<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Index</td>
<td>III</td>
</tr>
<tr>
<td>Index to Lead Articles—Authors</td>
<td>III</td>
</tr>
<tr>
<td>Index to Lead Articles—Titles</td>
<td>III</td>
</tr>
<tr>
<td>Index to Book Reviews—Authors</td>
<td>IV</td>
</tr>
<tr>
<td>Index to Book Reviews—Reviewers</td>
<td>IV</td>
</tr>
<tr>
<td>Index to Notes</td>
<td>V</td>
</tr>
<tr>
<td>Index to Decisions</td>
<td>V</td>
</tr>
<tr>
<td>Topical Index</td>
<td>VII</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>XVI</td>
</tr>
</tbody>
</table>

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INDEX TO LEADING ARTICLES—AUTHORS

ACHESON, DAVID C.: Professional Responsibility and the Workload of the Federal District Courts ................................................................. 542
ADAMS, JOHN J. AND COLEMAN, R. L.: Can Collective Bargaining Survive the Board? 366
ASHER, LESTER: Secondary Boycotts—Allied, Neutral and Single Employers ........... 406
BARR, DAVID S.: Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service ................................... 420
DONAHUE, CHARLES: Foreword ................................................................... 217
DUNAU, BERNARD: Some Aspects of the Current Interpretation of Section 8(b)(7) .......... 220
FARMER, GUY: Secondary Boycotts—Loopholes Closed or Reopened? ..................... 392
FAVRE, ANTOINE: Fault as an Element of the Illicit Act ..................................... 555
FELDESMAN, WILLIAM: May the Labor Board Make Policy? ............................ 527
GOODMAN, CARL F.: United States Government Foreign Property Controls .............. 767
GRESSMAN, EUGENE: Much Ado About Certiorari ........................................... 742
HALDERMAN, JOHN W.: Regional Enforcement Measures and the United Nations ........ 89
KLEEB, ROBERT H.: Recent Problems in the Creation of Federal Law Under Section 301 296
MATHews, CRAIG: Restrictions on Procurement Under the Economic Assistance Program .............................................................. 457
MOSLER, HERMANN: Protection of Human Rights by International Legal Procedure, The 800
ODONOGHUE, MARTIN F.: Jurisdictional Disputes in the Construction Industry Since CBS ......................................................................................... 314
PYE, A. KENNETH: Reflections on Proposals for Reform in Federal Criminal Procedure 675
RATNER, MOZART G.: Some Contemporary Observations on Section 301 ................. 260
ROWLAND, LANDON H.: Judicial Review of Disability Determinations ................ 42
SHAWe, EArLe K.: Federal Regulation of Recognition Picketing .............................. 248
SIGAL, BENJAMIN C.: Evolving Duty to Bargain, The ........................................ 379
SWINDLER, WILLIAM F.: Current Challenge to Federalism: The Confederating Proposals, The ........................................................................... 1
THATCHER, HERBERT S.: Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act .................................................... 339

INDEX TO LEADING ARTICLES—TITLES

Current Challenge to Federalism: The Confederating Proposals, The: William F. Swindler ......................................................................................... 1
Evolution of Duty to Bargain, The: Benjamin C. Sigal ..................................... 379
Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service: David S. Barr ................................................................. 420
Fault as an Element of the Illicit Act: Antoine Favre ........................................... 555
Federal Regulation of Recognition Picketing: Earle K. Shawe ................................. 248
Foreword: Charles Donahue ...................................................................................... 217
Judicial Review of Disability Determinations: Landon H. Rowland ......................... 42
Jurisdictional Disputes in the Construction Industry Since CBS: Martin F. O'Donoghue .... 314
May the Labor Board Make Policy?: William Feldesman ........................................ 527
Much Ado About Certiorari: Eugene Gressman ....................................................... 742
Professional Responsibility and the Workload of the Federal District Courts: David C. Acheson ...................................................................................................................... 542
Protection of Human Rights by International Legal Procedure, The: Hermann Mosler .... 800
Recent Problems in the Creation of Federal Law Under Section 301: Robert H. Kleeb .......... 296
Reflections on Proposals for Reform in Federal Criminal Procedure: A. Kenneth Pye .......... 675
Regional Enforcement Measures and the United Nations: John W. Halderman ............ 89
Restrictions on Procurement Under the Economic Assistance Program: Craig Mathews .... 457
Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act: Herbert S. Thatcher ............................................................................. 339
Secondary Boycotts—Allied, Neutral and Single Employers: Lester Asher .................. 406
Secondary Boycotts—Loopholes Closed or Reopened?: Guy Farmer .......................... 392
Some Aspects of the Current Interpretation of Section 8(b)(7): Bernard Dunau .......... 220
Some Contemporary Observations on Section 301: Mozart G. Ratner ....................... 260
United States Government Foreign Property Controls: Carl F. Goodman .................. 767

INDEX TO BOOK REVIEWS—AUTHORS

Names of authors are in capitals; titles of books are in italics; reviewers' names are in plain face and in parentheses.

Goldfarb, Ronald: The Contempt Power: (Bernie R. Burrus) ...................................... 658
Lapenna, Ivo: State and Law: Soviet and Yugoslav Theory: (Branko M. Pešelj) .......... 868
Mellinkoff, David: The Language of the Law: (Richard A. Gordon) ......................... 666
Westin, Alan F.: An Autobiography of the Supreme Court: (William F. Hughes, Jr.) .... 207

INDEX TO BOOK REVIEWS—REVIEWERS

Names of reviewers are in capitals; titles of books are in italics; authors' names are in plain face.

Burrus, Bernie R.: The Contempt Power, by Ronald Goldfarb .................................... 658
Gordon, Richard A.: The Language of the Law, by David Mellinkoff ......................... 666
Hughes, William F., Jr.: An Autobiography of the Supreme Court, by Alan F. Westin .... 207

IV
INDEX TO NOTES

Coming of Massiah: A Demand for Absolute Right to Counsel, The ........................................ 825
Community Antenna Television: Survey of a Regulatory Problem ............................................ 136
Hartigan's Wake: An Analysis of the Validity of Alabama Divorces in Sister States .............. 572
Study of Garnishment Procedure Under Section 15-312 of the District of Columbia Code, A .............................................................. 120

INDEX TO RECENT DECISIONS

Constitutional Law

Private Hospitals Receiving Funds Under Hill-Burton Act Are Within Fifth and
Fourteenth Amendment Prohibitions Against Racial Discrimination. Simkins
v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied,
376 U.S. 938 (1964) ................................................................. 624
Statute Basing Conscientious Objector Draft Exemption on Belief in Supreme Be-
ing Violates Due Process Clause of Fifth Amendment. United States v. Seeger,
326 F.2d 846 (2d Cir. 1964) ........................................................ 618

Criminal Law

Murder May be Reduced to Manslaughter, Absent a Specific Provocative Act,
Where Reasonable Belief Exists That Prior Provocation May Continue. State
v. Guido, 40 N.J. 191, 191 A.2d 45 (1963) .............................................. 177

Criminal Procedure

Voluntary Confession Before Presentment but After Police Prevented Retained At-
torney From Seeing Defendant is Inadmissible. People v. Donovan, 13 N.Y.2d
148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) ....................................... 629

Domestic Relations

Child Conceived of Married Woman by Heterologous Artificial Insemination Is
1963) ........................................................................................................ 633
Duty To Support Minor Children Regardless of Controversy Between Divorced
Spouses Does Not Apply Where Mother’s Conduct Deprives Court of Juris-

Emigration and Immigration

Resident Alien Who Makes a Brief, Lawful Exit From United States Does Not
Intend a Departure for Deportation Purposes. Rosenberg v. Fleuti, 374 U.S.
449 (1963) .......................................................................................... 182

Federal Rules of Civil Procedure

Rule 35 Can Apply to Defendants, but Original Party Defendant Becomes “Party”
Vis-à-vis Codefendant Only When He Asserts Cross-Claim Against Him.
Schlagenhauf v. Holder, 321 F.2d 43 (7th Cir. 1963), cert. granted, 375 U.S.
983 (1964) .......................................................................................... 639

Government Contracts

Government Is Liable for Price Adjustment Under “Suspension of Work” Clause
Where Delay Results From Government’s Failure To Comply With Union

V


INTERNATIONAL LAW


TAXATION

Corporation’s Costs In Issuing Nontaxable Common-on-common Stock Dividend Are Not Deductible as an Ordinary and Necessary Business Expense. *General Bancshares Corp. v. Commissioner*, 326 F.2d 712 (8th Cir. 1964) ............... 863


TRADE REGULATION

Wholesaler Competing in Distribution of Products With Direct-Buying Chain Store May Be Protected by Section 2(d) of Robinson Patman Act. *Fred Meyer, Inc.*, No. 7492, FTC, March 29, 1963 .................................................. 195

WARRANTY

Cigarette Manufacturer Breaches Warranty of Merchantability When Smoking Its Cigarettes Proximately Causes Cancer Although Manufacturer Could Not Have Foreseen Carcinogenic Effect. *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963) ............................................................ 200
### TOPICAL INDEX

**ALL REFERENCES ARE TO PAGE NUMBERS**

References in boldface are to Leading Articles and Comments; in italics to Notes; and in plain type to Decisions

<table>
<thead>
<tr>
<th>Actions and Defenses</th>
<th>Interpretation</th>
<th>305-06</th>
</tr>
</thead>
<tbody>
<tr>
<td>See LABOR LAW</td>
<td>Legislative history</td>
<td>306-09</td>
</tr>
<tr>
<td><strong>Administrative Law</strong></td>
<td>State law</td>
<td></td>
</tr>
<tr>
<td>See RADIO AND TELEVISION; SOCIAL SECURITY</td>
<td>Basis of</td>
<td>297-98</td>
</tr>
<tr>
<td><strong>Appellate Procedure</strong></td>
<td>History</td>
<td>298</td>
</tr>
<tr>
<td>See COURTS</td>
<td>Solution to grievance problems</td>
<td>301-05</td>
</tr>
<tr>
<td><strong>Arbitration and Award</strong></td>
<td>Certiorari</td>
<td></td>
</tr>
<tr>
<td>See UNITED STATES</td>
<td>Supreme Court certiorari practice</td>
<td>742-66</td>
</tr>
<tr>
<td>Section 301 of Labor Management Relations Act</td>
<td>Nature and quality of petitions</td>
<td>762-63</td>
</tr>
<tr>
<td>Allocation of authority between individual and exclusive bargaining representative</td>
<td>Role of the bar in seeking review by certiorari</td>
<td>762-66</td>
</tr>
<tr>
<td>Burley rule 273-76, 278-79, 281-82</td>
<td>In forma pauperis petitions</td>
<td>745-46</td>
</tr>
<tr>
<td>Collective bargaining and grievance procedure, distinction between 272-76</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative history 274-75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy objections to 276-78</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Railway labor cases 278-79</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Duty of fair representation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Congressional policy intended 285-90</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distinction between power to amend and power to interpret 292-94</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Enforceability 284-85</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In general 294-95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-emption by NLRB 286-87</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reconciliation 287-90</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard imposed 280-84, 291-95</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Burley and Miranda</em> rules 281-84, 293-94, 309-12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal law, history of 266-69, 280, 298-300</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impact upon individual contract rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Creation of federal rights 266-69, 280</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Curtailment of representative's authority 260-66</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Function of bargaining agent 263-66</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Function of impartial arbitrator 270-72</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In general 271-72</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substantive-procedural controversy 266-70</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In general 296-97</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Section 9(a)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Civil Rights**

Protection of prisoners' rights through federal law

Corporal punishment of convicts in state penal systems 713-18, 724


Application of § 241 excludes fourteenth amendment rights 709

Application of § 242 requires specific intent to deprive person of federal rights 708

Legislative history and proposed amendments concerning §§ 241-43 after 1956 737-39

Problems in administration 712-13

State policy concerning FBI investigations 719

Role in reducing policy brutality 735-37

Department of Justice, Civil Rights Section of 707

Function and policy 707-08, 713

Federal power regarding internal discipline of state penal institutions 724, 726-27, 732-34

History of prosecution in prison brutality cases

*United States v. Best* 711-18

*United States v. Irby* 736-37

*United States v. Jackson* 735-36

*United States v. Jones* 718-35

*United States v. Walker* 729-35

Collective Bargaining
See Arbitration Award; United States
Duty to bargain
Employer concessions 386
Future of collective bargaining 376-77
Hard bargaining (Boulwareism) 372-77, 385-90
Impasse 367-68, 381
Management prerogative 370-71, 382
Refusal to bargain 367-69, 381, 387
Requirement of good faith 372-73, 386-88
Subcontracting, employer’s decision to engage in 369-70, 382-83
Subjects of bargaining
Forbidden 368-69
Mandatory 367, 370-71, 381, 383, 385, 387
Permissive 367-69, 381, 384, 387
Purpose of NLRA 380
Unilateral choice by employer 387

Communications
See Radio and Television

Conflict of Laws
See Divorce

Constitutional Amendments
Confederating proposals as representing a challenge to federalism
Antifederalism
Conference on Chief Justices 5-8
In general 1-5
Article V—the amending process
In practice: federal or state responsibility 18-19
Constitutional amendatory history 19-21
Strengthening of the federal position 21-23
Present and proposed 12

Principles underlying the Convention proviso 13-18
Articles of Confederation 38-41
Federalism as representative government
Baker v. Carr 24
Guarantee clause
As interpreted in Luther v. Borden 27-30
Essence and origin 24-26
Representative government in jeopardy 31-33
Resolutions of General Assembly of States 8-11
Proposed amendments, critique of
Baker v. Carr 31-33
Court of the Union 35-38
In general 38-41
Proposed article V 21-22

Constitutional Law
See Divorce
Conscientious objector, statute requiring belief in Supreme Being violates constitutional right of
618-24
Private hospitals receiving federal funds may not discriminate because of race 624-29
Right to Counsel and the Exclusion of Confessions
Accusatorial system, structure and demands of 825-26
Approaches used to enforce right to counsel 826
Critical stage approach 837-42
Evolution of the approach in decisions 837-40
Supreme Court unwilling to use this approach 841
McNabb-Mallory approach 832-36
Exclusion of accused’s statements during illegal detention 833
Purpose of McNabb-Mallory rule 833
Threshold confessions, admissibility of 834
"Unnecessary delay," difficulty defining 836
New York approach 842-47
Absolute right to counsel, hearing recognition of 846-47
Rejection of approach by other states 843
# TOPICAL INDEX

**ALL REFERENCES ARE TO PAGE NUMBERS**

References in **boldface** are to **Leading Articles and Comments**; in **italics** to **Notes**; and in **plain type** to **Decisions**

<table>
<thead>
<tr>
<th>Corporations</th>
<th>Relation to professional responsibility of attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>See TAXATION</strong></td>
<td><strong>552-54</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Courts</th>
<th><strong>Criminal Law</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>See CERTIORARI</strong></td>
<td><strong>See CIVIL RIGHTS; CONSTITUTIONAL LAW</strong></td>
</tr>
<tr>
<td>Supreme Court of the United States</td>
<td><strong>Mitigation of murder to manslaughter where no immediate provocation</strong></td>
</tr>
<tr>
<td>Effect of Judiciary Act of 1925 on obligatory and discretionary jurisdiction</td>
<td><strong>177-82</strong></td>
</tr>
<tr>
<td>Nature and effect of increase in docket filings</td>
<td><strong>Criminal Procedure</strong></td>
</tr>
<tr>
<td>Methods of controlling number of cases to which plenary review is given</td>
<td><strong>See CONSTITUTIONAL LAW</strong></td>
</tr>
<tr>
<td>Number of written opinions</td>
<td><strong>Proposals for reforming the Federal Rules</strong></td>
</tr>
<tr>
<td>Hours devoted to oral argument</td>
<td><strong>Defendant's rights in general</strong></td>
</tr>
<tr>
<td>Nature of cases in which full opinions written</td>
<td><strong>Indigent defendant, the</strong></td>
</tr>
<tr>
<td>United States district courts</td>
<td><strong>679-85</strong></td>
</tr>
<tr>
<td>Congestion in civil dockets</td>
<td><strong>Reforms in the federal system</strong></td>
</tr>
<tr>
<td>Congestion in criminal dockets</td>
<td><strong>685-705</strong></td>
</tr>
<tr>
<td>In District of Columbia</td>
<td><strong>Arrest and detention</strong></td>
</tr>
<tr>
<td><strong>546-47</strong></td>
<td><strong>685-86</strong></td>
</tr>
<tr>
<td><strong>549-50</strong></td>
<td><strong>Mallory rule</strong></td>
</tr>
<tr>
<td><strong>547</strong></td>
<td><strong>Omnibus Crime Bill</strong></td>
</tr>
<tr>
<td><strong>550-52</strong></td>
<td><strong>686</strong></td>
</tr>
<tr>
<td>Proposed solution under retirement provisions of Judicial Code</td>
<td><strong>Ball</strong></td>
</tr>
<tr>
<td><strong>550-52</strong></td>
<td><strong>690-92</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Compulsory process of witnesses</strong></td>
</tr>
<tr>
<td></td>
<td><strong>693</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Defense procedures</strong></td>
</tr>
<tr>
<td></td>
<td><strong>695-96</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Ability and preparation of</strong></td>
</tr>
<tr>
<td></td>
<td><strong>695-96</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Right of</strong></td>
</tr>
<tr>
<td></td>
<td><strong>686-88</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Discovery</strong></td>
</tr>
<tr>
<td></td>
<td><strong>688-90</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Joinder of defendants</strong></td>
</tr>
<tr>
<td></td>
<td><strong>692-93</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Right to counsel</strong></td>
</tr>
<tr>
<td></td>
<td><strong>686-88</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Criminal Justice Act</strong></td>
</tr>
<tr>
<td></td>
<td><strong>686-88</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Judicial developments</strong></td>
</tr>
<tr>
<td></td>
<td><strong>686</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Rules of evidence</strong></td>
</tr>
<tr>
<td></td>
<td><strong>696-99</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Doctrine of limited admissibility</strong></td>
</tr>
<tr>
<td></td>
<td><strong>696-99</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Purpose of</strong></td>
</tr>
<tr>
<td></td>
<td><strong>696</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Sentencing</strong></td>
</tr>
<tr>
<td></td>
<td><strong>699-703</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Presentence reports</strong></td>
</tr>
<tr>
<td></td>
<td><strong>700-01</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Probation</strong></td>
</tr>
<tr>
<td></td>
<td><strong>701-03</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Trial procedures</strong></td>
</tr>
<tr>
<td></td>
<td><strong>693-95</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Voluntary confession inadmissible</strong></td>
</tr>
<tr>
<td></td>
<td><strong>where retained attorney not allowed to see defendant</strong></td>
</tr>
<tr>
<td></td>
<td><strong>629-33</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Descent and Distribution</th>
<th><strong>Disinheritance, proposals for reforming law of</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Forced share versus need</strong></td>
<td><strong>525-26</strong></td>
</tr>
<tr>
<td><strong>Inadequate protection of family under present law</strong></td>
<td><strong>499-502</strong></td>
</tr>
<tr>
<td><strong>Inconsistencies in the law</strong></td>
<td><strong>508</strong></td>
</tr>
<tr>
<td><strong>Creditor protection contrasted with family protection</strong></td>
<td><strong>508-10</strong></td>
</tr>
<tr>
<td><strong>Governmental controls on free disposition</strong></td>
<td><strong>510</strong></td>
</tr>
<tr>
<td><strong>Past proposals for reform</strong></td>
<td><strong>511</strong></td>
</tr>
</tbody>
</table>
### TOPOICAL INDEX

**ALL REFERENCES ARE TO PAGE NUMBERS**

References in boldface are to Leading Articles and Comments; in italics to Notes; and in plain type to Decisions

| Expansion of the forced share | 511-12 |
| Model Probate Code provision | 513 |
| Professor Macdonald's family Maintenance Act | 514-16 |
| Restraints on disposition based on need | 513-18 |
| Commonwealth countries | 516 |
| Forced heirship | 517-18 |
| Professor Cahn's suggestion | 513 |
| Statutory trust | 512-13 |
| Present state of the law |  |
| Protection of children | 506 |
| Homestead statutes | 508 |
| Pretermitted child | 507-08 |
| Protection of wife | 502-03 |
| Dower | 502 |
| Statutory forced share | 503 |
| Criticism of | 503 |
| Evasion of | 504-06 |
| Proposed revision of author | 518 |
| "Estate of decedent," definition of | 522 |
| Forced share for children | 519-21 |
| Matching trust device | 523 |
| Protection against outright transfers | 523 |
| Protection of surviving spouse | 520 |
| Provision for needy parents | 520-21 |
| Effect of Hartigan on suits between parties in sister states | 593-603 |
| Changes wrought by twofold test | 593 |
| Dominance of local law | 594-95 |
| Effect of Hartigan on suits involving third parties in sister states | 603-07 |
| Full faith and credit | 586-95 |
| Domicile as jurisdictional base | 587 |
| Extraterritorial divorce decrees | 586 |
| Limits on review of jurisdiction |  |
| Application of local estoppel law | 591 |
| Effect in rendering state | 590 |
| Extension of res judicata to third person | 590 |
| Participation—effect | 589-91 |
| Proposals | 610-13 |
| Extension of application of twofold test | 610-12 |
| Shifting emphasis in interest from state to parties | 612-13 |

### Domestic Relations

See **Divorce**

- Child conceived by artificial insemination, illegitimacy of 633-39
- Father's duty to support children, conduct of mother affecting 853-57

### Economics

- Economic Assistance Program—Procurement Restrictions
  - History of Foreign Assistance Program 458-62
  - Ad hoc measures 458
  - Current types of economic assistance 461-62
  - Development Loan Fund 460
  - Foreign Assistance Act of 1961 460
  - Marshall Plan and Offspring 458-59
  - Mutual Security Act of 1951 459
  - Mutual Security Act of 1954 459
  - Tied Procurement Policy
  - Adverse consequences of 488-97
  - Increased cost of aid program 488-93
  - Interference with foreign policy objectives of aid program 496-97
  - Interference with nondiscriminatory international trade 493-96
  - Effectiveness of 478-88

### Discrimination

See **Constitutional Law**

### District of Columbia

See **Courts; Garnishment**

### Divorce

- Alabama divorces—validity in sister states

  - Alabama divorce law 574-86
  - Hartigan v. Hartigan 577-78
  - History since 1945 575-76
  - Marital Relations Act 574
  - Possibility of attack 578-84
  - Extrinsic fraud 578-79
  - Intrinsic fraud 579
  - Policy to protect innocent third parties 582-83
  - Third party attack—Aiello v. Aiello 584-86
  - Timely objection to admission of testimony of prior frauds 582

Appendix—Tables 614-18
“Additionality—substitution-ality” problem 482-83
Balance of payments impact 478-85
Impact on other nations’ aid programs 485-88
Impracticability of restrictive policy 479-80
Evolution of 463-78
Change in policy 471-78
AID commodity procurement 476-77
DLF development loans 472
ICA commodity procurement 474-75
ICA development project assistance 473-74
Local costs and budget support 477
Reasons for 477-78
Development of balance of payments problem 463-64
Mutual Security Act of 1958 464-65
Mutual Security Act of 1959 470
Period of transition 467-71
Pre-1959 attitude 465-67

Emigration and Immigration
Deportation, brief exit of resident alien not departure for purposes of 182-89

Evidence
See CONSTITUTIONAL LAW; CRIMINAL PROCEDURE

Federalism
See CONSTITUTIONAL AMENDMENTS

Federal Rules of Civil Procedure
Rule 35, application to defendants of 639-44

Federal Rules of Criminal Procedure
See CONSTITUTIONAL LAW; CRIMINAL PROCEDURE

Garnishment
Affidavit, state requirement as prerequisite to issuance of writ of garnishment 128
Attachment on Judgment as necessary to garnishment 120-22

