of rights to supplement the coercive remedy of the injunction. For the power to be exercised there is no necessity of a prayer for injunctive relief, nor need irreparable injury be shown. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933). But the constitutional requirement of “cases” or “controversies” must be met, *Muskrat v. United States*, 219 U. S. 346 (1911), since the federal courts are without jurisdiction to render decrees where such cannot effect the legal relations of the parties, whether for lack of present interest, or for any other reason. Thus to have jurisdiction under the Act there must be an actual controversy, containing adverse interests which are capable of being acted upon by a judgment. *United States v. West Virginia*, 295 U. S. 463 (1935). This demand is satisfied in the principal case by the plaintiffs' denial of the constitutionality of the tax statutes and the assertion of legality by the defendants. Indeed, the Act may be employed where no proceedings have yet been taken to apply the taxing statute to the plaintiff, it being enough that it will be enforced in due course. *Boggus Motor Co. v. Onderdonk*, 9 F. Supp. 950 (S. D. Tex. 1935); *Black v. Little*, 8 F. Supp. 867 (E. D. Mich. 1934).

Although the language of the Act literally admits the consideration of any kind of controversy, the contention was made upon its passage that the hearing before the Sub-committee of the Judiciary Committee of the Senate on H. R. 5623, 70th Cong. 1st Sess., showed that the bill was limited in its effect to permit the settling of disputed questions arising in the interpretation of contracts, leases, wills, and other written instruments, for which the declaratory judgment is peculiarly fitted.
Despite this contention the federal district courts were soon employing the Act to declare tax statutes unconstitutional. In *Penn v. Glenn*, 10 F. Supp. 483 (W. D. Ky. 1935), an action under the Act to secure a declaration as to the constitutionality of the Tobacco Control Act, 49 Stat. 778 (1934), was held maintainable. And in *Vogt & Sons v. Rothensies*, 11 F. Supp. 225 (E. D. Pa. 1935), which was a suit for an injunction against a hog processing tax under the Agricultural Adjustment Act, or alternatively for judgment declaring the taxing provisions unconstitutional, the Federal Declaratory Judgment Act was held to be applicable. These cases showed that the Act afforded the taxpayer a new method by which to determine the validity of a tax levied upon him. The traditional procedure had been to require the payment of the tax before there could be any judicial determination as to its validity. The right of the government to collect its taxes by summary administrative proceedings had long been settled law. *Phillips v. Commissioner*, 283 U. S. 589 (1931). But the remedy of a declaratory judgment enables a taxpayer, when confronted by a tax of dubious validity, to secure immediately and in a relatively speedy action, a permanent declaration of his rights, with the result that the collector will respect this adjudication and not demand payment of the tax. However, in *Lake Erie Provision Co. v. Moore*, 11 F. Supp. 522 (N. D. Ohio 1935), the court refused to declare a processing tax invalid on the ground that its inability to enforce a judgment against the collector rendered the case moot. But the court in *Penn v. Glenn*, supra, dealt with this difficulty by threatening to withhold a certificate of probable cause if the collector refused to comply with the judgment and was sued for a refund. At any rate the objection in the *Lake Erie case* is untenable in view of the numerous decisions which hold that coercive relief is not a requisite of judicial action. *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123 (1927).