Comparison of District of Columbia procedures with those of other states and the Federal Rules 128-34
Conflict between District of Columbia Code and Federal Rules 121
Construction of District of Columbia garnishment statute to save it from unconstitutionality as denial of due process 125
Garnishee as party in District of Columbia garnishment action 131
Harsh results possible under District of Columbia Code 123-28
Hearing, garnishee who has failed to answer entitled to 125
Impleading of garnishee as third-party defendant not possible under District of Columbia procedures 130
Judgment against garnishee in state garnishment proceeding restricted to property held 129
Proceedings treated as ancillary to original action in the District of Columbia 121
Remedies available to the District Court for the District of Columbia in unfair garnishment actions 135-36
Sanctions under District of Columbia garnishment procedures, lack of 132

Government Contracts
Administrative record, judicial review of determinations of fact confined to 189-95
Price adjustment under “suspension of work” clause, liability of government for 644-51

Human Rights
See INTERNATIONAL LAW

International Law
European Convention of Human Rights
Procedure
Before the Commission of Human Rights 802-03
Individual applications 804
State applications 806-07
Before the Committee of Ministers 806-07
**TOPICAL INDEX**

### ALL REFERENCES ARE TO PAGE NUMBERS

References in boldface are to Leading Articles and Comments; in italics to Notes; and in plain type to Decisions

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual union members under</td>
<td>362-64</td>
</tr>
<tr>
<td>Deprivation of rights by violence</td>
<td>362-63</td>
</tr>
<tr>
<td>Prohibited by § 610</td>
<td>362-63</td>
</tr>
<tr>
<td>Violation of § 610 by individual</td>
<td>362-63</td>
</tr>
<tr>
<td>Dues, initiation fees, and assessments</td>
<td>360-61</td>
</tr>
<tr>
<td>Equal rights and privileges</td>
<td>344-45</td>
</tr>
<tr>
<td>Attendance at Union Meetings</td>
<td>344-45</td>
</tr>
<tr>
<td>Discussing and voting on union affairs</td>
<td>344-45</td>
</tr>
<tr>
<td>Nomination of candidates</td>
<td>344-45</td>
</tr>
<tr>
<td>Protection of existing rights</td>
<td>344-45</td>
</tr>
<tr>
<td>Voting for candidates</td>
<td>344-45</td>
</tr>
<tr>
<td>Freedom of speech and assembly</td>
<td>345-50</td>
</tr>
<tr>
<td>In general</td>
<td>345-50</td>
</tr>
<tr>
<td>Rules pertaining thereto</td>
<td>346-49</td>
</tr>
<tr>
<td>Slander and sedition</td>
<td>346-49</td>
</tr>
<tr>
<td>Improper discipline, safeguards against</td>
<td>355-59</td>
</tr>
<tr>
<td>Discipline, what constitutes</td>
<td>355-59</td>
</tr>
<tr>
<td>In general</td>
<td>355-59</td>
</tr>
<tr>
<td>Requirements before member may be disciplined</td>
<td>355-59</td>
</tr>
<tr>
<td>Review, right to</td>
<td>359-65</td>
</tr>
<tr>
<td>In general</td>
<td>359-65</td>
</tr>
<tr>
<td>Pre-emption under Title I</td>
<td>361-62</td>
</tr>
<tr>
<td>Exclusive jurisdiction of NLRB as limitation of rights guaranteed under Title I</td>
<td>361-62</td>
</tr>
<tr>
<td>Pre-emption, lack of</td>
<td>361-62</td>
</tr>
<tr>
<td>Protection of the right to sue</td>
<td>350-55</td>
</tr>
<tr>
<td>Administrative proceeding, right to institute action in</td>
<td>350-55</td>
</tr>
<tr>
<td>Court, right to institute action in</td>
<td>350-55</td>
</tr>
<tr>
<td>Exhaustion of hearing procedure within union</td>
<td>350-55</td>
</tr>
<tr>
<td>In general</td>
<td>350-55</td>
</tr>
<tr>
<td>Title I, scope of</td>
<td>340-44</td>
</tr>
<tr>
<td>In general</td>
<td>340-44</td>
</tr>
<tr>
<td>Membership in union</td>
<td>341-42, 345-50</td>
</tr>
<tr>
<td>Membership right of union to select</td>
<td>342-44</td>
</tr>
<tr>
<td>NLRRA, conflict with Title I</td>
<td>343-44</td>
</tr>
<tr>
<td>Union-member relationship</td>
<td>340-41</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Picketing</td>
<td>221-56</td>
</tr>
<tr>
<td>See STRIKES AND BOYCOTTS</td>
<td></td>
</tr>
<tr>
<td>Picketing against unfair labor practices</td>
<td>221-26</td>
</tr>
<tr>
<td>Picketing for area standards</td>
<td>227-30, 257</td>
</tr>
<tr>
<td>Picketing to secure reinstatement of strikers or discharged employees</td>
<td>226-227, 257-58</td>
</tr>
<tr>
<td>Role of fact finding</td>
<td>235-47, 258</td>
</tr>
<tr>
<td>Scope of final proviso to subsection (C)</td>
<td>230-35, 253-56</td>
</tr>
<tr>
<td>Structure of § 8(b)(7)</td>
<td>220-21, 250-52</td>
</tr>
</tbody>
</table>

### Professional Responsibility

See COURTS

### Property

See DESCENT AND DISTRIBUTION; UNITED STATES

### Radio and Television

#### Regulation of community antenna television

- FCC control under current statute | 141-56 |
- Carter Mountain case | 150-53 |
- End-use test | 152-55 |
- Part II amendment | 153-56 |
- Section 21.709 amendment | 145-50 |
- In general | 136-41 |
- Judicial control | 156-69 |
- Copyright | 157-61 |
- Federal Copyright Act | 157 |
- Statutory preemption | 167-69 |
- Unfair competition | 161-67 |
- Legislative proposals | |
- Past | 169-74 |
- Suggested | 174-75 |

### Regulated Industries

See RADIO AND TELEVISION

### Right to Counsel

See CONSTITUTIONAL LAW; CRIMINAL PROCEDURE

### Social Security

#### Disability benefit amendments to Social Security Act

- Administrative pattern | 48-51 |
- Applications for "freeze" or cash benefits | 48 |

XIII


Medical determination by state disability unit 48-49
Remedies available to claimant 49-51
Legislative history
In general 51-56
1960 subcommittee report 56-59
Statutory pattern
1954 amendments 44-45
1956 amendments 45-46
1958 amendments 46-47
Disability determinations, judicial review of
Statutory construction
Prognosis and earnings requirements 68-76
Nature of the statutory impairment 68
Proof of the statutory impairment 68-71
Remedial ailments 72-75
Requirement of substantial gainful activity 76-85
Burden of proof 77-82
Findings 78-79
Kerner v. Fleming 77-80, 83-85
Substantial evidence rule 59-62
Weighing evidence 62-68
Agency expertise 65-68
Evaluating medical evidence: Aaron v. Fleming 62-64

Strikes and Boycotts

See PICKETING
Secondary boycotts
Actual injury by picketing 398-400
Coercion 394, 397-400
Inducement of supervisors and employees 395-96
Loopholes reopened 395-402
Neutral employer 394, 396, 397-403
When an ally
Business-interrelationship criterion 418
Conduct inconsistent with neutrality 407
Struck work 407-09
Subsidiary and common ownership 414
Objective of picketing 396-97
Plugging the loopholes
Direct coercion of employer 394, 397-402
Hot cargo agreements 394-95, 402-03

Inducement of “employee” vis-à-vis “individual” 393-94, 395-97
“Producer,” definition of 400-02
Relationship to
Consumer boycotts 400-02
Handbilling 400
Peaceful picketing 398-400
Primary picketing 396, 400, 404
Publicity proviso (information picketing) 399-400
Roving situs picketing—new loophole 403-05

Taxation
Corporate costs incurred in issuance of nontaxable stock dividend, deductibility of 863-67
Release of partnership interest, “sale” or “liquidation” of 651-57

Trade Regulation
Section 2(d) of Robinson-Patman Act, applicability to wholesaler competing with direct-buying chain store of 195-200

Unfair Competition
See RADIO AND TELEVISION; TRADE REGULATION

United Nations
Regional enforcement measures
Amendment or modification of the Charter language by evolutionary process 105-08
Article 53 and problem of constitutional development 108-18
Article 51 may not have been intended to limit right of self-defense to actual attack 111-16
Cases not involving threat of aggression, article 53 should apply to 116-17
Development of effective constitution, policy of 111
“United for Peace” resolution and problem of article 53 108
Charter provisions recently relegated to background by OAS measures 118
Collective self-defense in cases of armed aggression 93-94
Denial that measures constitute “enforcement action” 94-105

XIV
### United States: Executive Order 10988

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agency as prosecutor, defender, and judge</td>
<td>444-50</td>
</tr>
<tr>
<td>Arbitration</td>
<td></td>
</tr>
<tr>
<td>Advisory</td>
<td>444</td>
</tr>
<tr>
<td>Arbitrator, decision of</td>
<td>435-38</td>
</tr>
<tr>
<td>Proceedings</td>
<td>434-38, 441</td>
</tr>
<tr>
<td>Appropriate unit</td>
<td></td>
</tr>
<tr>
<td>&quot;Common mission&quot; rule</td>
<td>425, 431</td>
</tr>
<tr>
<td>&quot;Community of interest&quot; rule</td>
<td>421, 424, 430-31, 439</td>
</tr>
<tr>
<td>Craft unit</td>
<td>424</td>
</tr>
<tr>
<td>In general</td>
<td>430-36, 438-41</td>
</tr>
<tr>
<td>Installation-wide unit</td>
<td>425, 431, 438</td>
</tr>
<tr>
<td>Central authority, need for</td>
<td>450-53</td>
</tr>
<tr>
<td>Code of fair labor practices</td>
<td>445-46, 452</td>
</tr>
<tr>
<td>Collective bargaining in the federal service</td>
<td>454</td>
</tr>
<tr>
<td>Department of Defense Directive</td>
<td>1426.1</td>
</tr>
<tr>
<td>Election rules</td>
<td>441-44</td>
</tr>
<tr>
<td>Grievance procedure</td>
<td>427</td>
</tr>
<tr>
<td>Levels of recognition</td>
<td></td>
</tr>
<tr>
<td>Exclusive (&quot;majority rule&quot;)</td>
<td>420, 430, 438-43</td>
</tr>
<tr>
<td>Formal (&quot;ten per cent rule&quot;)</td>
<td>420, 436, 439-40</td>
</tr>
<tr>
<td>Informal</td>
<td>420</td>
</tr>
<tr>
<td>Prohibition against strikes</td>
<td>428</td>
</tr>
<tr>
<td>&quot;Public service&quot; concept</td>
<td>423-24</td>
</tr>
<tr>
<td>Search for precedents</td>
<td>422-30</td>
</tr>
<tr>
<td>Similarities between Order and NLRA</td>
<td>423, 425-30, 435, 452</td>
</tr>
<tr>
<td>&quot;Sixty per cent rule&quot;</td>
<td>443-44</td>
</tr>
</tbody>
</table>

### United States: Foreign Policy

#### Foreign property controls

- Postwar unblocking                                                   | 782-85  |
- Problems in releasing funds                                         | 782     |
- Certification procedure                                             | 784-85  |
- General License No. 90                                               | 783-84  |
- General License No. 101                                              | 785     |
- General Treasury Ruling No. 11                                       | 782-83  |
- Post-World War II controls                                          | 785-94  |
- Cuban Assets Control                                                 | 792-94  |
- Embargo pursuant to Foreign Assistance Act of 1961                  | 792     |
- Department of Justice Office of Alien Property                      | 785-86  |
- Egyptian Assets Control                                              | 791     |
- Treasury Department Foreign Assets Control                          | 786-90  |
- Amendments to regulations                                            | 788     |
- Certification agreements                                             | 789     |
- Nationals affected, definition of                                  | 789-90  |
- Transactions affected, kind of                                      | 787-89  |

#### Significant court cases regarding

- Authority to issue regulations                                      | 795     |
- Effect of judgment on blocked property                              | 796-98  |
- Kinds of transactions within regulations                             | 795-96  |
- World War II controls                                               | 767-82  |
- Controls system                                                      | 770-82  |
- Nationals affected, definition of                                   | 780-82  |
- Transactions affected, kind of                                      | 770-80  |

#### History of freezing controls                                      | 767-70  |
#### Economic warfare aspects                                          | 768-69  |
#### Executive Order 8389                                               | 767-69  |
#### Executive Order 8785                                               | 769-70  |
#### Trading With the Enemy Act                                        | §5(b)   |
#### Warranty

- Warranty of merchantability breached                                 | 767-68  |
- Smoking of cigarettes proximately causes cancer                     | 200-06  |
TABLE OF CASES

ALL REFERENCES ARE TO PAGE NUMBERS

A
Aaron v. Flemming 60, 61, 62-64, 65, 77
Abbett Elec. Corp. v. United States 647
Adair v. United States 621
Adams v. Adams 594, 853-57
Adams v. Ellis 728
Adams v. Fleming 57, 67
Adams Dairy, Inc. 383
Aeronautical Industrial Dist. Lodge v. Campbell 261, 265, 277, 282
AFL v. Swing 233
Ahrens & Ott Mfg. Co. v. Patton 120
Aliello v. Aliello 575, 581, 584-86, 601, 604, 609-10
Ajuria v. Pan American Life Ins. Co. 783
Alaskan Glacier Sea Food Co. 444
Albany Electronics, Inc., In re 156
Allen v. Local 92, Iron Workers 344, 346, 356
Allen v. United States 683
Allen B. Dumont Labs., Inc. v. Carroll 139, 167, 168, 170
Allied Oil Workers Union v. Ethyl Corp. 276
Allied Paint & Color Works, Inc. v. United States 191
Allison v. Allison 519
Almeida Bus Lines, Inc. 379
Alton-Wood River Bldg. Trades Council (Jerseyville Retail Merchants Ass'n) 229, 258
Alvino v. Bakery Workers 355
Amalgamated Ass'n of Bus Employees v. Wisconsin Employment Relations Bd. 5
Amalgamated Lithographers (Local 78) 414-15
Amalgamated Lithographers (Ind.) (Local 17) 414-15
American Fed'n of Television & Radio Artists (Great Western Broadcasting Corp.) 401
American Surety Co. v. Baldwin 588
American Mfg. Co. 384
American Newspaper Publishers Ass'n v. NLRB 369
American Potash & Chem. Corp. 424, 425
American Steel Foundries v. Tri-City Trades Council 233
Anderson v. Dunn 660
Anderson v. N. V. Transandine Handling Co. 859
Anderson v. North Carolina 840
Andrews v. Andrews 587
Andrews Air Force Base 431

Angle v. Shinholt 580
Anioli v. Flemming 70-71
Anonymous, In re 572
Antennavision Serv. Co., In re 147, 148, 149-150
Apex Hosiery Co. v. Leader 233
Appeal of Ingraham 507
Appeal of Jack Clark 648
Arizona Micro-Wave Sys. Corp., In re 147, 149
Arlington Asphalt Co. 384
Ashcraft v. Tennessee 629
Ashley v. Ashley 576
Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp. 266-70, 272, 276, 278, 280, 293, 296, 299
Atlanta Trading Corp. 196-97
Atkinson v. Sinclair Ref. Co. 265, 272
Aufero v. Aufero 594
Austin v. Smith 121, 122-126, 128, 134
Austria v. Italy 804
Automotive Employees Union (Charlie's Car Wash & Serv.) 252, 259
Averbuck v. Averbuck 596

B
B. F. Goodrich Co. v. Hammond 204
Bachman Mach. Co. v. NLRB 413, 417, 418
Bailey v. Patterson 625
Bailey v. United States 681
Bair v. Bank of America Nat'l Trust & Sav. Ass'n 133
Baker v. Carr 2, 7, 10, 23, 24, 25, 29, 30-31, 32, 33, 214, 215
Baldwin v. Iowa State Traveling Men's Ass'n 588
Baltimore & O.R.R. v. Commissioner 866
Baltimore S.S. Co. v. Phillips 589
Banco de Brasil v. A. C. Israel Commodity Co. 783
Banco Nacional de Cuba v. Sabbatino 798
Bandy v. United States 682, 691
Barber v. Barber 594
Bard v. Bard 595, 596
Bardonek v. Bardonek 596
Barling v. United States 647
Barnett v. United States 658, 661, 662
Barrows v. Jackson 626
Bartenders Union (Fowler Hotel, Inc.) 253
Bartkus v. Illinois 684
Barunica v. Hatters Union 341, 361-62
Bashton v. Fleming 57
Basich Bros. Constr. Co. 648
Baxley v. United States 621
Baylis v. Baylis 583
Beach v. Beach 642
XVI
TABLE OF CASES

ALL REFERENCES ARE TO PAGE NUMBERS

Beauchamp v. Weeks 361
Beauharnais v. Illinois 348
Belk v. Allied Aviation Serv. Co. 300
Bell v. Bell 587
Benedict v. Benedict 591, 592
Benge v. Barnett 506
Bennett v. Hoisting Eng'rs Union 341
Berger v. E. Berger & Co. 202
Berger v. United States 208
Berman v. United States 619-20
Bessette v. W. B. Conkey Co. 661
Bethlehem Steel Co. 388
Betts v. Brady 729
Bidwell v. Bidwell 593
Birdsong, In re 717, 728
Biscayne Trust Co. v. American Security & Trust Co. 856
Bishop v. United States 180
Black-Clawson Co. v. International Ass'n of Machinists 263, 275, 300
Black Hills Video Corp., In re 147, 148
Blackburn v. Alabama 829
Blades v. Szatay 507
Blake Constr. Co. v. United States 191
Blanc v. Lonz 160
Blank v. Clark 783
Blanschet v. Ribicoff 76
Blanton v. Cudahy Packing Co. 201
Block v. Liggett & Myers Tobacco Co. 204
Blumenthal v. Blumenthal 854
Boles v. Celebrezze 71
Bolles v. Toledo Trust Co. 505
Bolling v. Patterson 654
Bolling v. Sharp 621
Borg-Warner Corp. 367
Boston Naval Shipyard 423, 428, 430, 431, 453
Bowden v. Ribicoff 80
Bowman Dairy Co. v. United States 688
Boxer v. Boxer 593, 596
Boyd v. United States 696
Brady v. Ribicoff 75
Brady v. Beams 580
Bramlet v. Ribicoff 86
Brandt v. Brandt 855, 856
Brasier v. Brasier 595, 600
Bravermen v. United States 715
Breen v. Breen 595
Bricklayers Int'l Union (Engineered Bldg. Specialties, Inc.) 323
Bristol v. Brent 120
Brooks v. NLRB 264, 531, 539
Brown v. Allen 745
Brown v. Board of Educ. 1-2, 4, 215, 625
Brown v. Hugo Stinnes Corp. 777
Brown v. United States 178, 709
Brown Food Store 534
Brown Shoe Co. v. United States 754
Brown Transport Co. 384
Brownell v. National City Bank 777-78
Brownell v. New York Trust Co. 778-79
Brownell v. Singer 776
Buchanan v. Buchanan 635
Buck v. Jewell-LaSalle Realty Co. 158-160
Budd Electronics, Inc. 287
Buffalo Linen Supply Co. 533
Building Serv. Employees Union v. Gazzam 232, 255
Burley v. Elgin, J. & E. Ry. 309
Burton v. Wilmington Parking Authority 626-28
Busby v. Electric Util. Employees Union 132
Bush v. Orleans Parish School Bd. 5
Butler v. Fleming 73, 80, 84, 85

C

C.J. Wieland & Son Dairy Prods. v. Wickard 133
CAB v. Hermann 663
Cable Vision, Inc. v. KUTV, Inc., The KLIX Corp. 163-65, 166-67
Cable Vision, Inc. v. The KLIX Corp. 140, 159, 163, 164
Caffrey v. Caffrey 856
Caldwell v. Taylor 578
Cammarata v. Cammarata 593
Campbell v. Campbell 499
Cannon v. Cannon 606
Cannon Constr. Co. v. United States 649
Cardillo v. Liberty Mut. Ins. Co. 62
Carey v. General Elec. Co. 290
Carey v. Westinghouse Elec. Corp. 289, 537
Carmichael v. Delaney 185, 188-89
Carmichael v. Southern Coal Co. 2-3
Carpenter v. Fleming 60, 63
Carpenters Dist. Council (Vestaglas, Inc.) 253
Carr v. Yokohama Specie Bank, Ltd. 776
Carrier Corp. v. NLRB 396-97, 405, 536
Carroll v. Powell 130
Carroll Broadcasting Co. v. FCC 144-45, 150, 151, 152
Carroll's Transfer Co. 269, 286
Carter v. Hector Supply Co. 202
Carter Mountain Transmission Corp., In re 150-51
Carter Mountain Transmission Corp. v. FCC 140, 144, 152-53, 175
Casablanca 562, 563
Catlett v. United States 709, 712
Cement Masons Local 694 (Edgar H. Hughes Co.) 328
Central Mkt. v. King 120
Ceracche & Co., In re 148