This interpretation of the Federal Declaratory Judgment Act, which allowed the judiciary to test a federal tax statute before the taxes were paid, opened the gates to a flood of litigation which, if allowed to continue, would have resulted in the frustration of many tax statutes. Those opposed to the application of the Act to federal taxes pointed out that prompt and certain availability of taxes was an imperious need of government, see *Bull v. United States*, 295 U. S. 247, 259 (1935); that, for certain federal taxes, at least, there was an elaborate system of corrective justice set up in the United States Board of Tax Appeals and other administrative bodies; that, apart from these administrative reliefs, it had been held that the filing of a claim for refund was an absolute prerequisite to the maintenance of an action to recover taxes, *United States v. Felt & Tarrant Mfg. Co.*, 283 U. S. 269 (1931); that, under the Act, functions would devolve on the courts which they were not equipped to perform, such as the determination of the validity of a special assessment, cf. *Blair v. Oesterlein Co.*, 275 U. S. 220 (1927); and that the issuance of declaratory judgments defeated the policy of *Rev. Stat. § 3224* (1875), 26 U. S. C. § 1543 (1934), prohibiting any suit to restrain the assessment or collection of a federal tax. The result was the amending of the Act to except from its scope litigation with respect to federal taxes, 49 Stat. 1027 (1935), 28 U. S. C. § 400 (Supp. 1940). This amendment was made effective from its date of passage, Aug. 30, 1935, and removed over one thousand tax cases then pending before the federal courts.
As evidenced by the instant case, the Act has never been amended with respect to state taxes. In 1937 the general statute defining the jurisdiction of federal District Courts was amended by the Johnson Act, 50 STAT. 738 (1937), 28 U. S. C. § 41 (1) (Supp. 1940), which restricted the power of those courts to enjoin, suspend, or restrain assessment levies or collection of any state tax where a plain, speedy and efficient remedy may be had at law or in equity in the courts of the state. But the court in the principal case found that in view of the legislative history, the Johnson Act could not be read into the Declaratory Judgment Act. The history shows that the amendment to the Declaratory Judgment Act with respect to federal taxes did not mention state taxes, nor did the Johnson Act include any prohibition against the use of the Federal Declaratory Judgment Act. On the other hand, in the case of Collier Advertising Service v. City of New York, 32 F. Supp. 870 (S. D. N. Y. 1940), the court decided that the Johnson Act should be read into the Declaratory Judgment statute for the reason that otherwise the practical effect would be to nullify the Johnson Act. Since the statutes are clear and unambiguous there is no rule of statutory construction justifying such a conclusion. But cf. the use of the analogy argument by Mr. Justice Frankfurter in United States v. Hutcheson, 61 Sup. Ct. 463 (1941).

To allow the federal courts, under the Declaratory Judgment Act, to interfere with the revenue collection of the several states, but not with that of the national government itself, seems an incongruity. However there is something to be said for the continuance of the Act in its present form. Some state statutes may contain no provision for refunding illegally collected taxes, as the one in the case under discussion; they may provide penalties for failure to pay promptly, or summary procedure for collection purposes, and the collector himself may be financially irresponsible and his bond inadequate. Thus the taxpayer who refuses to pay, hoping to assert his defense that the statute is unconstitutional, either subjects himself to penalties or his property to liens; and when he does pay before objecting he has little chance later to recover, even though the statute is subsequently held invalid, because of the sovereign's immunity from suit and the collector's financial inability. See Field, Recovery of Illegal and Unconstitutional Taxes (1932) 45 Harv. L. Rev. 501. Yet the objections to the Act's application to federal taxes are also valid with regard to state taxation. The courts must, under the Act, perform functions for which they are not designed; moreover, the need of the several states for a constant and unvarying flow of revenue is fully as pressing as that of the national government, and more than balances the inconvenience and loss sustained by the few taxpayers who cannot afford to pay the tax and await the refund.

CHARLES J. PETERS
BOOK REVIEWS


In 1932, Professor Powell published a two volume case book on Trusts and Estates, containing 2038 pages of material. This work included not only cases and other material relating to Trusts but also covered the topics of Wills, Future Interests, the Construction of Gifts, Tax Law and some other items, with more or less completeness. It was intended for a combination course to run for perhaps four hours a week throughout the year.

Professor Powell’s new book is designed for a much shorter course in a school where Trusts is kept as a separate topic. It contains apparently only 181 main cases. One would expect many more decisions to be given with some degree of fullness in a book which runs beyond 1000 pages. Other case books in this field offer approximately 300 cases. The explanation of the apparent shortage lies principally in the unusually large amount of text, statute, and footnote material which Professor Powell has included. An additional factor of lesser effect is that some cases printed in full are of considerable length, as, for example, the cases on pages 742 and 752 which together cover 16 pages.

The outline of the new book is naturally based on that of the 1932 work. Having analyzed the larger field to his satisfaction in 1932, it was hardly to be expected that Mr. Powell would change his ideas to a great extent in eight years. That portion of the 1932 outline related strictly to trust creation and administration has been retained with minor variations. The sections of the earlier book having to do with Future Interests, Wills and their construction, and Tax Law have been reduced to a marked degree and more closely woven into the strictly trust material. The relation of tax statutes to trust creation, administration and revocation is still stressed to a considerable extent.