XVII
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL REFERENCES ARE TO PAGE NUMBERS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Citation</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chalender v. United States</td>
<td>645, 647</td>
</tr>
<tr>
<td>Chambers v. Florida</td>
<td>745</td>
</tr>
<tr>
<td>Chambers v. United States</td>
<td>692</td>
</tr>
<tr>
<td>Chamblin v. Chamblin</td>
<td>579</td>
</tr>
<tr>
<td>Chaplain v. Chapman</td>
<td>592</td>
</tr>
<tr>
<td>Charles Dowd Box Co. v. Courtney</td>
<td>266, 290, 296</td>
</tr>
<tr>
<td>Chase Manhattan Bank v. United China Syndicate, Ltd.</td>
<td>796-98</td>
</tr>
<tr>
<td>Chattin (United States v. Mexico)</td>
<td>564</td>
</tr>
<tr>
<td>Cheney Bros. v. Doris Silk Corp.</td>
<td>165</td>
</tr>
<tr>
<td>Chicago Life Ins. Co. v. Cherry</td>
<td>588, 592</td>
</tr>
<tr>
<td>Chicago, R.I. &amp; Pac. Ry. v. Sturm</td>
<td>120</td>
</tr>
<tr>
<td>Chicot County Drainage Dist. v. Baxter State</td>
<td>589</td>
</tr>
<tr>
<td>Chisholm v. Georgia</td>
<td>21, 23</td>
</tr>
<tr>
<td>Chittick v. Chittick</td>
<td>594</td>
</tr>
<tr>
<td>Chouteau v. United States</td>
<td>646</td>
</tr>
<tr>
<td>Cenicia v. LaGay</td>
<td>630, 632, 633, 688, 852</td>
</tr>
<tr>
<td>Civil Rights Cases</td>
<td>625</td>
</tr>
<tr>
<td>Claremont Television, Inc., In re</td>
<td>156</td>
</tr>
<tr>
<td>Clark v. Chase Nat'l Bank</td>
<td>773</td>
</tr>
<tr>
<td>Clark v. Uebersee-Finanz Korporation</td>
<td>782, 796</td>
</tr>
<tr>
<td>Clark v. United States</td>
<td>214, 620, 725</td>
</tr>
<tr>
<td>Clausseen Baking Co.</td>
<td>202, 204</td>
</tr>
<tr>
<td>Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians</td>
<td>345</td>
</tr>
<tr>
<td>Cluett v. Lauderdale Biltmore Corp.</td>
<td>579</td>
</tr>
<tr>
<td>Clifton v. Ribicoff</td>
<td>59, 79</td>
</tr>
<tr>
<td>Coates v. Ellis</td>
<td>134</td>
</tr>
<tr>
<td>Cochran's Adm'x v. Cochran</td>
<td>504</td>
</tr>
<tr>
<td>Coe v. Coe</td>
<td>587, 589-603, 608-12</td>
</tr>
<tr>
<td>Coffin v. Reichard</td>
<td>716, 728</td>
</tr>
<tr>
<td>Cohen v. Cohen</td>
<td>593</td>
</tr>
<tr>
<td>Cohens v. Virginia</td>
<td>37</td>
</tr>
<tr>
<td>Cokeville Radio &amp; Elec. Co., In the Matter of</td>
<td>176</td>
</tr>
<tr>
<td>Colby v. Colby</td>
<td>592</td>
</tr>
<tr>
<td>Cole v. Phillips H. Lord</td>
<td>158</td>
</tr>
<tr>
<td>Coleman v. Happel</td>
<td>127</td>
</tr>
<tr>
<td>Collins v. Collins</td>
<td>595</td>
</tr>
<tr>
<td>Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.</td>
<td>283, 285</td>
</tr>
<tr>
<td>Columbia Basin Microwave Co., In re</td>
<td>146, 147, 148</td>
</tr>
<tr>
<td>Commissioner v. Court Holding Co.</td>
<td>656</td>
</tr>
<tr>
<td>Commissioner v. Duberstein</td>
<td>653</td>
</tr>
<tr>
<td>Commissioner v. Lehman</td>
<td>656</td>
</tr>
<tr>
<td>Commissioner of Pub. Welfare v. Koehler</td>
<td>635</td>
</tr>
<tr>
<td>Commonwealth v. Case</td>
<td>584, 603-05, 608, 609</td>
</tr>
<tr>
<td>Commonwealth v. Dascalakis</td>
<td>629</td>
</tr>
<tr>
<td>Commonwealth ex rel. Bowser v. Bowser</td>
<td>595</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Citation</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth Trust Co. v. Reconstruction Fin. Corp.</td>
<td>509</td>
</tr>
<tr>
<td>Community TV Sys. of Wyo., In the Matter of</td>
<td>176</td>
</tr>
<tr>
<td>Cone v. Union Oil Co.</td>
<td>297</td>
</tr>
<tr>
<td>Conley v. Celebreze</td>
<td>70</td>
</tr>
<tr>
<td>Conley v. Gibson</td>
<td>261, 269, 281, 283</td>
</tr>
<tr>
<td>Connecticut Coke Co.</td>
<td>386</td>
</tr>
<tr>
<td>Connor v. Teamsters Union</td>
<td>344</td>
</tr>
<tr>
<td>Consolidated Edison Co. v. NLRB</td>
<td>3, 60-61, 193</td>
</tr>
<tr>
<td>Continental Air Lines</td>
<td>397</td>
</tr>
<tr>
<td>Continental Cas. Co. v. Beardsley</td>
<td>157</td>
</tr>
<tr>
<td>Continental Copper &amp; Steel Indus., Inc. v. E. C. &quot;Red&quot; Cornellus, Inc.</td>
<td>204</td>
</tr>
<tr>
<td>Contractors v. Pillsbury</td>
<td>65</td>
</tr>
<tr>
<td>Cook v. Cook</td>
<td>590, 603</td>
</tr>
<tr>
<td>Cooper v. Aaron</td>
<td>625, 626, 628, 748</td>
</tr>
<tr>
<td>Cooper v. R. J. Reynolds Tobacco Co.</td>
<td>204</td>
</tr>
<tr>
<td>Coppedge v. United States</td>
<td>678, 684</td>
</tr>
<tr>
<td>Corfu Channel</td>
<td>560, 563-65, 566, 568</td>
</tr>
<tr>
<td>Corn v. Flemming</td>
<td>59, 79</td>
</tr>
<tr>
<td>Cosmark v. Strutters Wells Corp.</td>
<td>272</td>
</tr>
<tr>
<td>Costin v. Hollywood Credit Clothing Co.</td>
<td>121, 126, 136</td>
</tr>
<tr>
<td>Coulborn v. Joseph</td>
<td>573</td>
</tr>
<tr>
<td>Cowans v. Ticonderoga Pulp &amp; Paper Co.</td>
<td>573</td>
</tr>
<tr>
<td>Craig v. Ribicoff</td>
<td>60</td>
</tr>
<tr>
<td>Credit Serv. Co. v. Peters</td>
<td>126</td>
</tr>
<tr>
<td>Crews v. United States</td>
<td>725</td>
</tr>
<tr>
<td>Crewts v. Crewts</td>
<td>506</td>
</tr>
<tr>
<td>Cromwell v. County of Sac</td>
<td>589</td>
</tr>
<tr>
<td>Crooker v. California</td>
<td>630, 632, 633, 686, 825, 828, 831, 847, 850, 852</td>
</tr>
<tr>
<td>Cross v. United States</td>
<td>692</td>
</tr>
<tr>
<td>Crossman v. Crossman</td>
<td>574</td>
</tr>
<tr>
<td>Crowell v. Palmer</td>
<td>297</td>
</tr>
<tr>
<td>Culinary Workers Union (Educational Supply Serv.)</td>
<td>257</td>
</tr>
<tr>
<td>Culumbe v. Connecticut</td>
<td>827, 849</td>
</tr>
<tr>
<td>Culp v. United States</td>
<td>709, 715</td>
</tr>
<tr>
<td>Cuneo v. United Shoe Workers</td>
<td>251</td>
</tr>
<tr>
<td>Cunningham v. Erie R.R.</td>
<td>284</td>
</tr>
<tr>
<td>Cunningham v. Federal Cartridge Corp.</td>
<td>300, 301</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Citation</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>529</td>
</tr>
<tr>
<td>D. V. Displays Corp.</td>
<td>147, 150</td>
</tr>
<tr>
<td>Dan McKinney Co.</td>
<td>403</td>
</tr>
<tr>
<td>Daniel Constr. Co.</td>
<td>324</td>
</tr>
<tr>
<td>Darlington Mfg. Co.</td>
<td>377</td>
</tr>
<tr>
<td>Darlington Mfg. Co. v. NLRB</td>
<td>287</td>
</tr>
<tr>
<td>Daum v. United States</td>
<td>647</td>
</tr>
<tr>
<td>David A. Foxman</td>
<td>651-57</td>
</tr>
<tr>
<td>David Taylor Model Basin</td>
<td>429, 434, 438-39</td>
</tr>
</tbody>
</table>

**XVIII**
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davies' Estate, In re</td>
<td>509</td>
</tr>
<tr>
<td>Davis v. Davis</td>
<td>574, 582, 586, 588, 594</td>
</tr>
<tr>
<td>Day's Estate, In re</td>
<td>598</td>
</tr>
<tr>
<td>Dayton Typographical Union v. NLRB</td>
<td>222</td>
</tr>
<tr>
<td>De Becker v. Belgium</td>
<td>803, 819, 822</td>
</tr>
<tr>
<td>De Gategno v. De Gategno</td>
<td>594</td>
</tr>
<tr>
<td>De Leon v. United States</td>
<td>191</td>
</tr>
<tr>
<td>Dearborn Oil &amp; Gas Corp.</td>
<td>415</td>
</tr>
<tr>
<td>Deena Artware, Inc. v. NLRB</td>
<td>286, 289</td>
</tr>
<tr>
<td>Del Guercio v. Delgadillo</td>
<td>184-89</td>
</tr>
<tr>
<td>Del Guercio v. Gabot</td>
<td>184-89</td>
</tr>
<tr>
<td>Del Vecchio v. Bowers</td>
<td>60</td>
</tr>
<tr>
<td>Delgadillo v. Carmichael</td>
<td>184-89</td>
</tr>
<tr>
<td>Delli Paoli v. United States</td>
<td>683, 692, 697</td>
</tr>
<tr>
<td>Deluxe Metal Furniture Co.</td>
<td>250</td>
</tr>
<tr>
<td>Denver Bldg. &amp; Trades Council v. NLRB (Denver Bldg. Trades)</td>
<td>400</td>
</tr>
<tr>
<td>Department Store Employees’ Union (Oakland G. R. Kinney Co.)</td>
<td>220, 253</td>
</tr>
<tr>
<td>Detroit Resilient Floor Decorators (Mill Floor Covering, Inc.)</td>
<td>367, 384</td>
</tr>
<tr>
<td>Di Pasquale v. Karnuth</td>
<td>184-89</td>
</tr>
<tr>
<td>Dick v. New York Life Ins. Co.</td>
<td>752, 763</td>
</tr>
<tr>
<td>Dickerson v. United States</td>
<td>683</td>
</tr>
<tr>
<td>Dillon v. Gloss</td>
<td>17, 22</td>
</tr>
<tr>
<td>Dimpfel v. Wilson</td>
<td>583</td>
</tr>
<tr>
<td>District of Columbia v. Clawans</td>
<td>677</td>
</tr>
<tr>
<td>District 65, Retail Store Union (Eastern Camera &amp; Photo Corp.)</td>
<td>251</td>
</tr>
<tr>
<td>Dix</td>
<td>570</td>
</tr>
<tr>
<td>Dixie Bell Mills, Inc.</td>
<td>434</td>
</tr>
<tr>
<td>Doby v. Carroll</td>
<td>580</td>
</tr>
<tr>
<td>Donnell v. Howell</td>
<td>574, 592, 595, 601-02, 608</td>
</tr>
<tr>
<td>Donnelly v. United Fruit Co.</td>
<td>301-02, 307, 313</td>
</tr>
<tr>
<td>Donovan v. Travers</td>
<td>297</td>
</tr>
<tr>
<td>Doornbos v. Doornbos</td>
<td>634, 636-37</td>
</tr>
<tr>
<td>Douds v. Metropolitan Fed'n of Architects</td>
<td>407, 408</td>
</tr>
<tr>
<td>Douglas v. California</td>
<td>678, 684, 751</td>
</tr>
<tr>
<td>Dow Drug Co. v. Nieman</td>
<td>203</td>
</tr>
<tr>
<td>Dowd v. Cook</td>
<td>727</td>
</tr>
<tr>
<td>Draeger Shipping Co. v. Crowley</td>
<td>777</td>
</tr>
<tr>
<td>Drake v. Celebreze</td>
<td>79, 81</td>
</tr>
<tr>
<td>Drake Bakersies, Inc. v. Local 50, American Bakery &amp; Confectionary Workers</td>
<td>266</td>
</tr>
<tr>
<td>Draper v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Dred Scott v. Sanford</td>
<td>209, 215</td>
</tr>
<tr>
<td>Drinkwater v. Drinkwater</td>
<td>593</td>
</tr>
<tr>
<td>Drivers Local 639 (Curtis Bros.)</td>
<td>249</td>
</tr>
<tr>
<td>Duncan v. United States</td>
<td>682, 683</td>
</tr>
<tr>
<td>Dunn v. Brown</td>
<td>130</td>
</tr>
<tr>
<td>Dunshirn v. Austria</td>
<td>804, 823</td>
</tr>
<tr>
<td>Durfee v. Duke</td>
<td>588</td>
</tr>
<tr>
<td>Dye v. Johnson</td>
<td>728</td>
</tr>
<tr>
<td>Dykes v. United States</td>
<td>683</td>
</tr>
<tr>
<td>E H. Koester Bakery Co.</td>
<td>529</td>
</tr>
<tr>
<td>Eastern Shore Microwave Relay Co., In re</td>
<td>147</td>
</tr>
<tr>
<td>Edelstein v. Duluth, M. &amp; I. Ry.</td>
<td>275, 292</td>
</tr>
<tr>
<td>Edmonds v. Edmonds</td>
<td>853</td>
</tr>
<tr>
<td>Edmonston v. Sisk</td>
<td>133, 134</td>
</tr>
<tr>
<td>Edward B. Marks Music Corp. v. Continental Record Co.</td>
<td>159</td>
</tr>
<tr>
<td>Edwards v. Travelers Ins. Co.</td>
<td>74</td>
</tr>
<tr>
<td>Eisner v. Macomber</td>
<td>865</td>
</tr>
<tr>
<td>Electric Bond &amp; Share Co. v. SEC</td>
<td>3</td>
</tr>
<tr>
<td>Electrical Workers Union (Northwest Constr., Inc.)</td>
<td>401</td>
</tr>
<tr>
<td>Elgin Nat'l Watch Co. v. Illinois Watch Case Co.</td>
<td>161</td>
</tr>
<tr>
<td>Elizabeth Arden, Inc.</td>
<td>198-99</td>
</tr>
<tr>
<td>Employing Lithographers v. NLRB</td>
<td>403, 411, 415</td>
</tr>
<tr>
<td>Endicott Johnson Corp. v. Perkins</td>
<td>663</td>
</tr>
<tr>
<td>Enterprise Ass'n of Steam Pipefitters (All-Boro Air Conditioning Corp.)</td>
<td>321, 325, 327</td>
</tr>
<tr>
<td>Eppinger &amp; Russell Co.</td>
<td>269</td>
</tr>
<tr>
<td>Epstein v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Escobedo v. Illinois</td>
<td>632, 686, 847-48, 852</td>
</tr>
<tr>
<td>Eskridge v. Washington State Bd.</td>
<td>5</td>
</tr>
<tr>
<td>Estate of Caire (France v. Mexico)</td>
<td>560</td>
</tr>
<tr>
<td>Estate of Dubois</td>
<td>670</td>
</tr>
<tr>
<td>Estate of Foster</td>
<td>776</td>
</tr>
<tr>
<td>Estate of George B. Leonard Holding Corp.</td>
<td>866</td>
</tr>
<tr>
<td>Estate of Kerby</td>
<td>507</td>
</tr>
<tr>
<td>Estate of Leo Melnick</td>
<td>654</td>
</tr>
<tr>
<td>Estate of Trickett</td>
<td>507</td>
</tr>
<tr>
<td>Estes v. Timmons</td>
<td>580</td>
</tr>
<tr>
<td>Estin v. Estin</td>
<td>587</td>
</tr>
<tr>
<td>Etcheverry v. United States</td>
<td>620</td>
</tr>
<tr>
<td>Evatt v. Miller</td>
<td>583</td>
</tr>
<tr>
<td>Ex parte Hull</td>
<td>727</td>
</tr>
<tr>
<td>Ex parte Kay</td>
<td>576</td>
</tr>
<tr>
<td>Ex parte Peru</td>
<td>861</td>
</tr>
<tr>
<td>Ex parte Piazzola</td>
<td>184</td>
</tr>
<tr>
<td>Ex parte Quinín</td>
<td>748</td>
</tr>
<tr>
<td>Ex parte Robinson</td>
<td>659</td>
</tr>
<tr>
<td>Ex parte Virginia</td>
<td>707, 712</td>
</tr>
<tr>
<td>Ex parte Weissinger</td>
<td>581</td>
</tr>
<tr>
<td>Ex parte Yarbrough</td>
<td>707</td>
</tr>
<tr>
<td>F</td>
<td></td>
</tr>
<tr>
<td>F. H. McGraw &amp; Co. v. United States</td>
<td>647</td>
</tr>
<tr>
<td>Fabiani (France v. Venezuela)</td>
<td>569</td>
</tr>
</tbody>
</table>
**TABLE OF CASES**

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairclough v. St. Amand</td>
<td>577, 579, 585, 604</td>
</tr>
<tr>
<td>Falcon (Mexico v. United States)</td>
<td>563</td>
</tr>
<tr>
<td>Farley v. Celebrezze</td>
<td>82</td>
</tr>
<tr>
<td>Farmers Union v. WDAY</td>
<td>168</td>
</tr>
<tr>
<td>Farowitz v. Associated Musicians Union</td>
<td>349-50, 354, 364</td>
</tr>
<tr>
<td>FCC v. Sanders Bros. Radio Station</td>
<td>150, 168</td>
</tr>
<tr>
<td>Felhaber Corp. v. United States</td>
<td>191, 132</td>
</tr>
<tr>
<td>Fennell v. Bache</td>
<td>62, 77</td>
</tr>
<tr>
<td>Ferricks v. Flemming</td>
<td>50</td>
</tr>
<tr>
<td>Fibreboard Paper Prods. Corp.</td>
<td>287, 369-71, 383</td>
</tr>
<tr>
<td>Field v. Field</td>
<td>594</td>
</tr>
<tr>
<td>Fikes v. Alabama</td>
<td>827</td>
</tr>
<tr>
<td>Fisher v. DeMarr</td>
<td>605</td>
</tr>
<tr>
<td>Fiske v. Fiske</td>
<td>509</td>
</tr>
<tr>
<td>Fiswick v. United States</td>
<td>697</td>
</tr>
<tr>
<td>Flaherty v. United Steamworkers</td>
<td>356</td>
</tr>
<tr>
<td>Fleischer's Estate, In re</td>
<td>573</td>
</tr>
<tr>
<td>Flemming v. Booker</td>
<td>85</td>
</tr>
<tr>
<td>Florida Coca-Cola Bottling Co. v. Jordan</td>
<td>202</td>
</tr>
<tr>
<td>Foley v. Liggett &amp; Myers Tobacco Co.</td>
<td>203-04</td>
</tr>
<tr>
<td>Fong Sik Leung v. Dulles</td>
<td>641</td>
</tr>
<tr>
<td>Food Fair Stores, Inc. v. Macurda</td>
<td>202</td>
</tr>
<tr>
<td>Ford v. Ford</td>
<td>589</td>
</tr>
<tr>
<td>Ford Motor Co. v. Huffman</td>
<td>265, 277, 281, 282, 294, 357</td>
</tr>
<tr>
<td>Fort Stevens Pharmacy, Inc. v. Hollywood Credit Co.</td>
<td>126</td>
</tr>
<tr>
<td>Franks v. City of Okemah</td>
<td>126</td>
</tr>
<tr>
<td>Franks Bros. v. NLRB</td>
<td>530</td>
</tr>
<tr>
<td>Fred Meyer, Inc.</td>
<td>195-200</td>
</tr>
<tr>
<td>Friedlander v. Friedlander</td>
<td>596</td>
</tr>
<tr>
<td>Frohwerk v. United States</td>
<td>715</td>
</tr>
<tr>
<td>Frontier Broadcasting Co., In re</td>
<td>154</td>
</tr>
<tr>
<td>Frontier Broadcasting Co. v. Lamarie Community TV Co.</td>
<td>141</td>
</tr>
<tr>
<td>Fruit &amp; Vegetable Packers (Tree Fruits Labor Relations Comm., Inc.)</td>
<td>398</td>
</tr>
<tr>
<td>Fruit &amp; Vegetable Packers v. NLRB</td>
<td>398-99, 402, 405, 536, 540</td>
</tr>
</tbody>
</table>

**G**

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>G. Ricordi &amp; Co. v. Haendler</td>
<td>165</td>
</tr>
<tr>
<td>Gaidos v. Gaidos</td>
<td>854</td>
</tr>
<tr>
<td>Gallegos v. Colorado</td>
<td>827</td>
</tr>
<tr>
<td>Gallegos v. Nebraska</td>
<td>630</td>
</tr>
<tr>
<td>Gardine v. Estate of Cottey</td>
<td>507</td>
</tr>
<tr>
<td>Garner v. Teamsters Union</td>
<td>168</td>
</tr>
<tr>
<td>Garvin v. Commercial Trust Co.</td>
<td>779</td>
</tr>
<tr>
<td>Gee v. Gee</td>
<td>575</td>
</tr>
<tr>
<td>General Bancshares Corps v. Commissioner</td>
<td>863-867</td>
</tr>
<tr>
<td>General Cable Corp.</td>
<td>250</td>
</tr>
<tr>
<td>General Drivers Union v. Riss &amp; Co.</td>
<td>279</td>
</tr>
<tr>
<td>General Dynamics Corp.</td>
<td>429</td>
</tr>
<tr>
<td>General Elec. Co.</td>
<td>373-76, 389-90</td>
</tr>
<tr>
<td>General Paint Corp.</td>
<td>229</td>
</tr>
<tr>
<td>General Radio Co. v. Superior Elec. Co.</td>
<td>748</td>
</tr>
<tr>
<td>General Shoe Corp. v. Rosen</td>
<td>166</td>
</tr>
<tr>
<td>General Teamsters Union (Snowwhite Baking Co.)</td>
<td>322</td>
</tr>
<tr>
<td>George v. United States</td>
<td>620</td>
</tr>
<tr>
<td>George Fuller Co. v. United States</td>
<td>647</td>
</tr>
<tr>
<td>Geren &amp; Hamond v. Lawson</td>
<td>120</td>
</tr>
<tr>
<td>Gherardi De Parata v. Gherardi De Parata</td>
<td>574, 599-602, 608, 609</td>
</tr>
<tr>
<td>Gibbons v. Mahon</td>
<td>865</td>
</tr>
<tr>
<td>Giboney v. Empire Storage &amp; Ice Co.</td>
<td>255</td>
</tr>
<tr>
<td>Gideon v. Wainwright</td>
<td>745, 750, 751, 844, 852</td>
</tr>
<tr>
<td>Gilchrist v. Collector of Charlestow</td>
<td>209</td>
</tr>
<tr>
<td>Giordanello v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Glazers Local 1778, Bhd. of Painters (Manhattan Constr. Co.)</td>
<td>327</td>
</tr>
<tr>
<td>Globe Republic Ins. Co. v. Davis</td>
<td>127</td>
</tr>
<tr>
<td>Go-Bart Importing Co. v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Golden v. Golden</td>
<td>592</td>
</tr>
<tr>
<td>Goldsmith v. United States</td>
<td>680, 681</td>
</tr>
<tr>
<td>Gomillion v. Lightfoot</td>
<td>32, 33</td>
</tr>
<tr>
<td>Gompers v. Buck Stove &amp; Range Co.</td>
<td>661</td>
</tr>
<tr>
<td>Goodall v. Frank R. Jelleff, Inc.</td>
<td>124</td>
</tr>
<tr>
<td>Gooding v. Willard</td>
<td>62</td>
</tr>
<tr>
<td>Gordon v. Garrison</td>
<td>728</td>
</tr>
<tr>
<td>Gould v. Gould</td>
<td>573</td>
</tr>
<tr>
<td>Gowdy v. United States</td>
<td>709</td>
</tr>
<tr>
<td>Graef v. Kennedy</td>
<td>776</td>
</tr>
<tr>
<td>Graham v. Littleton</td>
<td>127</td>
</tr>
<tr>
<td>Graham v. Retail Clerks Int'l Ass'n</td>
<td>245</td>
</tr>
<tr>
<td>Graham v. Ribicoff</td>
<td>83, 84</td>
</tr>
<tr>
<td>Grand Union Co.</td>
<td>196</td>
</tr>
<tr>
<td>Granger v. Granger</td>
<td>510</td>
</tr>
<tr>
<td>Great Western Broadcasting Corp. v. NLRB</td>
<td>401, 402</td>
</tr>
<tr>
<td>Greece v. Great Britain</td>
<td>804</td>
</tr>
<tr>
<td>Green v. American Tobacco Co. 200-06,</td>
<td>204</td>
</tr>
<tr>
<td>Green v. Obergell</td>
<td>326</td>
</tr>
<tr>
<td>Green v. United States</td>
<td>658, 661</td>
</tr>
<tr>
<td>Greenspan v. Slate</td>
<td>499</td>
</tr>
<tr>
<td>Greenwell v. United States</td>
<td>677</td>
</tr>
<tr>
<td>Gregory v. Helvering</td>
<td>653</td>
</tr>
<tr>
<td>Griffen v. Griffen</td>
<td>588</td>
</tr>
<tr>
<td>Griffen v. Illinois</td>
<td>5, 745</td>
</tr>
<tr>
<td>Griffen v. Ribicoff</td>
<td>58</td>
</tr>
<tr>
<td>Grinstead v. Flemming</td>
<td>70</td>
</tr>
<tr>
<td>Groban, In re</td>
<td>831, 851</td>
</tr>
<tr>
<td>Grubb v. Public Util. Comm'n</td>
<td>589</td>
</tr>
<tr>
<td>Guerieri v. Guerieri</td>
<td>574, 597-99, 608</td>
</tr>
<tr>
<td>Guerin Bros.</td>
<td>648</td>
</tr>
</tbody>
</table>
A. Jones Constr. Co.) 321, 325, 337, 529
International Ass'n of Machinists v. Central Airlines, Inc. 268, 269
International Bhd. of Elec. Workers (Bendix Corp.) 321
International Bhd. of Elec. Workers (Golden Dawn Foods) 401
International Bhd. of Elec. Workers (Plauche Elec., Inc.) 403-05, 409
International Bhd. of Elec. Workers v. NLRB 535
International Bhd. of Teamsters (Alexander Warehouse & Sales Co.) 414, 415, 417, 418
International Bhd. of Teamsters (Al- ling & Cory Co.) 249
International Bhd. of Teamsters v. Hanke 233, 255
International Bhd. of Teamsters v. Vogt, Inc. 255
International Bldg. Co. v. United States 866
International Die Sinkers Conference (General Metals Corp.) 407, 408, 409
International Hod Carriers Union (C. A. Blinne Constr. Co.) 221, 222, 230, 251, 253, 256, 258
International Hod Carriers Union (Calumet Contractors Ass'n) 227-29, 257-58
International Ladies' Garment Work- ers (Saturn & Sedran, Inc.) 254
International Ladies' Garment Work- ers v. NLRB 230
International Longshoremen's Ass'n (Abraham Kaplan) 326
International Longshoremen's Union (Juneau Spruce Corp.) 314, 319, 321
International Longshoremen's Union v. Juneau Spruce Corp. 287
International News Serv. v. Associated Press 161-66, 168
International Union of Operating Eng'rs (E. C. Ernst, Inc.) 318, 321
International Union of Operating Eng'rs (Frank P. Badolato & Son) 321, 326, 328, 330, 331, 332
International Union of Operating Eng'rs (George E. Miller Elec. Co.) 327, 332
International Union, UAW v. Russell 286
International Woodworkers v. NLRB 387
Irvine v. California 708
Isserman v. Isserman 594, 598
Ives v. People 629