The present outline includes five main parts, namely, history, the creation of express trusts, implied trusts, the administration of trusts, and the use of trusts in business as substitutes for corporations, for security, and for the holding and voting of stock. The chapter on distinctions between trusts and other relationships, found in several case books, is omitted entirely, an action which seems to the writer desirable. The scattering of these contrasts throughout a case book at appropriate

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points seems preferable to consolidating them at the beginning. To the reviewer Professor Powell’s outline and organization seem sensible, logical, and well balanced, except that in the opinion of the writer the use of the resulting and constructive trust cases as auxiliary and subsidiary to the express trust material is more satisfactory than emphasizing the importance of these implied trusts by giving them separate chapters.

The historical development and some informational items are treated by statements prepared by the editor or quoted from text books or articles. This method undoubtedly saves time for teacher and student. Sample statutes are quoted in full in connection with each major subject and other legislation is referred to and discussed. It is thus easy to see how different solutions of the various problems have been tried in the various jurisdictions. A fairly large comparative law element is offered in this way. A table of these statutes, arranged by states, appears at the beginning of the book.

References to, and quotations from, the Restatement on Trusts, text books, law review articles and notes, and decisions, are numerous and well selected. The editor shows familiarity with the trust “services” and with trade journals such as Trust Estates Magazine. More than 2,000 cases are referred to or digested in the footnotes.

The book has a detailed table of contents, a table of cases, and is well indexed. The type and paper are excellent.

The treatment of charitable trusts, *cy pres*, and the remedial side of trust law seems somewhat scanty. The emphasis on New York law is rather heavy. About 30% of the 181 leading cases are from the courts of that state.

Professor Powell’s competency in the field of Property and Trusts is well known. Out of the wide experience which he has had as a teacher, student of the sources, reporter for the American Law Institute, and draftsman, he has here collected a rich store of legislative and judicial action and of scholarly comment and criticism. While one can never tell how well balanced and practical a source book is until he has tried it with a class, a limited examination gives the distinct impression that this volume is filled with well-arranged, interesting and valuable material. Its treatment bears the stamp of Professor Powell’s personality and of the Columbia teaching methods. The editor is to be congratulated on the successful completion of another of his many contributions to legal literature.

GEORGE G. BOGERT*

The fourth edition of Bunn on Jurisdiction and Practice of the Courts of the United States is of the same high quality of the former editions and records the many changes which have occurred in this field since 1927, when the third edition was written. The book is well organized, carefully written and has condensed into its two hundred and twelve small pages of large type print of the text one of the best summaries and informational treatments of the subject that may be found. The book is not, however, only a digest of the law but is rather a simple, accurate statement without elaboration of federal jurisdiction and procedure covering the source of federal jurisdictional power, the jurisdiction of the district courts, the circuit courts of appeals, the Supreme Court, and matters peculiar to the federal courts under so many chapters. Only a thorough understanding of the subject on the part of the author would permit so complete a treatment in so short a space. Upon all principal points the leading cases, federal constitutional provisions and statutes have been cited in the body of the text giving ready reference to the key authorities sustaining the position taken by the author. Almost without exception the basic case upon nearly all common points in the field of federal jurisdiction is cited, and where significant changes have been made, the process of development is brought out with citation of the leading case upon the earlier view and the case changing that position. This is illustrated in the section on venue. Reference is made to the case of Ex Parte Wisner1 which held that the federal district court was without jurisdiction to try a case between citizens of different states in a third state in which neither party was a resident. Later, in Lee v. Chesapeake & Ohio Ry.,2 a citizen of Texas sued the defendant company, a corporation of Virginia, in a state court in Kentucky and the defendant petitioned to remove to the United States district court because of diversity of citizenship. On a motion to remand to the state court, the Wisner case was overruled on the ground that diversity of citizenship having given the federal court jurisdiction, Section 51 of the Judicial Code limiting venue to the residence of the plaintiff or the defendant could not be applied to defeat federal jurisdiction where the

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1 203 U. S. 449 (1906).