J
J. A. McNeill Co. 648
J. A. Ross Co. v. United States 647
J. G. Roy & Sons Co. v. NLRB 413
J. I. Case Co. v. NLRB 262, 264, 265, 269
Jackson v. Harward 156, 168
Jackson v. Irving Trust Co. 588
Jackson v. Martin Co. 340, 355
Jackson v. United States 680, 681
Jackson v. Zurbrick 184
Jacobson v. Coon 120
James v. Helchm 507
James E. Colliflower & Co. v. Mccal- lum-Sauber Co. 121, 130
Jamieson v. Jamieson 594
Jarvis v. Ribicoff 75, 81
Jennings v. Jennings .298, 575, 577, 612
John A. Johnson & Sons, Inc. 648-49
Johnson v. Fleming 60, 63
Johnston v. Local 58, Int'l Bhd. of Elec. Workers 346
Johnson v. Johnson 576
Johnson v. Matthews 728
Johnson v. Muelberger 590, 600, 605-06, 609-10
Johnson v. San Diego Waiters Union 341
Johnson v. United States 213
Johnson v. Zerbst 677
Joki v. Fleming 59, 77, 79
Jones v. International Union of Operating Eng'rs 300, 301
Jones v. United States 645, 681, 687, 826, 834
Joski v. Short 120, 131
Joy Silk Mills, Inc. 248
Julian v. Folsom 58, 67, 77
Juneau Spruce Corp. v. International Longshoremen's Union 136

K
Kalamazoo Paper Box Corp. 424, 529
Kates' Estate 509
Kay Windsor Frocks, Inc. 199
Kehm Corp. v. United States 645, 647
Keller v. Keller 594
Keller v. Potomac Elec. Power Co. 665
Kelly v. Streho 341
Kemp v. United States 684
Kempe v. United States 696
Kenneecott Copper Corp. 424
Kentucky Skilled Craft Guild Gen- eral Elec. Co.) 322
Kephart v. Kephart 854, 855, 856
Ker v. California 751
Kerner v. Fleming 59, 71, 77-80, 82-85
Kerr v. Enoch Pratt Free Library 626
Kessler v. Faulquier Nat'l Bank 592
<table>
<thead>
<tr>
<th>Table of Cases</th>
<th>All References Are to Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kilgallen's Estate, In re</td>
<td>506</td>
</tr>
<tr>
<td>Killough v. United States</td>
<td>680, 681, 833, 836</td>
</tr>
<tr>
<td>King v. Fleming</td>
<td>80, 83</td>
</tr>
<tr>
<td>King v. Grand Lodge Machinists</td>
<td>357, 365</td>
</tr>
<tr>
<td>Klimaszewski v. Fleming</td>
<td>76-77</td>
</tr>
<tr>
<td>Kline v. Inland Rubber Corp.</td>
<td>594</td>
</tr>
<tr>
<td>Knight v. Garden</td>
<td>578</td>
</tr>
<tr>
<td>Knox v. Knox</td>
<td>594</td>
</tr>
<tr>
<td>Koehler v. United States</td>
<td>725, 727</td>
</tr>
<tr>
<td>Kohrs v. Fleming</td>
<td>72-73, 76</td>
</tr>
<tr>
<td>Konigsberg v. State Bar</td>
<td>5</td>
</tr>
<tr>
<td>Kovacs v. Brewer</td>
<td>586</td>
</tr>
<tr>
<td>Kraft Constr. Co.</td>
<td>648</td>
</tr>
<tr>
<td>Kramer v. United States</td>
<td>692</td>
</tr>
<tr>
<td>Krause v. Krause</td>
<td>506</td>
</tr>
<tr>
<td>Krinsky v. Mindick</td>
<td>509</td>
</tr>
<tr>
<td>Krug v. Int. Tel. &amp; Tel. Corp.</td>
<td>197</td>
</tr>
<tr>
<td>Liggett &amp; Myers Tobacco Co. v. Cannon</td>
<td>204</td>
</tr>
<tr>
<td>Liggett &amp; Myers Tobacco Co. v. De Lape</td>
<td>203</td>
</tr>
<tr>
<td>Lightcap v. Celebrezze</td>
<td>73</td>
</tr>
<tr>
<td>Limericks, Inc. v. Commissioner</td>
<td>656</td>
</tr>
<tr>
<td>Link v. Wabash R.R.</td>
<td>126</td>
</tr>
<tr>
<td>Lisena v. California</td>
<td>629, 630</td>
</tr>
<tr>
<td>Lithographers &amp; Printers Ass'n</td>
<td>403</td>
</tr>
<tr>
<td>Lithographers Ass'n</td>
<td>403</td>
</tr>
<tr>
<td>Little v. Celebrezze</td>
<td>67, 81</td>
</tr>
<tr>
<td>Litton Indus., Inc.</td>
<td>424</td>
</tr>
<tr>
<td>Local 3, Int'l Bhd. of Elec. Workers (Jack Picoulit)</td>
<td>231, 232, 254</td>
</tr>
<tr>
<td>Local 3, Int'l Bhd. of Elec. Workers (Western Elec. Co.)</td>
<td>323</td>
</tr>
<tr>
<td>Local 5, United Ass'n of Journeymen &amp; Apprentices of the Plumbing Indus. (Arthur Venneri Co.)</td>
<td>335, 336, 337</td>
</tr>
<tr>
<td>Local 5, United Ass'n of Journeymen &amp; Apprentices of the Plumbing Indus. v. NLRB</td>
<td>335, 336</td>
</tr>
<tr>
<td>Local 9, Int'l Bhd. of Elec. Workers (G. A. Rafel &amp; Co.)</td>
<td>318</td>
</tr>
<tr>
<td>Local 9, Wood, Wire &amp; Metal Lathers Union (A. W. Lee, Inc.)</td>
<td>326, 329, 332</td>
</tr>
<tr>
<td>Local 11, United Bhd. of Carpenters (Berti Co.)</td>
<td>326, 329</td>
</tr>
<tr>
<td>Local 16, American Fed'n of Grain Millers (Bartlett &amp; Co.)</td>
<td>255</td>
</tr>
<tr>
<td>Local 24, Int'l Bhd. of Teamsters v. Oliver</td>
<td>268</td>
</tr>
<tr>
<td>Local 24, Teamsters Union v. Oliver</td>
<td>382</td>
</tr>
<tr>
<td>Local 45, Int'l Ass'n of Bridge Workers (Kaiser-Nelson Steel &amp; Salvage Corp.)</td>
<td>323</td>
</tr>
<tr>
<td>Local 46, Wood, Wire &amp; Metal Lathers Union (Precrete, Inc.)</td>
<td>321, 322, 327</td>
</tr>
<tr>
<td>Local 48, Sheet Metal Workers Ass'n (Acoust Eng'r, Inc.)</td>
<td>335</td>
</tr>
<tr>
<td>Local 64, United Bhd. of Carpenters v. NLRB</td>
<td>535</td>
</tr>
<tr>
<td>Local 67, Int'l Bhd. of Teamsters (Washington Coca Cola Bottling Works, Inc.)</td>
<td>504</td>
</tr>
<tr>
<td>Local 68, Wood, Wire &amp; Metal Lathers Union (Acoustics &amp; Specialties, Inc.)</td>
<td>322, 323, 325, 334, 338</td>
</tr>
<tr>
<td>Local 78, Retail Clerks Ass'n v. Lion Dry Goods, Inc.</td>
<td>287</td>
</tr>
<tr>
<td>Local 100, United Ass'n of Journeymen &amp; Apprentices v. Borden</td>
<td>281</td>
</tr>
<tr>
<td>Local 107, Int'l Hod Carriers Union (Texarkana Constr. Co.)</td>
<td>258</td>
</tr>
<tr>
<td>Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.</td>
<td>288, 289</td>
</tr>
</tbody>
</table>

XXIII
### TABLE OF CASES

**ALL REFERENCES ARE TO PAGE NUMBERS**

| Local 130, Bhd. of Painters (Joiner, Inc.) | 259 |
| Local 149, UAW v. American Brake Shoe Co. | 288 |
| Local 154, Int'l Typographical Union (Ypsilanti Press, Inc.) | 254, 401 |
| Local 164, Bhd. of Painters (A. D. Cheatham Painting Co.) | 384 |
| Local 169, United Bhd. of Carpenters (W. H. condo) | 335 |
| Local 173, Wood, Wire & Metal Lathers' Union (Newark & Essex Plastering Co.) | 315, 323, 324 |
| Local 174, Teamsters Union v. Lucas Flour Co. | 279, 287, 290, 296 |
| Local 212, Retail Clerks Ass'n (Maxam, Inc.) | 254 |
| Local 239, Int'l Bhd. of Teamsters (Stan-Jay Auto Parts & Accessories Corp.) | 231, 251, 252, 255 |
| Local 252, Wood, Wire & Metal Lathers' Union (James J. Barnes Constr. Co.) | 335, 337 |
| Local 259, Int'l Union, UAW (Fanelli Ford Sales, Inc.) | 227, 257 |
| Local 282, Int'l Bhd. of Teamsters (Acme Concrete & Supply Corp.) | 415 |
| Local 344, Retail Clerks Ass'n (Alton Myers Bros.) | 258 |
| Local 389, Int'l Bhd. of Elec. Workers (Sam Melson) | 255 |
| Local 450, Int'l Union of Operating Eng'rs v. Elliott | 333 |
| Local 499, Int'l Bhd. of Elec. Workers (Iowa Power & Light Co.) | 322, 327 |
| Local 502, Int'l Haul Carriers Union (Ernest Fortunato) | 336 |
| Local 505, Int'l Bhd. of Teamsters (Carolina Lumber Co.) | 395, 396 |
| Local 562, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. (General Refrigeration Serv. Co.) | 318, 334 |
| Local 562, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. (Northwest Heating Co.) | 335 |
| Local 595, Int'l Ass'n of Iron Workers (Betchtel Corp.) | 319 |
| Local 636, United Ass'n of Journeymen & Apprentices of the Plumbing Indus. v. NLRB | 343-44 |
| Local 662, Int'l Bhd. of Elec. Workers (Middle South Broadcasting Co.) | 401 |
| Local 675, Int'l Union of Operating Eng'rs (Port Everglades Terminal Co.) | 315, 326 |
| Local 708, Int'l Ass'n of Iron-workers (Armco Drainage & Metal Prods. Co.) | 329 |
| Local 741, United Ass'n Of Journeymen & Apprentices of the Plumbing Indus. (Keith Rigg's Plumbing & Heating Contractor) | 258 |
| Local 761, Int'l Union of Elec. Workers v. NLRB | 535 |
| Local 825, Int'l Union of Operating Eng'rs (Nichols Elec. Co.) | 322, 323, 326 |
| Local 825, Int'l Union of Operating Eng'rs (Schwerman Co.) | 322, 326, 328 |
| Local 853, Int'l Union Of Operating Eng'rs (Schiafone & Sons, Inc.) | 323 |
| Local 964, United Bhd. of Carpenters (Carleton Bros.) | 321, 326, 327, 329 |
| Local 991, Int'l Longshoremen's Ass'n (Union Carbide Chem. Co.) | 322 |
| Local 1199, Drug Employees Union (Janel Sales Corp.) | 253, 259 |
| Local 1912, Int'l Ass'n of Machinists v. United States Potash Co. | 287 |
| Local 5895, United Steelworkers (Carrier Corp.) | 396, 536 |
| Local Joint Executive Bd. of Hotel Employees (Crown Cafeteria) | 230, 253-55 |
| Local Trademarks v. Rogers | 157 |
| Locher v. New York | 213 |
| Lockwood v. Lockwood | 856 |
| Lodge 68, Int'l Ass'n of Machinists (Moore Dry Dock Co.) | 314, 319 |
| Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp. | 290 |
| Lombard v. Louisiana | 626 |
| Long Beach Naval Shipyard | 423, 428, 430, 431, 435, 453 |
| Longshoremen's Union (Albin Stevenson Co.) | 322 |
| Longshoremen's Union (American Mail Line, Ltd.) | 322 |
| Lorillard v. Lorillard | 575, 584 |
| Lorings v. Marsh | 507 |
| Los Angeles Bldg. & Constr. Trades Council (Westinghouse Elec. Corp.) | 315 |
| Lumley v. Gye | 163 |
| Luther v. Borden | 27-31, 215 |
| Lynch v. Johnson | 120 |
| Lynch v. United States | 709, 725, 726, 734 |
| Lynham v. Hufty | 855 |
| Lynn v. Lynn | 596 |
| Lyon v. Singer | 775 |
| Mabson v. Mabson | 592 |
| Macintosh v. United States | 618 |
| Mack v. State | 629 |

**XXIV**
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL REFERENCES ARE TO PAGE NUMBERS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madden v. Steel Fabricators</td>
<td>410-11</td>
</tr>
<tr>
<td>Madden v. Warehouse Employees</td>
<td>241</td>
</tr>
<tr>
<td>Magner v. Hobby</td>
<td>572</td>
</tr>
<tr>
<td>Magnolia Petroleum Co. v. Hunt</td>
<td>586</td>
</tr>
<tr>
<td>Mallory v. United States</td>
<td>630, 676, 677, 680, 685-86, 697, 833</td>
</tr>
<tr>
<td>Mamula v. United Steel Workers</td>
<td>341</td>
</tr>
<tr>
<td>Mann Chem. Labs., Inc. v. United States</td>
<td>191, 193</td>
</tr>
<tr>
<td>Manning v. Miller Music Corp.</td>
<td>157</td>
</tr>
<tr>
<td>Mansfield v. Hill</td>
<td>506</td>
</tr>
<tr>
<td>Manufacturers Trust Co. v. Kennedy</td>
<td>775</td>
</tr>
<tr>
<td>Marbury v. Madison</td>
<td>37</td>
</tr>
<tr>
<td>Mar-Jac Poultry Co.</td>
<td>251</td>
</tr>
<tr>
<td>Marron v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Martin v. Hunter's Lessee</td>
<td>17</td>
</tr>
<tr>
<td>Martin v. Martin</td>
<td>612</td>
</tr>
<tr>
<td>Martin v. Ribicoff</td>
<td>62, 73-75</td>
</tr>
<tr>
<td>Martin's Estate, In re</td>
<td>507</td>
</tr>
<tr>
<td>Massiah v. United States</td>
<td>843, 844, 845, 846, 852</td>
</tr>
<tr>
<td>Mastro Plastics Corp. v. NLRB</td>
<td>287</td>
</tr>
<tr>
<td>Mattox v. United States</td>
<td>677</td>
</tr>
<tr>
<td>May Dep't Stores Co. v. NLRB</td>
<td>262</td>
</tr>
<tr>
<td>McCann v. New York Stock Exch.</td>
<td>661</td>
</tr>
<tr>
<td>McCarthy v. Industrial Comm'n</td>
<td>66</td>
</tr>
<tr>
<td>McCleary v. State</td>
<td>630</td>
</tr>
<tr>
<td>McCraw v. United Ass'n of Journeymen &amp; Apprentices of the Plumbing Indus.</td>
<td>354</td>
</tr>
<tr>
<td>McCulloch v. Maryland</td>
<td>17, 108, 209</td>
</tr>
<tr>
<td>McDonald v. State</td>
<td>717</td>
</tr>
<tr>
<td>McGrath v. Chase Nat'l Bank</td>
<td>773</td>
</tr>
<tr>
<td>McGrath v. Manufacturer's Trust Co.</td>
<td>779</td>
</tr>
<tr>
<td>McGrew v. Hobby</td>
<td>60</td>
</tr>
<tr>
<td>McLenond v. United States</td>
<td>697</td>
</tr>
<tr>
<td>McLeod v. Cooper</td>
<td>120</td>
</tr>
<tr>
<td>McLeod v. Newspaper &amp; Mail Deliverers' Union</td>
<td>333</td>
</tr>
<tr>
<td>McMahon v. McMahon</td>
<td>572</td>
</tr>
<tr>
<td>McNabb v. United States</td>
<td>630, 833</td>
</tr>
<tr>
<td>McNutt's Estate, In re</td>
<td>572</td>
</tr>
<tr>
<td>Meat Inspection Div., Dep't of Agriculture</td>
<td>434, 437</td>
</tr>
<tr>
<td>Meat &amp; Provision Drivers Union (Lewis Food Co.)</td>
<td>226, 258</td>
</tr>
<tr>
<td>Medo Photo Supply Corp. v. NLRB</td>
<td>272</td>
</tr>
<tr>
<td>Meeks v. United States</td>
<td>697</td>
</tr>
<tr>
<td>Meramac Mining Co.</td>
<td>424</td>
</tr>
<tr>
<td>Mesa Microwave, Inc., In re</td>
<td>148-149, 150, 152-53</td>
</tr>
<tr>
<td>Metropolitan Dist. Council of the United Bd. of Carpenters (McCloskey &amp; Co.)</td>
<td>397, 384</td>
</tr>
<tr>
<td>Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.</td>
<td>152, 166</td>
</tr>
<tr>
<td>Miami Newspaper Printing Pressmen (Knight Newspapers, Inc.)</td>
<td>416-17, 418</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michelson v. United States</td>
<td>697, 699</td>
</tr>
<tr>
<td>Middlebrooks, Application of</td>
<td>717</td>
</tr>
<tr>
<td>Midwest Piping &amp; Supply Co.</td>
<td>429</td>
</tr>
<tr>
<td>Milk Drivers &amp; Dairy Employees (Lohman Sales Co.)</td>
<td>400-01</td>
</tr>
<tr>
<td>Milk Drivers &amp; Dairy Employees (Minnesota Milk Co.)</td>
<td>402</td>
</tr>
<tr>
<td>Milk Wagon Drivers Union v. Meadow-moor Dairies, Inc.</td>
<td>232</td>
</tr>
<tr>
<td>Miller v. Miller</td>
<td>506</td>
</tr>
<tr>
<td>Miller v. Thompson</td>
<td>578</td>
</tr>
<tr>
<td>Mills Estate, Inc. v. Commissioner</td>
<td>867</td>
</tr>
<tr>
<td>Millwrights &amp; Mach. Erectors (Port Huron Sulphite &amp; Paper Co.)</td>
<td>334</td>
</tr>
<tr>
<td>Millwrights Local 1102, United Bhd. of Carpenters (Don Cartage Co.)</td>
<td>329</td>
</tr>
<tr>
<td>Minneapolis House Furnishing Co.</td>
<td>399</td>
</tr>
<tr>
<td>Minor v. Hapseries</td>
<td>215</td>
</tr>
<tr>
<td>Miranda Fuel Co.</td>
<td>281-84</td>
</tr>
<tr>
<td>Missouri-Kansas Pipe Line Co. v. Commissioner</td>
<td>866</td>
</tr>
<tr>
<td>Mitchell v. American Tobacco Co.</td>
<td>204</td>
</tr>
<tr>
<td>Mitchell v. United States</td>
<td>833, 834</td>
</tr>
<tr>
<td>Mitrovich v. United States</td>
<td>679</td>
</tr>
<tr>
<td>Modern Home Heating Co. v. Diehl</td>
<td>127</td>
</tr>
<tr>
<td>Montgomery Ward &amp; Co.</td>
<td>250</td>
</tr>
<tr>
<td>Monticello Tobacco Co. v. American Tobacco Co.</td>
<td>130</td>
</tr>
<tr>
<td>Moore v. Illinois Cent. R.R.</td>
<td>278</td>
</tr>
<tr>
<td>Morand Bros. Beverage Co.</td>
<td>434</td>
</tr>
<tr>
<td>Morrissey v. Morrissey</td>
<td>594</td>
</tr>
<tr>
<td>Moschetta v. Cross</td>
<td>355</td>
</tr>
<tr>
<td>Mosey Cafe, Inc. v. Licensing Bd.</td>
<td>168</td>
</tr>
<tr>
<td>Motes v. Williams</td>
<td>707</td>
</tr>
<tr>
<td>Motor Improvements, Inc. v. A. C. Spark Plug Co.</td>
<td>166</td>
</tr>
<tr>
<td>Motorresearch Co.</td>
<td>383</td>
</tr>
<tr>
<td>Mountain States Tel. and Tel. Co., In re</td>
<td>144</td>
</tr>
<tr>
<td>Moynahan v. Pari-Mutuel Employees Guild</td>
<td>343</td>
</tr>
<tr>
<td>Mulford v. Smith</td>
<td>3</td>
</tr>
<tr>
<td>Mussey v. Mussey</td>
<td>576, 585, 604</td>
</tr>
<tr>
<td>Mutual Benefit Life Ins. Co. v. Flynn</td>
<td>125</td>
</tr>
<tr>
<td>Mutual Broadcasting Sys., Inc. v. Muzak Corp.</td>
<td>162, 165</td>
</tr>
</tbody>
</table>

<p>| N | |
| Nance v. United States | 681 |
| Nappe v. Nappe | 593, 598 |
| Nardone v. United States | 677 |
| National City Bank v. Republic of China | 862 |
| National Exhibition Co. v. Teleflash, Inc. | 162 |
| National Park Bank v. Concordia Land &amp; Timber Co. | 130 |
| National Prohibition Cases | 22 |</p>
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL REFERENCES ARE TO PAGE NUMBERS</td>
</tr>
</tbody>
</table>

- National Shawmut Bank v. Cumming: 504
- National Sugar Ref. Co.: 532
- National Tube Co.: 425
- National Union of Marine Cooks (Irwin-Lyons Lumber Co.) 315, 412, 418
- Naulilaa (Portugal v. Gempmy): 563, 565, 570
- Naval Ammunition Depot, St. Ju-liens Creek, Portsmouth, Va.: 431
- Naval Eng'r Experiment Station 437, 438
- Nelson v. Brotherhood of Painters 346, 355
- Nelson v. Johnson: 364
- Nevin v. Nevin: 594
- Newman v. Dore: 505
- Newman v. Smith: 507
- New York Handkerchief Co. v. NLRB: 443
- New York Mailers' Union (New York Times Co.): 323
- Nielsen v. Denmark: 803
- Nitschke v. Nitschke: 607
- NLRB v. A. J. Tower Co.: 531, 539
- NLRB v. Adams Dairy, Inc.: 369
- NLRB v. Amalgamated Lithographers (Ind.) (Local 17): 415
- NLRB v. American Nat'l Ins. Co.: 372, 373, 380, 386-87
- NLRB v. Borg-Warner Corp.: 366-68, 380-81, 387
- NLRB v. Brown: 534
- NLRB v. Crompton-Mills, Inc.: 262
- NLRB v. Detroit Resilient Floor Decorators: 367
- NLRB v. Drivers Local 639: 249
- NLRB v. E. C. Atkins & Co.: 538
- NLRB v. Erie Resistor Corp.: 535
- NLRB v. Exchange Parts Co.: 536, 540
- NLRB v. Fitzgerald Mills Corp.: 376
- NLRB v. General Motors, Inc.: 387
- NLRB v. Insurance Agents' Union 292, 372-73, 387, 536
- NLRB v. International Ass'n of Machinists: 234
- NLRB v. International Rice Milling Co.: 393, 535
- NLRB v. International Union, Progressive Mine Workers: 530
- NLRB v. International Union, UAW: 290
- NLRB v. Jones & Laughlin Steel Corp.: 167, 272, 538-39
- NLRB v. Katz: 387
- NLRB v. Lion Oil Co.: 287
- NLRB v. Local 3, Int'l Bhd. of Elec. Workers: 231
- NLRB v. Local 182, Int'l Bhd. of Teamsters: 223
- NLRB v. Local 294, Teamsters Union: 265, 281, 396
- NLRB v. Local 450, Int'l Union of Operating Eng'rs: 315
- NLRB v. Local 825, Int'l Union of Operating Eng'rs: 335
- NLRB v. MacKay Radio & Tel. Co.: 383
- NLRB v. Sanson Hosiery Mills, Inc.: 533
- NLRB v. Truitt Mfg. Co.: 386, 387
- NLRB v. United Ass'n of Journeymen & Apprentices of the Plumbing Indus.: 315, 318
- NLRB v. United Bhd. of Carpenters: 315, 335
- NLRB v. United Clay Mines Corp.: 376
- NLRB v. Walt Disney Prods.: 290
- NLRB v. Washington Aluminum Co.: 536, 540
- Noel v. Ewing: 501
- Nolan v. Nolan: 509
- Norfolk Naval Air Station: 431
- Norfolk Naval Shipyard 423, 426, 428, 430, 453
- Norris v. Mayor of Baltimore: 626
- Northern Trust Co. v. Porter: 509
- Nunnemacher v. State: 501
- Nye & Nisson v. United States: 715