2 260 U. S. 653 (1922).
case had been properly brought in the state court. The author in his treatment of the subject after setting out the position taken states: "The opinion pronounced the Wisner case essentially unsound and definitely overruled it. The rule was emphatically applied that the privilege in question is that of the defendant and in no sense is dependent on the will or acquiescence of the plaintiff; therefore that, when the defendant petitioned for removal, he waived his exemption from suit in the wrong district and the plaintiff had no voice in the matter." A recent case decided since the publication of the book should be noted in connection with the problem dealt with on page 71 where it is accurately stated that corporations are regarded as inhabitants of the district "only where they are incorporated notwithstanding that they own property and do business in other districts." The author continues to state that, "In such other districts they cannot be sued against their objection in the United States district court, except that suits based on diverse citizenship only may be brought against corporations in the district where plaintiff resides." The leading citations for this position are then given, but the now famous case of Nierbo Co. et al. v. Bethlehem Shipbuilding Corporation,3 had not yet been written. For most practical purposes the Nierbo case destroys the effect of former decisions by holding that if the defendant corporation has obtained a permit to do business in a state other than that in which it is incorporated, it is deemed to have waived the venue statute permitting suit only at the residence of the plaintiff or of the defendant. Thus, if a citizen of State A sues a corporation organized in State B in a Federal Court of State C in which the corporation has obtained a permit to do business, the corporation is held to have waived venue limitations and the jurisdiction exists by virtue of diversity of citizenship. Throughout the book key cases upon nearly every point have been cited with accuracy and it came out at a time when many of the significant changes such as in the case of Erie R.R. v. Tompkins,4 had been made. The interesting question is presented of whether Gelpcke v. Dubuque5 has been overruled by the Erie case. If the latter case were logically followed, the validity of an issue of municipal bonds would seem to be a question purely of state law which the federal courts would have to follow even though it overruled a former decision under which the bonds were issued and sold.

308 U. S. 165 (1939).
304 U. S. 64 (1938).
1 Wall. 175 (U. S. 1864).
The author concludes, however, that "the injustice of the situation seems so clear, when the bonds have been purchased by the present plaintiffs in reliance on the first decision, that it is not impossible that some way to retain the Gelpcke doctrine will be found."\(^6\)

Throughout the book the Federal Rules of Civil Procedure, which went into effect in the fall of 1938, have been referred to with brief comment. Obviously in so short a space a complete treatment of the procedural problem could not be given nor has it been attempted. The same is true of the revised rules of the Supreme Court adopted in 1939 which are referred to in the treatment of appellate procedure. The treatment given of procedural rules serves largely to create awareness of the change which they have worked rather than give a complete discussion of them. They have been neatly placed where they stand out most effectively with the other problems discussed in the book, and excerpts from the rules have been included in many places. Federal jurisdiction and procedure lends itself to this type of condensed treatment because some key case by the Supreme Court of the United States solves the jurisdictional problem and eliminates the necessity of discussion of the many variable views which might exist in a similar analysis of state procedural and jurisdictional problems.

After reading this book one wonders how so much could be included in so little space. It presents an accurate summary of the jurisdiction of all courts of the United States and includes much helpful material in respect to the practice before them. For the beginner a better review of the subject would be hard to find. For the experienced practitioner in federal courts the book may be read with profit to obtain a comprehensive picture of federal jurisdiction as a whole, including the many changes of recent years. This little book upon a big subject should find a place in every lawyer's library. A few evenings spent in careful reading of this pointed treatment of the subject would give a good picture of the federal court system in its operation today and serve as an excellent refresher to those who are generally informed upon the subject. The time would be well spent.

MASON LADD*  

\(^6\)P. 207.  
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For historical reasons explained in this book the appeal in criminal cases was not a common law institution. Special situations gave rise to special remedies. Some of these had a vigorous, though contorted growth. Taken altogether, however, they did not fulfill the functions of a modern criminal appeal. Most of the legislative attempts at it have been piece-work. Is there delay? Pass a statute to correct it. Are there reversals on technicalities? Pass a statute forbidding them. Is the record on appeal unsatisfactory? Change it. Should the state have an appeal? Provide for it. Professor Orfield has brought together for the first time the historical roots, the later growth, and a critical analysis of the modern statutes that attempt to view the problem as a whole. He has also included references to about all the extant literature on the subject, and this within the compass of 305 pages in which there is, if anything, too much repetition, probably by reason of the fact that the chapters were published as separate articles. The administration of justice in America owes a large debt to Professor Orfield for preparing this work and to the National Conference of Judicial Councils for its wide distribution. The work constitutes a starting point for all new departures.

The reviewer believes that not enough consideration has been given to the fact that the problem is an individual one for each state. Each state has developed individual habit patterns. Devices successful in one jurisdiction cannot always be successfully transplanted to another. For example, the author gives certain figures for California taken from Ronald Beattie’s study. In six years there were 44,842 felony convictions, 942 defense appeals were decided on the merits and there were 100 reversals. It is evident, therefore, that appellate appeals and reversals play a small part in the administration of criminal justice in California. Few convictions are reversed on technicalities, although most of the remedies suggested by the author for preventing technical reversals are non-existent in the state. What evidence is there that appellate judges without trial experience are more technical than those who have come up from the trial bench? The present Supreme Court of the United States has shown no disposition to exalt technicalities, although only two of its members were trial judges and those two in inferior courts. Coming back to the criminal statistics in California, while only two per cent of the convictions are carried through to an appeal, it is estimated that that

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means about 200 opinions a year and many times that if Professor Orfield's recommendation is adopted that each appellate judge write an opinion. Most of these appeals are decided by an intermediate court and do not reach the supreme court. To add this burden to the supreme court as recommended by Professor Orfield, would swamp it completely. Whenever appeals reach a certain number, intermediate courts must be created, and when the hearings in the highest court reach a certain number, the highest court must pick and choose its cases as does the Supreme Court of the United States. To enlarge the highest court to fifty or one hundred members, as in France and Germany, is to lose the certainty and finality that a modern supreme court can bring about in the law.

Each state must work out its own organization in accordance with its volume of business and with its traditions. The objects that should be accomplished in a criminal appeal are, however, substantially the same everywhere. Although weighty names can be cited contra, the overwhelming opinion among laymen and lawyers is in favor of an appeal. What should be its scope? There is general agreement in including errors in law appearing in the record, disregarding, however, errors which have probably not resulted in the conviction of an innocent man and errors which do not involve a serious departure from the essentials of a fair trial. On the other hand, no one would advocate a complete retrial, hearing all the witnesses. Certainly one trial is enough. Is there not, however, a place for a critical review of the evidence, giving all due weight to the fact that the jury has heard the witnesses? In the excitement of a trial before a single judge important considerations are often overlooked. A calm reconsideration by an experienced appellate judge is a valuable corrective of trial mistakes. As the Pope says in his review of the case of Guido and his accomplices for the murder of Pompilia and her family in Browning's *The Ring and the Book*:

"Through hard labor and good will,
And habitude that gives a blind man sight
At the practised finger-ends of him, I do
Discern, and dare decree in consequence,
Whatever prove the peril of mistake."

Were such a review made, however, by some appellate courts in this country, what would be the result? Bear in mind that from seventy to eighty per cent of those in state prisons have arrived there on a plea of guilty and not by a trial. It is only reasonable to suppose a good propor-
tion of the other cases present disputable questions of fact, yet the reversals are almost negligible. When the records of cases affirmed are examined, it comes as a shock to see that juries have convicted on eyewitness testimony of personal identification that no competent psychologist would trust for a moment, on dubious inferences from disputable circumstances, on suspicious corroboration, on expert testimony of questionable scientific value. Are we, then, to conclude that innocent men are being convicted? No. The evidence shows this seldom happens. What does happen is that the police get the right man from stool-pigeons, undercover agents, tips from the underworld, extorted confessions, their knowledge of criminals, and a good hunch. None of this is put in evidence. The courts in several of our states have now reached a formula. If the jury by well-known devices has brought in its expected verdict of guilty, the question before the appellate court is not whether the guilt has been proved to a moral certainty and beyond a reasonable doubt, not even whether the evidence preponderates in favor of guilt, but whether the prosecution has got into the record the minimum to get to the jury. The record does not justify the verdict any more than the ordeals of fire and water demonstrated guilt, but the guilty were usually convicted by the ordeal and the innocent usually acquitted because the ordeal was manipulated to accomplish that purpose. The appellate courts in several of our states have an affirmance complex. They have emancipated themselves from reversals for technical error, but in most states they have not the authority under the law to accomplish the results contemplated in New York. There Section 528 of the Code of Criminal Procedure permits the appellate courts to order a new trial if "satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial."

The task of the past generation of appellate courts has been to free the criminal law from technicalities and avoid reversals for error which have nothing to do with guilt or with the fundamentals of a fair trial. It may be the task of the next generation to remove archaic obstructions to the admission of relevant evidence and to require trial courts to use all the resources of modern science so that a trial will demonstrate the question of guilt or innocence. It will not be, as under the supernatural tests and in our modern criminal procedure, a ritual for the purpose of ratifying a result otherwise determined.

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