- O'Donoghue v. Boies: 607
- Ofner v. Austria: 803, 823
- Ohio ex rel. Eaton v. Price: 253
- Ohikara v. Clark: 776-77
- O'Leary v. Brown Pacific-Maxon: 62
- 164 East Seventy-Second St. Corp. v. Ismay: 573
- Order of R.R. Telegraphers v. Chicago & N.W. Ry.: 381-82
- Order of R.R. Telegraphers v. Railway Express Agency 261, 262, 269, 283, 380
- Orford v. Orford: 636
- Orvis v. Brownell: 774-76
- Ostrofsky v. United Steelworkers: 298
- Otis Williams & Co. v. United States: 647
- Overly v. Overly: 594
- Ozark Dam Constructors v. United States: 647

XXVI
## TABLE OF CASES

**ALL REFERENCES ARE TO PAGE NUMBERS**

| P | Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce | 857-863 |
|   | Phelps Dodge Copper Prods. Corp. | 387 |
|   | Philadelphia Typographical Union (Philadelphia Inquirer) | 322 |
|   | Philadelphia Window Cleaners (Atlantic Maintenance Co.) | 254 |
|   | Philip Carey Mfg. Co. | 373 |
|   | Phillip v. Ribicoff | 71 |
|   | Phillips v. Kepler | 856 |
|   | Phillips v. Teamsters Union | 359 |
|   | Pillars v. R. J. Reynolds Tobacco Co. | 203 |
|   | Pine Industrial Relations Comm., Inc. | 387 |
|   | Pirone v. Fleming | 60 |
|   | Pittsburgh Athletic Co. v. KQV Broadcasting Co. | 162 |
|   | Pittsburgh Plate Glass Co. v. United States | 681 |
|   | Plant v. Plant | 856 |
|   | Plaza Provision Co. | 529 |
|   | Plessy v. Ferguson | 625 |
|   | Polish Relief v. Banca Nationala a Rumaniei | 773 |
|   | Pollak v. Ribicoff | 80, 85 |
|   | Pollock v. Farmers' Loan & Trust Co. | 20 |
|   | Portsmouth Naval Shipyard | 429, 430, 431, 432, 453 |
|   | Post Eng'r Section, U.S. Army Infantry Center | 434 |
|   | Potts v. Harmer | 127 |
|   | Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co. | 165 |
|   | Powell v. Alabama | 676, 825, 837, 844 |
|   | Powell v. Powell | 581 |
|   | Prater v. Dingus | 131 |
|   | Presnell v. Leslie | 168 |
|   | Price v. Johnston | 710 |
|   | Priebé & Sons, Inc. v. United States | 645 |
|   | Prieto v. Succession of Prieto | 583 |
|   | Pritchard v. Liggett & Myers Tobacco Co. | 343 |
|   | Propper v. Clark | 772-73, 776, 777, 797 |
|   | Pruitt v. Fleming | 70-71 |
|   | Public Util. Constr. Workers v. Public Serv. Elec. & Gas Co. | 290 |
|   | Puget Sound Naval Shipyard | 429, 430, 453 |
|   | Pugh, In the Matter of (Great Britain v. Panama) | 563 |

| Q | Quaker City Life Ins. Co. | 424, 529 |
|   | Querze v. Querze | 607 |
|   | Quesenberry v. Celebrezze | 70 |

| R | Radiator Specialty Co. | 376 |
|   | Radio Station WOW v. Johnson | 168 |

XXVII
TABLE OF CASES

ALL REFERENCES ARE TO PAGE NUMBERS

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ragland v. UMW</td>
<td>344-45</td>
</tr>
<tr>
<td>Railroad Retirement Bd.</td>
<td>429</td>
</tr>
<tr>
<td>Railway Employees Dept v. Hanson</td>
<td>268</td>
</tr>
<tr>
<td>Rambin v. Ewing</td>
<td>60</td>
</tr>
<tr>
<td>Randall v. Fleming</td>
<td>60, 61, 62, 84</td>
</tr>
<tr>
<td>Ranes v. Office Employees</td>
<td>360-61</td>
</tr>
<tr>
<td>Ratcliff v. Ratcliff</td>
<td>581</td>
</tr>
<tr>
<td>Ray v. Bruce</td>
<td>125, 126, 127</td>
</tr>
<tr>
<td>Reading Steel Casting Co. v. United States</td>
<td>645</td>
</tr>
<tr>
<td>Reck v. Pate</td>
<td>827</td>
</tr>
<tr>
<td>Reed v. Roumell</td>
<td>251</td>
</tr>
<tr>
<td>Reeves Broadcasting &amp; Dev. Corp.</td>
<td>379</td>
</tr>
<tr>
<td>Regents of N.M. College of Agriculture &amp; Mechanic Arts v. Albuquerque Broadcasting Co.</td>
<td>168</td>
</tr>
<tr>
<td>Regents of The Univ. of Ga. v. Carroll</td>
<td>168</td>
</tr>
<tr>
<td>Reichelderfer v. Quinn</td>
<td>165</td>
</tr>
<tr>
<td>Reichert v. Jerome H. Sheip, Inc.</td>
<td>583</td>
</tr>
<tr>
<td>Rekant v. Shochtay-Gasos Union</td>
<td>357-58, 362, 365</td>
</tr>
<tr>
<td>Remick Music Co. v. American Tobacco Co.</td>
<td>165</td>
</tr>
<tr>
<td>Renton News Record</td>
<td>371, 383</td>
</tr>
<tr>
<td>Republic Aviation Corp. v. NLRB</td>
<td>537, 538</td>
</tr>
<tr>
<td>Republic of Mexico v. Hoffman</td>
<td>861</td>
</tr>
<tr>
<td>Retail Clerks (Ames IGA Foodliner)</td>
<td>253</td>
</tr>
<tr>
<td>Retail Clerks Ass'n (Hested Stores Co.)</td>
<td>253, 255</td>
</tr>
<tr>
<td>Retail Clerks Ass'n (Petrie's)</td>
<td>228-29</td>
</tr>
<tr>
<td>Retail Clerks Union (Barker Bros.)</td>
<td>230, 231, 253, 254, 255</td>
</tr>
<tr>
<td>Retail Clerks Union (Jay Jacobs Downtown, Inc.)</td>
<td>253, 255</td>
</tr>
<tr>
<td>Retail Store Employees' Union (Jumbo Food Stores, Inc.)</td>
<td>254</td>
</tr>
<tr>
<td>Retail Store Employees' Union (Martin's Complete Home Furnishings)</td>
<td>253, 255</td>
</tr>
<tr>
<td>Rhinelander's Estate, In re</td>
<td>596</td>
</tr>
<tr>
<td>Ribicoff v. Hughes</td>
<td>75</td>
</tr>
<tr>
<td>Rice v. Celebrezze</td>
<td>67, 81</td>
</tr>
<tr>
<td>Rice v. Rice</td>
<td>594</td>
</tr>
<tr>
<td>Richfield Oil Corp.</td>
<td>380</td>
</tr>
<tr>
<td>Rinaldi v. Ribicoff</td>
<td>84</td>
</tr>
<tr>
<td>Robert W. Irwin Co. v. Sterling</td>
<td>136</td>
</tr>
<tr>
<td>Roberts v. Flemming</td>
<td>50, 63, 70</td>
</tr>
<tr>
<td>Roberts v. Ribicoff</td>
<td>84</td>
</tr>
<tr>
<td>Roberts v. Roberts</td>
<td>607</td>
</tr>
<tr>
<td>Roberts v. United States Dist. Court</td>
<td>728</td>
</tr>
<tr>
<td>Robinson v. Ribicoff</td>
<td>68</td>
</tr>
<tr>
<td>Robison v. Robison</td>
<td>594</td>
</tr>
<tr>
<td>Rogers v. Missouri Pac. R.R.</td>
<td>753</td>
</tr>
<tr>
<td>Rogers v. Richmond</td>
<td>827</td>
</tr>
<tr>
<td>Romanski's Estate</td>
<td>604</td>
</tr>
<tr>
<td>Rosenberg v. Fleuti</td>
<td>182-89</td>
</tr>
<tr>
<td>Rosenberg v. United States</td>
<td>748</td>
</tr>
<tr>
<td>Rosenbluth v. Rosenbluth</td>
<td>584, 585, 596, 606-07, 608, 610</td>
</tr>
<tr>
<td>Ross v. Middlebrooks</td>
<td>717, 728</td>
</tr>
<tr>
<td>Ross v. Phillip Morris Co.</td>
<td>204</td>
</tr>
<tr>
<td>Roumell v. Miami Newspaper Printing Pressmen</td>
<td>417</td>
</tr>
<tr>
<td>Rowe-Jordan Furniture Corp.</td>
<td>444</td>
</tr>
<tr>
<td>Rubinstein v. Rubinstein</td>
<td>594</td>
</tr>
<tr>
<td>Ryan v. Ryan</td>
<td>297, 593, 600, 601</td>
</tr>
</tbody>
</table>

S

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. A. v. The Navemar</td>
<td>859</td>
</tr>
<tr>
<td>Sailors' Union (Moore Dry Dock Co.)</td>
<td>397, 535</td>
</tr>
<tr>
<td>St. Louis B. &amp; M. Ry v. Dallas Cooperage &amp; Woodenware Co.</td>
<td>129</td>
</tr>
<tr>
<td>Salyers v. Celebrezze</td>
<td>71</td>
</tr>
<tr>
<td>Salzhandler v. Caputo</td>
<td>346-47, 349, 354, 364</td>
</tr>
<tr>
<td>Sams v. Sams</td>
<td>576</td>
</tr>
<tr>
<td>San Diego Bldg. Trades Council v. Garmon</td>
<td>299, 361</td>
</tr>
<tr>
<td>San Diego County Waiters Union (Joe Hunt)</td>
<td>255</td>
</tr>
<tr>
<td>Sandlin's Adm'x v. Allen</td>
<td>506</td>
</tr>
<tr>
<td>San-Juan Non-Profit T-V Ass'n, Inc. v. Sauls</td>
<td>156</td>
</tr>
<tr>
<td>Sapos v. Plame</td>
<td>579, 581</td>
</tr>
<tr>
<td>Saunders v. United States</td>
<td>681</td>
</tr>
<tr>
<td>Sav-on Drugs, Inc.</td>
<td>424</td>
</tr>
<tr>
<td>Scales v. Flemming</td>
<td>84</td>
</tr>
<tr>
<td>Schaefer v. Schaefer</td>
<td>600</td>
</tr>
<tr>
<td>Scharen's Estate, In re</td>
<td>776</td>
</tr>
<tr>
<td>Schlagenhauf v. Holder</td>
<td>639-44</td>
</tr>
<tr>
<td>Schlemm v. Schlemm</td>
<td>598, 609</td>
</tr>
<tr>
<td>School Dist. v. Schempp</td>
<td>622, 623</td>
</tr>
<tr>
<td>Schram v. Carlucci</td>
<td>120</td>
</tr>
<tr>
<td>Schram v. Spivack</td>
<td>120</td>
</tr>
<tr>
<td>Schriock v. Schriock</td>
<td>595</td>
</tr>
<tr>
<td>Schumacker v. Brownell</td>
<td>776</td>
</tr>
<tr>
<td>Schuykill Trust Co. v. Pennsylvania</td>
<td>214</td>
</tr>
<tr>
<td>Scott Buttner Elec. Co.</td>
<td>648</td>
</tr>
<tr>
<td>Screws v. United States</td>
<td>708-09, 715, 721, 722, 725, 726, 727, 733-34, 738</td>
</tr>
<tr>
<td>Sealfon v. United States</td>
<td>684, 715</td>
</tr>
<tr>
<td>Seals v. United States</td>
<td>826</td>
</tr>
<tr>
<td>Sears v. Rusden</td>
<td>579</td>
</tr>
<tr>
<td>Sebby v. Flemming</td>
<td>60</td>
</tr>
<tr>
<td>SEC v. C. M. Joiner Leasing Corp.</td>
<td>77</td>
</tr>
<tr>
<td>SEC v. Chenery Corp.</td>
<td>79</td>
</tr>
<tr>
<td>Selective Draft Law Cases</td>
<td></td>
</tr>
<tr>
<td>Sencer v. Carl's Mkts., Inc.</td>
<td>202, 203, 204</td>
</tr>
<tr>
<td>Servette, Inc. v. NLRB</td>
<td>396</td>
</tr>
<tr>
<td>Seward v. Kaufman</td>
<td>509</td>
</tr>
<tr>
<td>Shamrock Dairy, Inc.</td>
<td>382</td>
</tr>
<tr>
<td>Shapiro, Bernstein &amp; Co. v. Goody</td>
<td>157</td>
</tr>
<tr>
<td>Shea v. Shea</td>
<td>593, 596, 606-07</td>
</tr>
<tr>
<td>Sheffield Corp.</td>
<td>424, 529</td>
</tr>
</tbody>
</table>

XXVIII
### TABLE OF CASES

**ALL REFERENCES ARE TO PAGE NUMBERS**

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shell Oil Co.</td>
<td>368</td>
</tr>
<tr>
<td>Shelley v. Kraemer</td>
<td>621, 626</td>
</tr>
<tr>
<td>Sheppard v. State</td>
<td>180</td>
</tr>
<tr>
<td>Sheridan v. United Bhd. of Carpenters</td>
<td>354, 355</td>
</tr>
<tr>
<td>Sherrer v. Sherrer</td>
<td>586, 588, 589-603, 608-12</td>
</tr>
<tr>
<td>Sherwin-Williams Co.</td>
<td>369</td>
</tr>
<tr>
<td>Shoeps v. Carmichael</td>
<td>188</td>
</tr>
<tr>
<td>Shopmen's Local 501 (Oliver Whyte Co.)</td>
<td>408, 409</td>
</tr>
<tr>
<td>Sibbach v. Wilson &amp; Co.</td>
<td>130, 640, 641</td>
</tr>
<tr>
<td>Siegel v. Ragen</td>
<td>724, 728</td>
</tr>
<tr>
<td>Simkins v. Moses H. Cone Memorial Hosp.</td>
<td>624-28</td>
</tr>
<tr>
<td>Simms v. United States</td>
<td>682, 683</td>
</tr>
<tr>
<td>Simplicity Pattern Co.</td>
<td>369</td>
</tr>
<tr>
<td>Sincock v. Duffy</td>
<td>24</td>
</tr>
<tr>
<td>Singo v. Fritz</td>
<td>576</td>
</tr>
<tr>
<td>Sistare v. Sistare</td>
<td>855</td>
</tr>
<tr>
<td>Skenandoa Rayon Corp. v. Commissioner</td>
<td>866</td>
</tr>
<tr>
<td>Slochower v. Board of Educ.</td>
<td>5</td>
</tr>
<tr>
<td>Slucum v. Delaware, L. &amp; W.R.R.</td>
<td>278, 279</td>
</tr>
<tr>
<td>Smith v. Allwright</td>
<td>626</td>
</tr>
<tr>
<td>Smith v. Bankers Life Ins. Co.</td>
<td>120</td>
</tr>
<tr>
<td>Smith v. Burdine's, Inc.</td>
<td>202</td>
</tr>
<tr>
<td>Smith v. Evening News Ass'n</td>
<td>260, 265, 266, 270, 272, 279, 286, 289, 296-300, 304, 311, 362</td>
</tr>
<tr>
<td>Smith v. Funk</td>
<td>506, 510</td>
</tr>
<tr>
<td>Smith v. Ribicoff</td>
<td>70</td>
</tr>
<tr>
<td>Smith v. Smith</td>
<td>572, 576</td>
</tr>
<tr>
<td>Smith v. United States</td>
<td>676, 680, 682, 693</td>
</tr>
<tr>
<td>Smithsonian Institution, Nat'l Zoological Park</td>
<td>431</td>
</tr>
<tr>
<td>Smyth v. Cleveland Trust Co.</td>
<td>504</td>
</tr>
<tr>
<td>Snip v. Snip</td>
<td>855</td>
</tr>
<tr>
<td>Snyder v. Massachusetts</td>
<td>733</td>
</tr>
<tr>
<td>Social Security Bd. v. Nierotko</td>
<td>62</td>
</tr>
<tr>
<td>Societe Internationale v. Rogers</td>
<td>130, 775</td>
</tr>
<tr>
<td>Society of European Stage Authors &amp; Composers v. New York Hotel Statler Co.</td>
<td>158, 159</td>
</tr>
<tr>
<td>Soft-Lite Lens Co. v. Ritholz</td>
<td>166</td>
</tr>
<tr>
<td>Solo Cup Co.</td>
<td>379</td>
</tr>
<tr>
<td>Solomon v. Kenner</td>
<td>131</td>
</tr>
<tr>
<td>Sommer v. Sommer</td>
<td>595-96</td>
</tr>
<tr>
<td>Southern Pac. Co. v. Jensen</td>
<td>213, 215</td>
</tr>
<tr>
<td>Spafford v. Spafford</td>
<td>581</td>
</tr>
<tr>
<td>Spano v. New York</td>
<td>827, 828, 829, 842, 844</td>
</tr>
<tr>
<td>Sparks v. Ribicoff</td>
<td>51, 64, 77, 79</td>
</tr>
<tr>
<td>Spears v. Flemming</td>
<td>57, 67</td>
</tr>
<tr>
<td>Speiser v. Randall</td>
<td>235, 620, 621</td>
</tr>
<tr>
<td>Spence v. Three Rivers Builders &amp; Masonry Supply, Inc.</td>
<td>204</td>
</tr>
<tr>
<td>Spencer v. Spencer</td>
<td>579</td>
</tr>
<tr>
<td>Spitzer v. Superior Court</td>
<td>592</td>
</tr>
<tr>
<td>Sprouse v. Celebrezze</td>
<td>70</td>
</tr>
<tr>
<td>Square D. Co.</td>
<td>287</td>
</tr>
<tr>
<td>Stack v. Boyle</td>
<td>676</td>
</tr>
<tr>
<td>Staedler v. Staedler</td>
<td>593, 594, 598, 600, 602</td>
</tr>
<tr>
<td>Stanley v. Columbia Broadcasting Sys., Inc.</td>
<td>158, 160</td>
</tr>
<tr>
<td>Star Baby Co.</td>
<td>370, 384</td>
</tr>
<tr>
<td>Stark v. Twin City Carpenters Council</td>
<td>349</td>
</tr>
<tr>
<td>State v. Barrington</td>
<td>179</td>
</tr>
<tr>
<td>State v. Brown</td>
<td>178</td>
</tr>
<tr>
<td>State v. Bunk</td>
<td>629</td>
</tr>
<tr>
<td>State v. Finn</td>
<td>180</td>
</tr>
<tr>
<td>State v. Guido</td>
<td>177-82</td>
</tr>
<tr>
<td>State v. King</td>
<td>178</td>
</tr>
<tr>
<td>State v. Kristich</td>
<td>843</td>
</tr>
<tr>
<td>State v. Krozel</td>
<td>841</td>
</tr>
<tr>
<td>State v. Local 5760, United Steelworkers</td>
<td>661</td>
</tr>
<tr>
<td>State v. Mikay</td>
<td>630</td>
</tr>
<tr>
<td>State v. Murphy</td>
<td>630</td>
</tr>
<tr>
<td>State v. Nipper</td>
<td>716</td>
</tr>
<tr>
<td>State (O'Laighless) v. Sullivan</td>
<td>816</td>
</tr>
<tr>
<td>State v. Williams</td>
<td>179</td>
</tr>
<tr>
<td>State v. Wynn</td>
<td>179, 180</td>
</tr>
<tr>
<td>State v. Zukauskas</td>
<td>630</td>
</tr>
<tr>
<td>State ex rel. Attorney General v. Circuit Court</td>
<td>658</td>
</tr>
<tr>
<td>State ex rel. Tate v. Siever</td>
<td>22</td>
</tr>
<tr>
<td>State St. Trust Co. v. Kissel</td>
<td>509</td>
</tr>
<tr>
<td>Stauffer v. Stauffer</td>
<td>596</td>
</tr>
<tr>
<td>Steele v. Louisville &amp; N.R.R.</td>
<td>263, 294</td>
</tr>
<tr>
<td>Steffens v. Steffens</td>
<td>594</td>
</tr>
<tr>
<td>Stein v. New York</td>
<td>831</td>
</tr>
<tr>
<td>Stephens v. Stephens</td>
<td>579</td>
</tr>
<tr>
<td>Stirling, In re</td>
<td>583</td>
</tr>
<tr>
<td>Stoehr v. Wallace</td>
<td>769</td>
</tr>
<tr>
<td>Stolaroff v. Ribicoff</td>
<td>67, 84</td>
</tr>
<tr>
<td>Stoner v. Farber</td>
<td>509</td>
</tr>
<tr>
<td>Stovall v. State</td>
<td>180</td>
</tr>
<tr>
<td>Strauss v. International Bhd. of Teamsters</td>
<td>340, 355</td>
</tr>
<tr>
<td>Strnad v. Strnad</td>
<td>634, 635-38</td>
</tr>
<tr>
<td>Stroble v. California</td>
<td>630</td>
</tr>
<tr>
<td>Succession of Fertel</td>
<td>517</td>
</tr>
<tr>
<td>Succession of Lisa</td>
<td>517</td>
</tr>
<tr>
<td>Sullivan v. Banque Chrissettservoni</td>
<td>776</td>
</tr>
<tr>
<td>Sullivan v. Sullivan</td>
<td>607</td>
</tr>
<tr>
<td>Sun Printing Ass'n v. Remington Co.</td>
<td>215</td>
</tr>
<tr>
<td>Sunshine Anthracite Coal Co. v. Adkins</td>
<td>528</td>
</tr>
<tr>
<td>Superior Communications Co., In re</td>
<td>148, 149, 150</td>
</tr>
<tr>
<td>Superior Distrib. Co. v. White</td>
<td>595</td>
</tr>
</tbody>
</table>

XXIX
TABLE OF CASES

ALL REFERENCES ARE TO PAGE NUMBERS

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Survaunt v. Commissioner</td>
<td>653</td>
</tr>
<tr>
<td>Sutton v. Leib</td>
<td>592</td>
</tr>
<tr>
<td>Sweeney v. Woodall</td>
<td>733</td>
</tr>
<tr>
<td>T. C. Bateson Constr. Co. v. United States</td>
<td>644-51</td>
</tr>
<tr>
<td>Talley v. Flemming</td>
<td>85</td>
</tr>
<tr>
<td>Talley v. Ribicoff</td>
<td>60</td>
</tr>
<tr>
<td>Tarlton v. Tarlton</td>
<td>585</td>
</tr>
<tr>
<td>Tate v. United States</td>
<td>681, 697, 835</td>
</tr>
<tr>
<td>Taunsco Contracting Co.</td>
<td>648</td>
</tr>
<tr>
<td>Taylor v. George</td>
<td>506, 510</td>
</tr>
<tr>
<td>Taylor v. Taylor</td>
<td>579, 583</td>
</tr>
<tr>
<td>Teamsters “General” Local 200 (Bachman Furniture Co.)</td>
<td>224, 258</td>
</tr>
<tr>
<td>Teamsters Local 200 (Milwaukee Cheese Co.)</td>
<td>403</td>
</tr>
<tr>
<td>Teamsters Union (Editorial “El Impartial,” Inc.)</td>
<td>401</td>
</tr>
<tr>
<td>Teamsters Union (S. &amp; W. Constr. Co.)</td>
<td>323, 326</td>
</tr>
<tr>
<td>Teeter v. Flemming</td>
<td>66-68</td>
</tr>
<tr>
<td>Television Transmission, Inc. v. Public Util. Comm’n</td>
<td>176</td>
</tr>
<tr>
<td>Terry v. Adams</td>
<td>626</td>
</tr>
<tr>
<td>Textile Workers Union v. Lincoln Mills</td>
<td>5, 260, 266, 268, 270, 278, 296, 428</td>
</tr>
<tr>
<td>The Netherlands v. Federal Reserve Bank</td>
<td>779-80, 787-88</td>
</tr>
<tr>
<td>Theberge v. United States</td>
<td>73</td>
</tr>
<tr>
<td>Thigpen v. Meyers</td>
<td>24</td>
</tr>
<tr>
<td>Thomann v. City of Rochester</td>
<td>214</td>
</tr>
<tr>
<td>Thomas v. Collins</td>
<td>232</td>
</tr>
<tr>
<td>Thomas E. Lewis</td>
<td>653</td>
</tr>
<tr>
<td>Thompson v. Flemming</td>
<td>63, 76</td>
</tr>
<tr>
<td>Thompson v. Hill Grocery Co.</td>
<td>128</td>
</tr>
<tr>
<td>Thompson v. Whitman</td>
<td>588, 611</td>
</tr>
<tr>
<td>Thompson v. United States</td>
<td>647</td>
</tr>
<tr>
<td>Thone v. Ribicoff</td>
<td>54-55</td>
</tr>
<tr>
<td>Thorn Estate</td>
<td>583</td>
</tr>
<tr>
<td>Thornhill v. Alabama</td>
<td>255</td>
</tr>
<tr>
<td>Tierney v. Tierney</td>
<td>594</td>
</tr>
<tr>
<td>Tiller v. Celebrezze</td>
<td>71</td>
</tr>
<tr>
<td>Timken Roller Bearing Co.</td>
<td>383</td>
</tr>
<tr>
<td>Toland v. Sprague</td>
<td>120</td>
</tr>
<tr>
<td>Tomkins v. Missouri</td>
<td>826</td>
</tr>
<tr>
<td>Tomko v. Hibert</td>
<td>341</td>
</tr>
<tr>
<td>Torcaso v. Watkins</td>
<td>623, 624</td>
</tr>
<tr>
<td>Town &amp; Country Mfg. Co.</td>
<td>287, 369-71, 383, 388</td>
</tr>
<tr>
<td>Town &amp; Country Mfg. Co. v. NLRB</td>
<td>369, 371</td>
</tr>
<tr>
<td>Towne v. Eisner</td>
<td>865</td>
</tr>
<tr>
<td>Transcontinental Air v. Koppal</td>
<td>278</td>
</tr>
<tr>
<td>Treinies v. Sunshine Mining Co.</td>
<td>588, 611</td>
</tr>
<tr>
<td>Triangle Publications, Inc. v. New</td>
<td></td>
</tr>
<tr>
<td>England Newspaper Publishing Co.</td>
<td>165, 166, 168</td>
</tr>
<tr>
<td>Tribolet (United States v. Mexico)</td>
<td>559</td>
</tr>
<tr>
<td>Truckdrivers Local 413 (Patton Warehouse)</td>
<td>407-09</td>
</tr>
<tr>
<td>Tumey v. Ohio</td>
<td>677</td>
</tr>
<tr>
<td>Turner v. City of Memphis</td>
<td>626</td>
</tr>
<tr>
<td>Turner v. Turner</td>
<td>572, 578</td>
</tr>
<tr>
<td>Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.</td>
<td>160, 162</td>
</tr>
<tr>
<td>U</td>
<td></td>
</tr>
<tr>
<td>UAW v. Wisconsin Employment Relations Bd.</td>
<td>286</td>
</tr>
<tr>
<td>Ulen &amp; Co. v. Bank Gospodarstwa Krajowego</td>
<td>860</td>
</tr>
<tr>
<td>Underwood v. Ribicoff</td>
<td>86</td>
</tr>
<tr>
<td>Underwood v. Underwood</td>
<td>519</td>
</tr>
<tr>
<td>Union News Co. v. Hildreth</td>
<td>262, 263, 275</td>
</tr>
<tr>
<td>Union Pac. R.R. v. Public Serv. Comm’n</td>
<td>213</td>
</tr>
<tr>
<td>Union Pac. Ry. v. Botsford</td>
<td>640-41</td>
</tr>
<tr>
<td>United Artists Associated, Inc. v. The NWL Corp.</td>
<td>159</td>
</tr>
<tr>
<td>United Ass’n of Journeymen &amp; Apprentices of the Plumbing Indus. (Matt J. Zaich Constr. Co.)</td>
<td>321, 327, 328, 331</td>
</tr>
<tr>
<td>United Ass’n of Journeymen &amp; Apprentices of the Plumbing Indus. (Tecon Corp.)</td>
<td>330</td>
</tr>
<tr>
<td>United Ass’n of Journeymen &amp; Apprentices of the Plumbing Indus. (York Corp.)</td>
<td>332</td>
</tr>
<tr>
<td>United Bhd. of Carpenters (Don Cartage Co.)</td>
<td>329</td>
</tr>
<tr>
<td>United Bhd. of Carpenters (J. G. Roy &amp; Sons Co.)</td>
<td>413, 418</td>
</tr>
<tr>
<td>United Bhd. of Carpenters (Manhattan Constr. Co.)</td>
<td>319, 329</td>
</tr>
<tr>
<td>United Bhd. of Carpenters (O. R. Karst)</td>
<td>322, 323, 326, 329, 332</td>
</tr>
<tr>
<td>United Bhd. of Carpenters (Wendnagel Co.)</td>
<td>335</td>
</tr>
<tr>
<td>United Brick &amp; Clay Workers v. Deena Artware Co.</td>
<td>286, 289</td>
</tr>
<tr>
<td>United Constr. Workers v. Laburnum Constr. Co.</td>
<td>286</td>
</tr>
<tr>
<td>United Dairy Co.</td>
<td>370</td>
</tr>
<tr>
<td>United Elec. Workers v. Worthington Corp.</td>
<td>290</td>
</tr>
<tr>
<td>United Marine Div. of Nat’l Maritime Union (D. M. Picton &amp; Co.)</td>
<td>408-09</td>
</tr>
<tr>
<td>United Nations Assessment Case 93, 103-04</td>
<td>404</td>
</tr>
<tr>
<td>United Plant Guard Workers (Houston Armored Car Co.)</td>
<td></td>
</tr>
<tr>
<td>United Rubber Workers (O’Sullivan Rubber Corp.)</td>
<td>249</td>
</tr>
</tbody>
</table>

XXX
**TABLE OF CASES**

**ALL REFERENCES ARE TO PAGE NUMBERS**

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Shoe Mach. Corp. v. Fitzgerald</td>
<td>248</td>
</tr>
<tr>
<td>United States v. Apodaca</td>
<td>708, 737</td>
</tr>
<tr>
<td>United States v. Baird</td>
<td>133</td>
</tr>
<tr>
<td>United States v. Bayer</td>
<td>835</td>
</tr>
<tr>
<td>United States v. Bellot</td>
<td>731</td>
</tr>
<tr>
<td>United States v. Bendick</td>
<td>620</td>
</tr>
<tr>
<td>United States v. Bentrena</td>
<td>682</td>
</tr>
<tr>
<td>United States v. Best</td>
<td>711-18</td>
</tr>
<tr>
<td>United States v. Blair</td>
<td>645</td>
</tr>
<tr>
<td>United States v. Bledsoe</td>
<td>709</td>
</tr>
<tr>
<td>United States v. Borden Co.</td>
<td>754</td>
</tr>
<tr>
<td>United States v. Brennan</td>
<td>682</td>
</tr>
<tr>
<td>United States v. Brooks</td>
<td>709</td>
</tr>
<tr>
<td>United States v. Broverman</td>
<td>795-96</td>
</tr>
<tr>
<td>United States v. Buntin</td>
<td>707</td>
</tr>
<tr>
<td>United States v. C. L. Guild Constr. Co.</td>
<td>697</td>
</tr>
<tr>
<td>United States v. California</td>
<td>3-4</td>
</tr>
<tr>
<td>United States v. Carignan</td>
<td>833</td>
</tr>
<tr>
<td>United States v. Carlo Bianchi &amp; Co.</td>
<td>189-95</td>
</tr>
<tr>
<td>United States v. Chemical Foundation, Inc.</td>
<td>769</td>
</tr>
<tr>
<td>United States v. China Daily News</td>
<td>795</td>
</tr>
<tr>
<td>United States v. Crescent-Kelvan Co.</td>
<td>677</td>
</tr>
<tr>
<td>United States v. Classic</td>
<td>726</td>
</tr>
<tr>
<td>United States v. Cruikshank</td>
<td>707, 709</td>
</tr>
<tr>
<td>United States v. Di Re</td>
<td>213</td>
</tr>
<tr>
<td>United States v. Doherty</td>
<td>363</td>
</tr>
<tr>
<td>United States v. Fay</td>
<td>838</td>
</tr>
<tr>
<td>United States v. Garsson</td>
<td>678</td>
</tr>
<tr>
<td>United States v. Gassaway</td>
<td>727</td>
</tr>
<tr>
<td>United States v. Gugel</td>
<td>709</td>
</tr>
<tr>
<td>United States v. Haug</td>
<td>682</td>
</tr>
<tr>
<td>United States v. Hoffa</td>
<td>682</td>
</tr>
<tr>
<td>United States v. Howard P. Foley Co.</td>
<td>647</td>
</tr>
<tr>
<td>United States v. Irby</td>
<td>736-37</td>
</tr>
<tr>
<td>United States v. Jackson</td>
<td>707, 735-36</td>
</tr>
<tr>
<td>United States v. Jakobson</td>
<td>620</td>
</tr>
<tr>
<td>United States v. Jones</td>
<td>194, 718-29, 731-36</td>
</tr>
<tr>
<td>United States v. Kaufman</td>
<td>655</td>
</tr>
<tr>
<td>United States v. Kauten</td>
<td>619</td>
</tr>
<tr>
<td>United States v. Kime</td>
<td>621</td>
</tr>
<tr>
<td>United States v. Lefkowitz</td>
<td>676</td>
</tr>
<tr>
<td>United States v. Louisiana</td>
<td>3-4</td>
</tr>
<tr>
<td>United States v. Louisiana &amp; Pac. Ry.</td>
<td>147</td>
</tr>
<tr>
<td>United States v. Macintosh</td>
<td>620, 621</td>
</tr>
<tr>
<td>United States v. Macker</td>
<td>692</td>
</tr>
<tr>
<td>United States v. Markham</td>
<td>731</td>
</tr>
<tr>
<td>United States v. Moorman</td>
<td>190-91</td>
</tr>
<tr>
<td>United States v. Morgan</td>
<td>678</td>
</tr>
<tr>
<td>United States v. Moser</td>
<td>589</td>
</tr>
<tr>
<td>United States v. Mosley</td>
<td>706</td>
</tr>
<tr>
<td>United States v. Pacific Forwarding Co.</td>
<td>133</td>
</tr>
<tr>
<td>United States v. Parrish</td>
<td>731</td>
</tr>
<tr>
<td>United States v. Peters</td>
<td>4</td>
</tr>
<tr>
<td>United States v. Ragland</td>
<td>677</td>
</tr>
<tr>
<td>United States v. Rhodes</td>
<td>707</td>
</tr>
<tr>
<td>United States v. Rice</td>
<td>646</td>
</tr>
<tr>
<td>United States v. Roganovich</td>
<td>341, 362-65</td>
</tr>
<tr>
<td>United States v. Seeger</td>
<td>618-24</td>
</tr>
<tr>
<td>United States v. Shreveport Grain &amp; Elevator Co.</td>
<td>528</td>
</tr>
<tr>
<td>United States v. Speed</td>
<td>646</td>
</tr>
<tr>
<td>United States v. Sprague</td>
<td>21, 22</td>
</tr>
<tr>
<td>United States v. Standard Rice Co.</td>
<td>645</td>
</tr>
<tr>
<td>United States v. Stone</td>
<td>707</td>
</tr>
<tr>
<td>United States v. Sutton</td>
<td>694</td>
</tr>
<tr>
<td>United States v. Texas</td>
<td>3-4</td>
</tr>
<tr>
<td>United States v. Throckmorton</td>
<td>578</td>
</tr>
<tr>
<td>United States v. Tirado</td>
<td>682</td>
</tr>
<tr>
<td>United States v. von Clemm</td>
<td>776</td>
</tr>
<tr>
<td>United States v. Wagman</td>
<td>795</td>
</tr>
<tr>
<td>United States v. Walker</td>
<td>729-36</td>
</tr>
<tr>
<td>United States v. Weishaupt</td>
<td>795</td>
</tr>
<tr>
<td>United States v. Williams</td>
<td>707, 709, 712, 715, 722, 725</td>
</tr>
<tr>
<td>United States v. Worley</td>
<td>655</td>
</tr>
<tr>
<td>United States v. Wunderlich</td>
<td>190-92</td>
</tr>
<tr>
<td>United States ex rel. Bartsch v. Watkins</td>
<td>187</td>
</tr>
<tr>
<td>United States ex rel. Clausen v. Day</td>
<td>183</td>
</tr>
<tr>
<td>United States ex rel. De George v. Jordan</td>
<td>187</td>
</tr>
<tr>
<td>United States ex rel. Eichenlaub v. Shaughnessy</td>
<td>187</td>
</tr>
<tr>
<td>United States ex rel. Paetau v. Watkins</td>
<td>187</td>
</tr>
<tr>
<td>United States ex rel. Phillips v. Downer</td>
<td>619</td>
</tr>
<tr>
<td>United States ex rel. Polymeris v. Trudell</td>
<td>183</td>
</tr>
<tr>
<td>United States ex rel. Reel v. Badt</td>
<td>619</td>
</tr>
<tr>
<td>United States ex rel. Rubio v. Jordan</td>
<td>187</td>
</tr>
<tr>
<td>United States ex rel. Stapf v. Corsi</td>
<td>183</td>
</tr>
<tr>
<td>United States ex rel. Ueberall v. Williams</td>
<td>184</td>
</tr>
<tr>
<td>United States ex rel. Volpe v. Smith</td>
<td>183-89</td>
</tr>
<tr>
<td>United States Nat'l Bank v. United States</td>
<td>191</td>
</tr>
<tr>
<td>United States Steelworkers (Tennessee Coal &amp; Iron)</td>
<td>407, 411, 413</td>
</tr>
<tr>
<td>United States Steelworkers v. American Mfg. Co.</td>
<td>270, 296, 305, 353</td>
</tr>
<tr>
<td>United States Steelworkers v. Enterprise Wheel &amp; Car Corp.</td>
<td>270, 296, 305</td>
</tr>
<tr>
<td>United States Steelworkers v. New Park Mining Co.</td>
<td>287</td>
</tr>
<tr>
<td>United Steelworkers v. Warrior &amp; Gulf Nav. Co.</td>
<td>270, 271, 296, 305, 382</td>
</tr>
<tr>
<td>United Wholesale &amp; Warehouse Em-</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES
ALL REFERENCES ARE TO PAGE NUMBERS

ployees (Perfection Mattress & Spring Co.) 398, 399
Universal Camera Corp. v. NLRB 60-62, 66, 436
Uproar Co. v. NBC 160
Upshaw v. United States 833
Urquhart v. McDonald 585
V
V. Zay Smith 656-57
Valenti v. Dempsey 24
Van Prods., Inc. 653
Vanderbilt v. Vanderbilt 587
Vars v. Boilermakers Union 359
Vaughan v. Vaughan 584
Veterans Administration Hosp. 429, 437
Virgil L. Beavers 653
Virginian Ry. v. System Fed’n 40, 443, 444
Volentine & Littleton v. United States 191, 192
Volin v. Volin 584
Vortex Mfg. Co. v. Ply-Rite Contracting Co. 166
W
W. A. Henley, d/b a s Kimble Communications 146
W. W. Cross & Co. 380
Waddow v. Humberd 642
Wagman v. Arnold 795
Waiters Local 500 (Mission Valley Inn) 221, 224, 226, 236, 243, 258
Walet v. United States 697
Walet v. Darby 506, 517
Walker v. United States 735
Wallace v. Wallace 594, 612
Wallihan v. Hughes 593
Walton v. State 838
Wanstrath v. Kappel 504
Ward v. Celebrezze 75
Ward v. Ward 510
Warehouse & Distribution Workers Union (Bachman Mach. Co.) 413
Warehouse Employees (Aetna Plywood & Veneer Co.) 235-47, 258
Warehousemen & Mail Order Employees v. NLRB 239
Waring v. Dunlea 162
Waring v. WDAS Broadcasting Station, Inc. 159, 160
Washington Area Metal Trades Council 435
Watts v. Indiana 633, 825, 849
Watts v. Ribicoff 68, 69
Weber v. Weber 594
Weeks v. United States 677, 680, 697
Weingarten Food Center, Inc. 383
Weirton Steel Co. 662
Weiss v. Stearn 653
Weitzenkorn v. Lesser 158
Welch v. Helvering 807
Welch v. Welch 133
Wells & Wells, Inc. v. United States 191
West Coast Hotel Co. v. Parrish 2, 215
Western TV Relay, Inc., In re 148, 150
Whalen v. Ribicoff 74, 77
Wheat v. Wheat 594, 612
White v. Maryland 837, 839, 840, 841, 842
White v. Ragen 727
White v. White 600
Wholesale Delivery Drivers (Servette, Inc.) 305
Wickard v. Filburn 167
Wiley v. Flemming 85
Wilkinson v. McCarthy 753
Wilkinson v. Wilkinson 581
Williams v. Mayor of Baltimore 214
Williams v. North Carolina 586, 587-93, 613
Williams v. Overcast 578
Williams v. United States 717, 725, 726, 727
Wilson v. Girard 748
Wilson v. United States 677
Winterbottom v. Wright 205
Wolf v. Wolf 601
Wong Sun v. United States 632, 680, 847
Wood v. Wood 612
Wood, Wire & Metal Lathers Union (Acoustical Contractors Ass’n) 319, 326, 329, 330, 336
Wood, Wire & Metal Lathers Union (Acoustics & Specialties, Inc.) 334
Woodhouse v. Woodhouse 593, 598
Woods v. Massachusetts Mills 131
Wray v. Folsom 68-69, 71, 76
Wright’s Estate, In re 583
WSTV, Inc. v. Fortnightly Corp. 150, 159, 164-65, 166, 167
Y
Yadkoe v. Fields 158
Yick Wo v. Hopkins 726
Yokohama Specie Bank, Ltd., In re 776
Yokohama Specie Bank, Ltd., In the Matter of 776
York v. Texas 611
Youmans (United States v. Mexico) 559
Yukio Chai v. Bonham 185, 187
Z
Z Bar Net v. Helena Television 160
Zdanok v. Glidden 280
Zenker v. Zenker 594
Zittman v. McGrath 773-76, 797
Zurbrick v. Woodhead 184

XXXII
THE CURRENT CHALLENGE TO FEDERALISM: THE CONFEDERATING PROPOSALS

WILLIAM F. SWINDLER*

Professor Swindler treats the three recently proposed constitutional amendments as the culmination of state frustration at the evolution of ascendant federalism especially as embodied in modern Supreme Court decisions. Equating the proposals, in effect, to the fragmented system under the Articles of Confederation, he rejects them as contrary to the weight of constitutional history. The Constitution having established a new concept of federalism—an amalgam of the people of the United States—the author concludes that representative government is the essence of that federalism and that neither the states, their legislatures, nor their courts can have authority in the area of activity which the people of the United States have established as their exclusive domain.

INTRODUCTION: GENESIS OF THE NEW ANTI-FEDERALISM

Almost a decade has passed since Brown v. Board of Educ.¹ touched off a Babel of debate which has been as acrimonious as it has been prolonged. Aside from, even though inseparable from, the question of racial segregation in public schools has been the issue of state versus federal jurisdiction over certain subject-areas. When, upon hearing further arguments on its order in the first ruling in the Brown case, the Supreme Court unequivocally reaffirmed "the fundamental principle that racial discrimination in public education is unconstitutional," it added categorically that "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."² The Louisiana legislature was the first of many to react to this holding; it memorialized Congress with the declaration that such a question "is a matter of legisla-

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¹ 347 U.S. 483 (1954).
tive policy for the several states, with which the federal courts are powerless to interfere." This has been the premise—or the ultimate issue, as the case might be—over which a long judicial struggle has been carried on in the ensuing nine years.4

The segregation cases, in their variants, have thus served to exacerbate a constitutional issue which is itself "separate but equal" in importance to the social question represented in the cases themselves. And the cases have developed at a significant point in time with respect to this issue; Brown, it should be remembered, came on the heels of the flurry of litigation and legislation involving the question of state versus federal control over tideland oil deposits,5 and eight years before Baker v. Carr.6 A traceable chronology of disputes over states and federalism, in terms of mid-century problems and politics, can in fact be extended back to 1937 when a series of decisions typified by West Coast Hotel Co. v. Parrish7 signaled an historic shift in constitutional jurisprudence where broad construction was equated with ascendant federalism.8

Ironically enough, Parrish established (by a five-to-four margin) a state power to establish minimum wages for women; its significance lay in the fact that it was to usher in a rapid succession of cases in which the paramountcy of the federal power, based upon the welfare and commerce clauses9 of the Constitution, was to be ever more positively declared. The states' power to enact social security legislation was upheld10—but it

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4 The most comprehensive documentary record of this struggle appears in the collective volumes of the Race Relations Law Reporter, established at Vanderbilt University School of Law in 1956 under a grant from the Fund for the Republic.

5 See cases cited note 19 infra.


7 300 U.S. 379 (1937).

8 Representative of the torrent of commentary having some pertinence to the present debate are: Alfange, Supreme Court and the National Will (1937); Corwin, Constitutional Revolution, Ltd. (1941); Swisher, Supreme Court in Transition, 1 J. Politics 349 (1939).

9 For the most comprehensive annotation of the clauses in article I, section 8, see Constitution of the United States of America: Analysis and Interpretation 112-253 (Corwin ed. 1953) [hereinafter cited as Corwin].

paled in comparison with the seven-to-two opinion affirming the greater federal power over this particular subject matter.11 Meanwhile, the expansion of federal jurisdiction advanced steadily in other fields as Chief Justice Hughes undertook the remarkable administrative task of preserving a consistency and unity in jurisprudence—his tenure having inherited the remnants of laissez-faire and being destined to end in a blaze of federalism.12 After 1937 the Court consistently found favorable constitutional grounds for national jurisdiction13 in the fields of labor relations,14 business15 and agriculture.16 And each step along the way was disputed by various groups with various arguments17 at first espoused by only a minority but continually waxing and waning in volume and effect.

Political straws in the wind following World War II pointed toward a mounting legislative antipathy respecting the continued expansion of federal jurisdiction. The new policy direction in labor law, exemplified in the Taft-Hartley Act,18 doubtless encouraged a move to dispute the paramount interest of the national government in an economic area of major concern to a small but powerful group of states—the area relating to tideland oil deposits. The judicial position was firmly in favor of federal jurisdiction over the underwater preserves extending from the low-tide mark to the three-mile limit; in three suits involving California, Louisiana and Texas,19 the Supreme Court uniformly found for the

13 On this significant area of constitutional development, the most objective and concise discussion appears in Swisher, American Constitutional Development, ch. 37 (2d ed. 1954).
14 Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).
15 Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).
17 See authorities cited note 8 supra. In addition, the following works contain relevant commentary: Corwin, Court Over Constitution (1950); Jackson, Struggle for Judicial Supremacy (1941); Pritchett, The Roosevelt Court (1948).

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.
United States, with Mr. Justice Black observing that "the state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion it seeks." Congress, however, heeded the pleas for "the returning of the tidelands to their rightful owners, the states," and in 1953 renounced the federal government's rights in favor of state claims to the preserves.

On the whole, however, state efforts to resist the growing assertiveness of federal jurisdiction have been substantially frustrated. The reaction to the Brown decision took the form of a brief but vigorous effort to revive the constitutional doctrine of interposition—which was summarily

20 United States v. California, supra note 19, at 35-36.


23 Interposition, as originally conceived, was based upon the theory that the Constitution derived its powers from the people of the individual states instead of an amalgam of the people of the United States. The doctrine meant that by having originally granted powers to the federal government, the states assumed the "duty, to watch over and oppose every infraction of those principles, which constitute the only basis of Union." (Virginia Resolution) Interposition vs. Judicial Power, 1 Race Rel. L. Rep. 471 (1956). At its inception, the doctrine rested primarily on the fact that the states could attempt to amend the Constitution and thus overrule the expanding use of federal power; this was a constitutional basis since such state power was inherent in the amending process and was effectuated by the adoption of the eleventh and fourteenth amendments.

But as the federal courts became the primary arbiters of the rights between the federal government and the states, the doctrine of interposition was based more upon state opposition to Supreme Court decisions affecting what a particular state thought to be within its exclusive concern. The original vitality of this aspect of the doctrine has been emasculated because of the realistic acceptance of the binding precedent of United States v. Peters, 9 U.S. (5 Cranch) 115 (1809), where Chief Justice Marshall declared that "if the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." Id. at 136.

Today the doctrine of interposition has been sophisticated to the point that the claiming states now feel that they "may suspend the binding effect of federal law until such time as there has been submitted to the states, and ratified, a constitutional amendment giving the power against which the state has interposed its sovereignty." 1 Race Rel. L. Rep. 466 (1956).

For the documentary history of the modern interposition effort in eight southern states, see 1 Race Rel. L. Rep. 252 (Virginia), 435 (Georgia), 437 (Alabama), 438 (Georgia), 440 (Mississippi), 443 (South Carolina), 445 (Virginia), 462 (Virginia) (1956); 2 Race Rel. L. Rep. 228 (Tennessee), 480 (Mississippi), 481 (Tennessee), 707 (Florida), 853 (Virginia) (1957).
disposed of by the Supreme Court. The segregation cases, and the judicial maneuvers which developed around them, were but a small part of the broad series of issues involving state versus federal jurisdiction, to which state authorities after World War II addressed themselves with increasing concern. The doctrine of pre-emption of federal jurisdiction over activities sought to be controlled by the states touched off long comment, especially in cases involving jurisdiction over subversive activities, state labor relations legislation, public employment cases where questions of political loyalty arose, state control over admissions to the bar and state administration of criminal law.

In recognition of this expanding federal power, the Conference of Chief Justices, a coordinate agency of the Council of State Governments, in August 1958 published the now renowned report of its Committee on Federal-State Relations as Affected by Judicial Decisions. The committee, in a detailed review of the cases in the subject-areas where federal and state powers seemed to conflict, made a number of observations which take on added significance in the light of subsequent actions on the part of other coordinate agencies of the Council of State Governments. Note-worthy, for example, in contrast to the proposed establishment of a

25 Cf. memorial to Congress on the tidelands oil issue in Resolutions of the Eighth General Assembly of the States, 20 State Gov't 96-97 (1947), and the protests against federal influence over interstate compacts in Resolutions Adopted by the Fifteenth General Assembly of the States, 34 State Gov't 23 (1961).
"Court of the Union" which is described below, is the committee's statement that
when we turn to . . . the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos.33

Somewhat more cryptic, and perhaps even inconsistent, is another observation of the committee that

whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments.34

In summarizing its deliberations, the committee unburdened itself in these words:

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact . . . that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. . . .

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

. . . .

. . . We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot

34 Id. at 5. (Emphasis added.)
be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to stare decisis could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. . . .

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow process of amending the Constitution which that instrument provides.35

The committee report precipitated a round of comment,36 as well as demonstrated the depth of anti-federalist feeling which was generating among state political and judicial divisions. It is in this context that the 1962 ruling in Baker (discussed in a later section of this paper) can best be appreciated. It is against this background of restiveness and resentment that the Sixteenth Biennial General Assembly of the States was convened at Chicago in December 1962. The Assembly's action had

35 Id. at 33-37. (Emphasis added.)
been anticipated by the September meeting in Phoenix, Arizona, of the National Legislative Conference, another constituent agency of the Council of State Governments. The Phoenix meeting approved a resolution for strengthening the states in the federal system. It concluded that the increasing trend toward concentration of power in the national government could be stemmed by present provisions in the federal constitution. In furtherance of its resolution to strengthen the states, it directed its Committee on Federal-State Relations to prepare a report for consideration by the General Assembly of the States exploring a clear cut approach to the initiation of constitutional amendments through a constitutional convention—the dormant method of amendment in article V. The committee was also requested to explore areas in which the tenth amendment could be strengthened.37

At the Chicago meeting in December, the Committee on Federal-State Relations made its requested report to the General Assembly of the States, including the following observations:

Some federal judicial decisions involving powers of the federal and state governments carry a strong bias on the federal side, and consequently are bringing about a strong shift toward the extension of federal powers and the restraint of state powers. This shift tends to accelerate as each decision forms the basis and starting point for another extension of federal domination.

A greater degree of restraint on the part of the United States Supreme Court can do much, but experience shows that it is not likely to be sufficient. The basic difficulty is that the Supreme Court's decisions concerning the balance between federal and state power are final and can be changed in practice only if the states can muster sufficient interest in Congress, backed by a three-fourths majority of the states themselves to amend the Constitution. While the Founding Fathers fully expected and wished the words of the Constitution to have this degree of finality, it is impossible to believe that they envisaged such potency for the pronouncements of nine judges appointed by the President and confirmed by the Senate . . . .

To amend the Federal Constitution to correct specific decisions of the federal courts on specific points is desirable, but it will not necessarily stop the continuing drift toward more complete federal domination. The present situation has taken a long time to develop and may take a long time to remedy. Accordingly, some more fundamental and far-reaching change in the Federal Constitution is necessary to preserve and protect the states.38

The committee then submitted to the Assembly three resolutions, memorializing Congress to call a convention for the purpose of proposing

38 Amending the Constitution to Strengthen the States in the Federal System, 36 State Gov't 10 (1963). (Emphasis added.)
one or all of the constitutional amendments embodied in the report. The committee recommended that the resolutions "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto." The first proposed amendment concerns the amending of the amending process itself:

Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several states within seven years from the date of its submission.

The resolution also provided that in each case the application for a convention under article V is to have no force or effect if, by January 1, 1965, Congress itself has proposed an identical amendment.

Forty-five state delegations to the General Assembly voted on the constitutional proposal quoted above, with thirty-seven in favor, four

39 Id. at 11 n.*, 12 n.*, 13 n.*; cf. the following resolution in regard to legislative apportionment generally:

WHEREAS the General Assembly of the States has favorably acted upon a proposal for state initiation of an amendment to the United States Constitution which would eliminate federal judicial authority over apportionment of representation in state legislatures; and

WHEREAS it is essential that the states themselves act responsibly and effectively in redistricting and reapportioning their legislative bodies in accordance with the provisions of their own constitutions;

NOW THEREFORE BE IT RESOLVED that all States proceed as quickly as possible to reapportion their legislatures in accordance with the provisions of their state constitutions and in a manner which will insure an equitable basis for representation of the people of their states.


40 Amending the Constitution, supra note 38, at 11-12. (Emphasis added.)

41 Id. at 11-12.
opposed and four abstaining.\textsuperscript{42} Forty-six delegations answered the roll call on the second and third proposals.\textsuperscript{43}

The second proposed amendment is aimed at reversing the rule in \textit{Baker v. Carr}, and was approved by the General Assembly by a vote of twenty-six to ten, with ten abstentions.\textsuperscript{44} The proposed amendment reads as follows:

Section 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.

Section 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the \textit{Legislatures} of three-fourths of the several States within seven years from the date of its submission.\textsuperscript{45}

The final proposal, approved by an Assembly vote of twenty-one to twenty with five abstentions,\textsuperscript{46} is an elaborate provision for the establishment of a \textit{fifty-member court} to review certain Supreme Court opinions in cases involving state-federal relations. This \textit{extensio ad absurdum} is set out as follows:

Section 1. Upon demand of the legislatures of five states, no two of which shall share any common boundary, made within two years after the rendition of any judgment of the Supreme Court relating to the rights reserved to the states or to the people by this Constitution, such judgment shall be reviewed by a Court composed of the chief justices of the highest courts of the several states to be known as the Court of the Union. The sole issue before the Court of the Union shall be whether the power or jurisdiction sought to be exercised on the part of the United States is a power granted to it under this Constitution.

Section 2. Three-fourths of the justices of the Court of the Union shall constitute a quorum, but it shall require concurrence of a majority of the entire Court to reverse a decision of the Supreme Court. In event of incapacity of the chief justice of the highest court of any state to sit upon the Court of the Union, his place shall be filled by another justice of such state court, selected by affirmative vote of a majority of its membership.

Section 3. On the first Monday of the third calendar month following the ratification of this amendment, the chief justices of the highest courts of the several states shall convene at the national capital, at which time the Court of the Union shall be organized and shall adopt rules governing its procedure.

Section 4. Decisions of the Court of the Union upon matters within its

\textsuperscript{42} Id. at 12.

\textsuperscript{43} Id. at 12-13.

\textsuperscript{44} Id. at 13.

\textsuperscript{45} Ibid. (Emphasis added.)

\textsuperscript{46} Id. at 15.
jurisdiction shall be final and shall not thereafter be overruled by any court and may be changed only by an amendment of this Constitution.

Section 5. The Congress shall make provision for the housing of the Court of the Union and the expenses of its operation.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.47

The three resolutions embodying the proposed amendments were quietly introduced in a large number of state legislative sessions in the early months of 1963. The record of action upon them is difficult to confirm, but a tabulation published in the summer of this year showed the following course of action:48

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<tr>
<th>amendment</th>
<th>one house approving</th>
<th>both houses approving</th>
<th>total states considering</th>
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<tbody>
<tr>
<td>article V</td>
<td>4</td>
<td>18</td>
<td>22</td>
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<tr>
<td>apportionment</td>
<td>8</td>
<td>15</td>
<td>23*†</td>
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<tr>
<td>Court of Union</td>
<td>4</td>
<td>5</td>
<td>9</td>
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* Nebraska's unicameral legislature, ignoring the Assembly recommendation to keep the resolution from action by the Governor, adopted the resolution but saw it vetoed by Governor Frank Morrison.

† Utah's resolution reportedly departs from the uniform language of the recommended resolution.

In February 1963, Senator J. Strom Thurmond of South Carolina introduced the article V and Court of the Union proposals as Senate Joint Resolutions 42 and 43.49 Representative Sydney A. Herlong of Florida in March 1963 introduced the apportionment resolution as House Joint Resolution 300.50 In May, the Board of Governors of the American Bar Association at its annual meeting in Washington, acting on a recommendation of its Committee on Jurisprudence and Law Reform, went on record as opposing the first and third proposals.51 The apportionment proposal was the subject of a special report of the committee to the House of Delegates at its August meeting in Chicago. The committee headed by Representative Louis C. Wyman (R., N.H.) endorsed the apportionment amendment by a vote of 6 to 1. But the Bar Association's Board of Governors voted 10 to 7 to urge opposition to the

47 Id. at 14.
committee report. Later, the House of Delegates voted 136 to 74 to oppose the apportionment proposal.\(^5\)

Thus stands the anti-federalist movement of the mid-century, at the end of twenty-five years of judicial and legislative activity extending from 1937 to 1962. The importance of the issue now presented in the three constitutional proposals is attested by the commentary which has begun to appear both in legal and general publications.\(^6\) It is not so much the intrinsic merit (or lack of merit) in the propositions themselves, as the challenge which they present to the practical reality of federalism itself, which requires this exhaustive assessment. For it is clear—upon the analysis of each proposal in the present paper and the others now being published—that the effect of one or all of the proposals, if they should be adopted, would be to extinguish the very essence of federalism which distinguishes the Constitution from the Articles of Confederation.

The current anti-federalism, as the historical references in the present study will seek to show, is anachronistic in that it looks to a pre-1787 form of national union; hence, it is alien to the historic advocacy of state sovereignty within the federal system to which this nation was committed in 1787. It is fundamentally dangerous because it threatens to upset the political balance of nature. And it is ironically brought into its present focus on the centennial of the dread conflict which settled, beyond any reasonable doubt, that the federal structure was indissoluble. The propriety, or the jurisprudential soundness, of any judicial opinions which have helped to precipitate the present proposals, is not here in question. The central problem is the jeopardy in which the essence of federalism would be placed if these proposals were seriously entertained. That there is a concerted effort now to bring about their serious entertainment warrants the critical examination of each of the proposals in the light of our constitutional heritage.

I

Article V—The Amending Process

Article V, as it presently stands, reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the application of the


Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The amending process, it can be seen, is termed in alternatives. There are two alternative ways by which application may be made for a proposed amendment: (1) by originating directly from the Congress or (2) by applications from state legislatures, whereafter the Congress calls for a convention for the purpose of proposing amendments. Ratification also comes about by alternative methods: either by conventions or legislatures of three-fourths of the states; Congress, however, makes the crucial determination as to which alternative is to be used.

The proposed article V would abolish the convention proviso as a method of amending the Constitution by removing both the convention as a proposing body and the power of Congress to choose the convention method of ratification if it so desires. Furthermore, Congress’ right to initiate amendments could be circumvented and its power as a proposing body thus diluted whenever two-thirds of the state legislatures had identical language in their applications to Congress.

PRINCIPLES UNDERLYING THE CONVENTION PROVISO

In the famed series of resolutions with which the Virginia plan of a stronger union was introduced to the Constitutional Convention of 1787, Edmund Randolph submitted one which proposed “that provision ought to be made for [hereafter] amending the system now to be established, without requiring the assent of the Natl. Legislature.”54 His fellow Virginian, George Mason, supported this resolution. It would be improper, Mason contended, to require the consent of Congress to amendments proposed by the states “because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt.”55 James Madison noted that Charles Pinckney “doubted the propriety or necessity

54 1 Farrand, The Records of the Federal Convention of 1787, at 121 (2d ed. 1934) [hereinafter cited as Farrand].
55 Id. at 203.
for it”; but Elbridge Gerry added his support by saying that: “[T]he novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt.” The resolution was postponed by a vote of seven states to three.

Randolph’s proposal for amending the Constitution without the consent of Congress was postponed on several occasions as the convention proceeded to its work. When, on June 12 and 13 the committee of the whole recapitulated the resolutions after a week of revision, the proviso had been stricken; it did not reappear. The committee, on the other hand and in due course, inserted a clause requiring “the Approbation of Congress” for the proposing of new amendments. It was not until August 30 that the alternative proposal for initiating amendments by state action was advanced and adopted without debate. It was not until September 15—the day of the final debate on the new organic instrument—that Gouverneur Morris and Elbridge Gerry moved that Congress should call a constitutional convention upon application of two-thirds (nine, as Madison noted) of the states. The Morris-Gerry motion was thus incorporated into present article V. With the twenty-one year moratorium on the question of legislation outlawing the slave trade, and the assurance to the small states that their equal vote in the Senate would be preserved, article V as it now reads was approved.

From the records of the Convention of 1787 it is clear that the Founding Fathers were concerned, in article V, with two central problems: One was the desire to reform the rigid procedure for “alteration” which had been provided in the Articles of Confederation; the other was a doubt as to whether the federal system which they were constructing would actually work in practice. The need for overhauling state constitutions hastily devised during the Revolution was familiar to many of the delegates to Philadelphia; by 1787 at least half of the original states had taken, or were about to take, action to replace their first constitutions.

56 Id. at 121.
57 Id. at 122.
58 Ibid.
59 Id. at 194, 203.
60 Id. at 223, 227, 231, 237.
61 2 Farrand 133.
62 Id. at 467-68.
63 Id. at 148.
64 Id. at 629-30 (general discussion)
65 Id. at 631.
New Hampshire had made three attempts to draft an acceptable document before its constitution was finally adopted in 1784; Massachusetts had had a comparable experience in the lengthy debates of its constitutional convention. Before the end of the eighteenth century, Delaware and Pennsylvania had each adopted two constitutions, while Georgia, South Carolina and Vermont had adopted three apiece. 66

For that matter, the fact that a second national charter was now being drafted only six years after the final ratification of the first one, made many besides Elbridge Gerry feel that "the novelty and difficulty of the experiment" would necessitate frequent revision. 67 Edmund Randolph, fearing the "indefinite and dangerous power given by the Constitution to Congress," moved "that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by another General Convention." 68 Charles Pinckney, while having grave reservations, observed that "conventions are serious things, and ought not to be repeated." 69 The Randolph motion was defeated by unanimous vote. 70

Article 13 of the Articles of Confederation had provided that "alterations" in the Articles were to be approved by the Continental Congress and then unanimously confirmed by the states. Alexander Hamilton reminded the convention that it "had been wished by many and was much to have been desired that an easier mode of introducing amendments had been provided." 71 But Hamilton rejected the idea that the states should have either joint or exclusive rights to propose amendments: "The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments." 72

The convention proviso in article V, as the internal evidence of the convention and ratification debates strongly suggests, was never considered as anything but a transitional safeguard. Randolph, in his notes

67 1 Farrand 121-22.
68 2 Farrand 631.
69 Id. at 632.
70 Id. at 633.
71 Id. at 558.
72 Ibid.
refers to “two-thirds” of the states as “nine”—i.e., in terms of the thirteen members of the “perpetual union” proclaimed by the Articles, now being made “more perfect” under the new instrument.78 Hamilton, writing after the fact of ratification but in refutation of New York’s abortive effort to seek a new convention, observed: “The intrinsic difficulty of governing THIRTEEN STATES . . . will, in my opinion, constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents.”74 Somewhat ruefully, Hamilton conceded, “we may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.”76 But to demand a new convention, Hamilton insisted, would be to deny to the new Constitution the practical tests of time and experience which alone would determine if it was workable.76 The thrust of all the writing concerning the convention proviso would seem to be that once the constitutional system was demonstrably operative, the proviso itself would become inoperative since its only function was to provide a means of correcting the system if it failed to become self-sustaining.77

At the very least, the historical evidence demonstrates the totally different intent of the current proposal to amend article V by resort to the general convention device. In the first place, the proposal of the General Assembly of the States seeks to utilize that quite possibly inoperative device to alter the article in such degree as to reduce the national government to a confederation subject to state legislative control—and in the very process to eliminate the convention device once its purposes had been served.78 The proposed amendment would, in fact, strike both convention

73 Id. at 148.
74 The Federalist No. 85, at 593 (Cooke ed. 1961) (Hamilton).
75 Ibid.
76 Id. at 594-95.
77 Cf. Elbridge Gerry in the House of Representatives in 1789:
The Constitution of the United States was proposed by a Convention met at Philadelph; but . . . , that Convention was not convened in consequence of any express will of the people, but an implied one, through their members in the state legislatures. The Constitution derived no authority from the first Convention; it was concurred in by conventions of the people, and that concurrence armed it with power, and invested it with dignity.
4 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 404 (2d ed. 1836). See generally Orfield, Amending the Federal Constitution, ch. 6 (1942).
procedures presently incorporated in the article—the first being the general convention proviso inserted at the last minute by the Morris-Gerry motion\(^79\) and the second being the alternative method which Congress may stipulate for state ratification of proposed amendments.\(^80\) It is pertinent here to recall the observation made by Madison at the 1787 Convention, in reference to the proposal in article VII to require ratification of the Constitution by conventions rather than by legislatures.\(^81\) Madison pointed out that

the powers given to the Genl. Govt. being taken from the State Govts. the Legislatures would be more disinclined than conventions composed in part at least of other men; and if disinclined, they could devise modes, apparently promoting, but really thwarting the ratification.\(^82\)

Subsequently, writing in support of adoption of the Constitution, Madison speculated:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may consider it to be most due . . . .\(^83\)

The preamble confirms what is manifest in every part of the record of the convention and the adoption—that the Constitution emanated from the people and was not the act of sovereign and independent states.\(^84\) If the people of the United States—the amalgam of the people of the thirteen original states and of the subsequently created states—ordained and established this Constitution, the states and their legislatures cannot be

\(79\) 2 Farrand 629-30.
\(80\) Dillon v. Gloss, 256 U.S. 368, 374 (1921).
\(81\) It is worth noting in passing that another resolution submitted by Edmund Randolph proposed ratification of the "amendment" of the Articles of Confederation (the presumed business of the 1787 convention) by conventions of the people of the several states. James (later Mr. Justice) Wilson commented concerning this resolution that "the people by a convention are the only power that can ratify the proposed system of the new government." 1 Farrand 126-27. The concept of "the people of the United States" was already taking shape.
\(82\) 2 Farrand 476.
\(83\) The Federalist No. 46, at 317 (Cooke ed. 1961) (Madison).
\(84\) "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816) (Story, J.); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C. J.).
proper parties at interest in any amending proposal having the effect, as threatened by proposed article V, of abridging a right of the very people who created the Constitution.

On yet another count the present proposal concerning article V is indictable as capricious and subversive of the entire constitutional system. It is that in the majority of states the state constitution is subject to revision or at least approval of revision by the people, either by election or convention. Even the conservative, Thomas M. Cooley, considering the ultimate source of constitutional power, found it in the people and not in their legislatures except as the people had so delegated it. But all revisions of the Constitution, Cooley maintained, must ultimately be submitted to the people as a whole. It is clear that the resolution of the case for the legitimacy and authority of a republican form of government rests ultimately upon the people who constitute that government. In the one case, these are the people of a state in the American form of federalism; and in the other, they are the people of the United States. It is begging the question to aver that the federal government is one of delegated and limited powers; assuming this to be true, the powers are delegated and limited by the people of the United States who ordained and established the Constitution. An amending proposal going to the legitimacy of the federal authority is the exclusive concern of the people upon whom such legitimacy and authority rests; for the states or their legislatures to call it in question is only to derogate their own legitimacy and authority.

THE AMENDING PROCESS IN PRACTICE: FEDERAL OR STATE RESPONSIBILITY?

Time and experience—the basic Hamiltonian requisites for testing the workability of the new Constitution—have demonstrated two basic features of article V in practice. One is that amendments have been kept to a minimum; in the course of 175 years, only twenty-nine have been submitted by Congress to the states, and of these only twenty-three have been adopted. The other is that, with three early exceptions (the ninth, tenth and eleventh, all adopted in the first decade of the Constitution),

85 Cf. constitutions of the following states: Alaska Const. art. XIII, § 1; Ariz. Const. art. 21, § 1; Cal. Const. art. 18, § 1; Ga. Const. art. XIII, § 1; Idaho Const. art. 20, § 1; Ind. Const. art. 16, § 1; Iowa Const. art. 10, § 1; Mass. Const. art. XLVIII, § 173; N.J. Const. art. 9, § 1; N.Y. Const. art. 19, § 1; Pa. Const. art. 18, § 1; Tenn. Const. art. 11, § 3; Va. Const. art. XV, § 196.
87 Id. at 88.
the amendments have tended to strengthen the federal position and correspondingly to limit the states’ participation in or exemption from national concerns.

*Constitutional Amendatory History*

Since the first amendments were proposed by the first Congress, more than three thousand proposals for amendment have been introduced in subsequent Congresses, many of them via state legislative memorials. The first attempt to fix the amending process itself in a more rigid, state-dominating form, was made in 1794 by Rhode Island, last of the original states to ratify the Constitution. It proposed that no subsequent amendments be effective “without the consent of 11 of the States heretofore united under the Confederation.” Scores of other proposals for altering article V—all of them understandably seeking the interest of the proposing agency—have been advanced since then. Most of them have sought to relax the amending requirements—by reducing the majority needed to propose or to ratify, by providing for a popular vote in ratification, or by making possible the introduction of amendments by initiative. In 1911, Senator Bristow of Kansas anticipated the sense of the 1963 proposal by introducing a plan which would have provided that

whenever the Legislature of any State wishes the Constitution altered, it shall pass a resolution embodying the proposed change or amendment and send a copy to the Secretary of State, who shall without delay transmit a copy thereof to the governor of every State with a request that it shall be brought to the State legislature either at the next regular session or at a special session, as the governor may think advisable.

The Bristow proposal reflected the zeal of the progressive political movement, which had captured many of the states and had persuaded them that the federal government was moving too slowly into the socio-economic paths of the twentieth century. The opposite state persuasion is reflected in the 1963 proposal; but both suffer from the same error of constitutional theory—the assumption that the states or their legislatures


89 Musmanno, supra note 88, at 190; Ames, op. cit. supra note 88, at 292.

90 Musmanno, supra note 88, ch. V.

91 Id. at 191-92.

92 An excellent portrait of the Senate in the clash of reform and tradition appears in Bowers, Beveridge and the Progressive Era 313-66 (1932).
have a right to determine the amending process and the subject-matter of amendments to the federal constitution.93

As for the subject-matter of the amendments which have in fact been submitted and adopted, they may be seen to fall into three broad categories—subject both to judicial interpretation and the changing political frames of reference across the years. Of the twenty-one operative amendments (the twenty-first having repealed the eighteenth), thirteen may be described as primarily intended to secure personal rights for the people of the United States—the source of the federal power itself. Four amendments relate to the functions of the federal government. The remaining four relate to the rights—or liabilities—of the states in the federal system.

1. Amendments I-VIII (the Bill of Rights) concern certain civil, criminal and political rights of the individual: freedom of expression, the now dead-letter definitions of civilian-military relations, freedom from unlawful search and seizure, self-jeopardy (the "fifth"), speedy jury trials and reasonable bail.94 The thirteenth abolished slavery, the fifteenth enforced manhood suffrage and the nineteenth woman suffrage. The twenty-third extended suffrage to residents of the District of Columbia. The seventeenth—which was a substantial curtailment of state legislative influence in national legislative affairs—also extended the people's voting rights to the election of United States Senators.

2. Four amendments amplify or clarify functions of the national government—the twelfth and twentieth, relating to presidential electoral procedures; the sixteenth, overcoming the income tax rule in Pollock v. Farmers' Loan & Trust Co.;95 and the twenty-second, limiting incumbency in the presidency to two terms.

3. The remaining four amendments are the only ones primarily affecting the states in the federal system. The ninth is hardly more than a policy statement, and pertains as much to the people of the United States as to the people of the individual states; it has aptly been termed the "forgotten" amendment96—and indeed there has been almost a total

93 Cf. Corwin's comment: "The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words, the original, inalienable power of the people of the United States to determine their own political institutions." Corwin, The Constitution and What it Means Today 177 (12th ed. 1958).
94 See id. at 188-239.
95 157 U.S. 429, modified on rehearing, 158 U.S. 160 (1895).
dearth of judicial commentary upon it. It might be termed a constitutional maxim in derogation of the common-law rule of *expressio unius*. The tenth has had little more significance; indeed, the Supreme Court in 1931 went out of its way to declare that it “added nothing to the instrument as originally ratified.” But the tenth amendment has provided the point of departure, at least, for three lines of judicial argument: through Marshall’s tenure, in the direction of narrow construction of reserved powers; for the following century, in the opposite direction; since 1937, in a new course emphasizing that certain assertions of federal powers were not incursions into the tenth amendment area. The eleventh was a swift and vigorous (at the time) assertion of state prerogative in overturning *Chisholm v. Georgia*. But outweighing all of these in practical and jurisprudential effect has been the fourteenth. Although its language purports to extend to the people of the states the privileges guaranteed to them by the federal government under the fifth amendment, voluminous judicial interpretation has made it the instrument by which state freedom of action or freedom from liability vis-à-vis many national and interstate subject-areas has been progressively circumscribed in narrower dimensions.

*The Strengthening of the Federal Position*

The first twelve amendments were adopted within the first generation of the new Constitution. In the hundred years that followed only three more were enacted. Then came four (on the income tax, popular election of Senators, prohibition and woman suffrage) which reflected the high tide of the progressive movement. The remainder have been responses to particular needs of the political economy of the mid-twentieth century. What is more significant, historically, is the fact that since adoption of the eleventh amendment in 1795, the added constitutional provisions have applied to the states only in a restrictive sense—witness the thirteenth, fourteenth, fifteenth and seventeenth. Even more in point will be the pending twenty-fourth amendment which would abolish the poll tax in federal elections.

In 1920 the Supreme Court undertook to define the scope and purpose

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98 See Corwin 915-16.
99 See id. at 916-18.
100 See id. at 918.
101 2 U.S. (2 Dall.) 419 (1793).
102 See generally Corwin 957-1177.
of article V by considering two series of cases, raised in reference to the prohibition and woman suffrage amendments. One question presented to the Court disputed the constitutional power of Congress to propose amendments on matters which were claimed to be exclusively state concerns. The question, in the National Prohibition Cases, was settled definitively in favor of the congressional power. The second contention, in Dillon v. Gloss, was that Congress had acted arbitrarily in proposing ratification by conventions rather than by action of the state legislatures. Speaking for a unanimous Court, Mr. Justice Vandevanter said:

An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. . . . Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

The state, in acting upon a proposed amendment to the federal constitution, has been held by the Supreme Court to be performing a federal function derived from the Constitution itself; and this "transcends any limitations sought to be imposed by the people of a state." Nor is there such a distinction, in the tenth amendment, between powers reserved to the states and those reserved to the people, as to give the states a right of qualifying their federal function in acting upon a proposed amendment purportedly affecting their powers. No conditions to discharging the federal function may be imposed by a state in such cases.

Constitutional federalism in the United States is a product of the national experience during the past 175 years; that the state-federal relationship has changed as it has matured is simply a fact of history. In 1787 there were two forces which functioned in relationship to the

103 253 U.S. 350 (1920).
104 256 U.S. 368 (1921).
105 Id. at 373-74.
106 Lesser v. Garnett, 258 U.S. 130, 137 (1922); cf. United States v. Sprague, 282 U.S. 716 (1931). Where a state legislature acts upon an amendment submitted to it by Congress, it is exercising power conferred by the federal constitution and not by any provision in its own state constitution. State ex rel. Tate v. Sevier, 333 Mo. 662, 667, 62 S.W.2d 895, 897 (1933).
creature of one of the forces. These were the people of the states and the states themselves, on the one hand, and the Continental Congress—the product of an interstate compact which, in Randolph's words, "cried aloud for its own reform"—on the other. In 1789, and probably in 1788 when the Constitution was ratified, the American polity was comprised of four forces—the people of the several states and the states themselves, substantially as before; and in addition, the people of the United States and the federal structure they had established. The process effectuated in 1787-1788 was irreversible, as the Civil War was to establish. The competence of the states in national questions under the Confederation was one thing; it was quite another under the Constitution.

In the light of these facts, it can reasonably be insisted that only a federal agency (Congress, as provided by the Constitution) is competent to evaluate and take action upon initiating proposals to be submitted to the states, relating to the federal constitution. The only competence in the states is that which is vested in them by the same Constitution, if the general convention proviso of article V is in truth no longer of any effect. Even if it were assumed to have continued in effect, the qualifications of a state to participate in a constitutional question would depend upon the standards enunciated by a federal judiciary—witness the criteria proposed by the opinion in *Baker v. Carr*.

The ultimate question whether the general convention proviso in article V is still viable today is obviously one to be determined by the Supreme Court. There is then the question whether an alteration of article V, by the general convention device or other means, is inconsistent with the essence of federalism evolved in the course of 175 years. The answer to this question is the responsibility of Congress itself, fixed by the oaths of its members to uphold the Constitution. It is also the clear responsibility of Congress, if the general convention method were held valid and if the propriety of such a proposal as the current one were conceded, to prescribe the convention in terms of genuinely representative delegations under the *Baker* rule. And, finally, it is within the reasonable discretion of Congress, in the event of such a convention, to stipulate unanimous approval of the results, in accordance with the action of ratification of the original Articles of Confederation and with the final vote of the qualified state delegations to the Convention of 1787.

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106 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 423 (1793).
II

FEDERALISM AS REPRESENTATIVE GOVERNMENT

"Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question," Mr. Justice Brennan observed in Baker v. Carr.\(^{110}\) It is not necessary here to subject this renowned case to an exhaustive critique—this has already been done;\(^{111}\) but its basic propositions lead directly to the question of the degree to which representative government is part of the essence of federalism which, in the concept of the preceding section of this paper, is an exclusive concern of the people of the United States and their national government. It is on this ground that the second of the proposed amendments of the General Assembly of the States must be condemned—and this condemnation must rest upon the corpus of constitutional history as much as upon the variable premises in Baker.

The language of the proposed amendment has a plausible ring—it seeks to vest in the state legislatures the control of apportionment of membership in these legislatures.\(^{112}\) And the language of the majority opinion in Baker tends to encourage the advocates of this proposition, by emphasizing that the justiciability of malapportionment issues turns upon the combination of irrationality of the local law and unavailability of local remedy.\(^{113}\) But the flaw in the one instance is not unlike the inherent difficulty in proposed article V, namely, that the control sought by the proposed apportionment amendment would be vested in the legislatures and hence beyond the reach of the people. And the flaw in the second instance is that the majority opinion in Baker has accepted, all too uncritically, the strained and special rule laid down by Chief Justice Taney, and followed equally uncritically by later courts, as to what constitutes "political" questions beyond the judicial purview.\(^ {114}\)

THE GUARANTEE CLAUSE: ESSENCE AND ORIGIN

The Court, this writer submits, must ultimately—in consequence of the welter of rulings which have developed as a result of Baker\(^ {115}\)—

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\(^{110}\) Id. at 209.

\(^{111}\) Among the more successful efforts to place this holding in its proper context are: The Problem of Malapportionment: A Symposium on Baker v. Carr, 72 Yale L.J. 7 (1962); and the two issues devoted to the electoral process in 27 Law & Contemp. Prob. 157-327 (1962).

\(^{112}\) See Amending the Constitution to Strengthen the States in the Federal System, 36 State Gov't 13 (1963).

\(^{113}\) 369 U.S. 186, 198-204 (1962).

\(^{114}\) Cf. id. at 242 n.2 (Douglas, J., concurring).

reconsider the essence of the guarantee clause which it so quickly dismissed in that case. That clause was first introduced at the Convention of 1787 by Edmund Randolph in the same series of resolutions on the Virginia plan, to which reference has already been made. The resolution "that a Republican government & the territory of each State . . . ought to be guaranteed by the United States to each State" was accepted by the convention virtually as axiomatic; the only concern expressed by the delegates was that it might tend to perpetuate existing state constitutional processes which had outlived their value or called for reform. James Wilson proposed a revision of the resolution which appears substantially as the present clause, and this virtually closed debate on the matter. The clause, now section 4 of article IV of the Constitution, thus provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The wording of the clause is significant in several respects. First, as to the general intent of the provision, the convention's committee on detail advised that it was "(1) to prevent establishment of any government, not republican (2) [3] to protect each state against internal commotion and (3) [2] against external invasion." The Founding Fathers were, from the record of the convention debates, particularly concerned with the latter two subjects; but enough had been said about the first subject to make it clear that they viewed anti-republicanism as equally basic an evil to be combatted. Domestic violence was a subject fresh in the

116 1 Farrand 20-23.
117 2 Farrand 47-49. One of the few, and certainly the most comprehensive, studies of this clause is Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513 (1962). The present writer, while working independently in the same source material, wishes to acknowledge the corroborating research on this subject to be found in the Bonfield article. Professor Bonfield has extended his observations in Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government, 50 Calif. L. Rev. 245 (1962).
118 2 Farrand 48-49.
119 Id. at 148.
120 See 4 Farrand 122 (2d ed. 1937) for citations regarding these debates.
121 Cf. the objection to Randolph's resolution voiced by William Houston of Georgia: he was "afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised & amended." 2 Farrand 48. See note 128 infra.
delegates' memories. Shays' rebellion in Massachusetts had taken place the previous winter.\footnote{122} Disputes between Connecticut settlers and the Pennsylvania government over the settlers' claims in Pennsylvania's Wyoming valley had flared sporadically between 1782 and 1787.\footnote{128} Externally, Spanish threats in Florida loomed large in Georgia's eyes,\footnote{124} and the British power on the Great Lakes continued to worry the northern states.\footnote{125} It is readily understandable, therefore, that dangers of internal and external force should be a subject which the convention wished to make a national one. But by this very fact, the initial provision in the clause for the protection of "a Republican Form of Government" assumes an equal importance as a responsibility of the national authority.

Second, then, is the significance of the reference to this national authority—"the United States shall guarantee" this republican form of government. The guarantee is not the exclusive concern of Congress, whose powers are set out in article I; nor of the executive, whose powers are set out in article II; nor of the judiciary, whose powers are set out in article III. Article IV, in which this guarantee appears, concerns the relations of the states to each other and to the national government in the federal system. Section 1 contains the "full faith and credit" clause and empowers Congress to implement it; section 2 prescribes the privileges and immunities of citizens of the several states and has derived its force throughout the national history from Supreme Court interpretation;\footnote{126} section 3 concerns the admission of new states and vests the authority to admit them in the Congress, as well as vesting in Congress a general authority over territories. But section 4 is a general power vested in the national government—which of necessity and logic means in any and all branches of that government established by the Constitution.

GUARANTEE CLAUSE AS INTERPRETED—AN EXCLUSIVELY "POLITICAL" CONCERN?

If the intention of the guarantee is that a republican form of government is to be a constitutional concern of the federal government, it is clearly not a "political" question but a legal one. It may not be exclusively judicial but under the language of the clause, it may also

\footnote{122} Warren, The Making of the Constitution 30-32 (1928).
\footnote{128} 6 Avery, A History of the United States and its People 387-89 (1909).
\footnote{124} 1 Morison & Commager, The Growth of the American Republic 270 (1942).
\footnote{125} See Bemis, A Diplomatic History of the United States 70, 73 (4th ed. 1955).
\footnote{126} Corwin 686-92.
be legislative and/or executive. That it should have come to be held to be “political” is an unfortunate result of Chief Justice Taney’s opinion in the old case of Luther v. Borden\textsuperscript{127}—and a misreading of that opinion as well. The case arose in Rhode Island and developed from Dorr’s rebellion in 1841-1842; \textit{i.e.}, from the type of “domestic violence” to which reference is made in the third proviso of section 4 of article IV.\textsuperscript{128} The state’s fundamental charter, as a matter of fact, was its colonial charter of 1663 which it did not replace with a new constitution until 1843.\textsuperscript{129} In 1841 a group of state residents, disfranchised under the ancient charter, took the initiative in organizing a constitutional convention, which in turn adopted a new constitution and elected Thomas W. Dorr as the governor. An abortive attempt was made to carry the constitution into effect by force, but the rebellion was quickly frustrated.

In the case which came before the Taney court, one Martin Luther, a supporter of Dorr and a participant in the rebellion, sought to maintain an action in trespass against Luther Borden and others who, relying upon the authority of the incumbent “charter government,” had broken into Luther’s house to arrest him. The plaintiff insisted that the people of the state of Rhode Island had by sovereign action replaced the old charter, and hence that Borden and his associates were without lawful authority to come upon his property.\textsuperscript{130} The question therefore presented to the Court was, as the Chief Justice stated it, whether any legality obtained for acts done under the constitution adopted by the popular convention in 1842 or whether the constitution of 1843, sanctioned by the “charter government,” was the proper terminal date for the latter government.\textsuperscript{131} This, clearly, was not the same as a question whether the United States was being required to guarantee to Rhode Island a republican form of government; the plaintiffs either neglected, or were unable, to raise a constitutional question in such a form as would have focused the Court’s attention upon the guarantee question. Thus, Taney was confined (or confined himself) to the


\textsuperscript{128}It is worth remembering that Gouverneur Morris objected to the original proposal of the guarantee in the Convention of 1787 by stating that he did not wish to guarantee Rhode Island’s constitution. 2 Farrand 47. And Rhode Island, it will be recalled, did not participate in the Convention.

\textsuperscript{129}48 U.S. (7 How.) at 35.

\textsuperscript{130}Id. at 35-37.

\textsuperscript{131}See id. at 46.
question of legitimacy under the circumstances of the constitutional upheaval of this whole period in Rhode Island. And he found the Court estopped from assuming the function vested in the United States under section 4 of article IV because another federal agency—the executive—had already elected to settle the question acting under authority conferred upon that agency by Congress.\textsuperscript{132} Taney's opinion, however, requires some attention, since it was the progenitor of a succession of opinions tending to establish the concept of the "political" question:

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not: and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State . . . that, according to the law and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment . . .

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a state government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest. . . .

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily

\textsuperscript{132} Id. at 43. The statute is quoted in the opinion in its original form. In its modern form it appears in 10 U.S.C. § 331 (1958), and provides, in event of domestic disturbance in a particular state, for calling into federal service such of the militia of other states, in the number requested by that state, and using such of the armed forces, as he (the President) considers necessary to suppress the insurrection.
decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . .

So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. . . .

. . . . The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force.133

Relying upon Taney’s opinion, including his dictum, the majority opinion in Baker concluded that Luther had established "that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."134 This conclusion was not necessarily a valid one since the question in Baker was not whether the governmental process involving malapportionment was lawful (in the sense of being legitimate and not insurrectionary) but whether it was republican. Thus, Luther could only be concerned with the proviso in article IV, section 4, relating to domestic violence. Confined to this narrow issue, the Taney holding

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133 48 U.S. (7 How.) at 39, 40, 42-44.
134 369 U.S. at 223; cf. id. at 292-97 (Frankfurter, J., dissenting and analyzing Luther).
is a proper precedent. The point in reviewing at such length the role of *Luther* with respect to the guarantee proviso is to underline the proposition that that case is not applicable to the guarantee of a republican form of government. The proposition that judicially manageable standards are not available with regard to the republican form of government proviso, then, may only mean that courts have been reluctant to enter this area, but it does not mean that it may not be a legal question.

Taney's statement that the language of article IV, section 4, "has treated the subject as political in its nature," and that "Congress must necessarily decide what government is established in the State before it can determine whether it is republican," is gratuitous as well as dictum. Article IV vests certain specific responsibilities in Congress in sections 1 and 3; the mention of Congress in these clauses merely underlines the significance of the lack of such mention in section 4. It is obvious that Congress is concerned with the application of the guarantee clause, and as a practical matter, legislative action may be the most practical means of implementing the clause. But such action is properly limited to particular subjects within the area of responsibility envisioned by the clause; the act of 1795, to which the Taney opinion refers, is addressed only to the specific issue of domestic violence. Therefore, until Congress acts, in like manner, with regard to the republican form of government proviso, that subject matter may still be thought of as being a legal issue open even to the federal judiciary. Surely, as was pointed out earlier, the language of the guarantee clause does not support the conclusion that all determinations thereunder are within the exclusive province of Congress—especially not the determination of what violates the republican form of government proviso. In any event, the guarantee clause is an example of *federal* power, be it judicial, congressional or executive, over the states in the areas specified in article IV.

The Court in *Baker*, having persuaded itself that the guarantee clause was exclusively "political," failed to spell out the *complete* federal authority under that clause and based its opinion on the provisions of

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135 48 U.S. (7 How.) at 42.

136 The present writer contends, as is evident from his treatment of the *Luther* case and the subsequent reliance upon it, that the term "political" is properly applicable only to those functions of the legislature which consist essentially of a choice of alternative courses in terms of policy (or party) preferences, and that this legislative function is distinguishable from the legal; i.e., lawmaking or statute-enacting function in discharge of constitutional obligations.
the fourteenth amendment which it deemed applicable.\textsuperscript{137} As is suggested below, this amendment may actually be considered as complementing the responsibilities settled upon the states and the federal government by article IV, section 4. This depends upon a proper re-examination of Luther in terms of the foregoing review. But that the draftsmen of the proposed amendment now advocated by the General Assembly of the States have not overlooked the latent federal power in the guarantee clause is clear in its wording: "No provision of this Constitution [\textit{i.e.}, article IV, section 4] or any amendment thereto [\textit{i.e.}, the fourteenth] shall restrict or limit any state"\textsuperscript{138} in the matter of legislative apportionment. The complementary section of the proposal would remove from the judiciary the authority to entertain any suit at law or equity on questions of apportionment.\textsuperscript{139}

**Representative Government in Jeopardy**

The current proposal, then, challenges the federal concept of our governmental structure at three points. In the first place, it recognizes, if the Court as yet does not, the true breadth of the federal authority vested in article IV, section 4. Secondly, it concedes, by specific reference, that this authority may extend to the judicial as well as to the legislative and executive branches of the federal government. But thirdly in sum, it is intended to excise from American federalism the concept of representative government. If representative government is the essence of federalism—as this discussion has assumed and as is examined below—then the proposed amendment must be indicted as subversive of the entire constitutional structure.

That representative government is the essence of federalism is readily discerned in the specific provisions of the Constitution itself. Indeed, our history demonstrates that representation in terms of a broadened suffrage has become more fundamental a requirement of federalism with the passing of time. Thus, manhood suffrage became universal in 1870;\textsuperscript{140} it was extended to women in 1920;\textsuperscript{141} and, it was extended in 1961 to the residents of the District of Columbia with reference to presidential elections.\textsuperscript{142} The present policy of the United States, to

\textsuperscript{137} 369 U.S. at 237.
\textsuperscript{138} See Amending the Constitution, supra note 112, at 14.
\textsuperscript{139} Ibid.
\textsuperscript{140} U.S. Const, amend. XV, § 1.
\textsuperscript{141} U.S. Const, amend. XIX.
\textsuperscript{142} U.S. Const, amend. XXIII.
minimize or eliminate any restraints upon the exercise of suffrage, is reflected in the imminent ratification of the twenty-fourth amendment which would outlaw a poll tax in federal elections. And as the celebrated case of *Gomillion v. Lightfoot*\(^{143}\) has demonstrated, in a holding which may well be regarded as a corollary of *Baker*, impediments to the exercise of suffrage which may be struck down by the courts under the fourteenth amendment include any which unreasonably tend to reduce the effectiveness of the exercise by preventing the equal impact of the vote upon the electoral system.

While it is true that the provision of article I, section 5, that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" has encouraged Congress under the guise of professional courtesy to overlook circumstances which frustrate the representative process,\(^{144}\) this does not diminish the validity of the proposition that the intent of the Constitution as a whole—with article IV, section 4, read in the context of the fourteenth, fifteenth, twentieth and twenty-third amendments—is to assert representation as the essence of federalism. For, if the suffrage guarantees are to be of practical effect, the exercise of the suffrage must reasonably have equal effect for all voters. Thus said Mr. Justice Brennan:

> These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 [Tennessee] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . .\(^{145}\)

The circumstances under which the Convention of 1787 accepted the provision which became article IV, section 4—with a question only as to its possible delimiting of the federal power *vis-à-vis* unregenerate state constitutionalism\(^{146}\)—established the principle that a republican form of government was an enforceable requirement of membership in the federal union. Whether "republican" equates with representative

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144 Corwin 95-96.
145 369 U.S. at 207-08.
146 See note 117 supra and accompanying text.
government, and whether this in turn is synonymous with reasonable degrees of equality of effect of the voter’s exercise of his suffrage, has presumably been established by the rules in *Gomillion* and in *Baker*. This being so, the proposal of the General Assembly of the States is inimical to the rationale of federalism.

The current proposal is an apt illustration of Hamilton’s warning that state legislatures would seek to alter the Constitution only with a view to the increase of their own powers. But, in the context of the preceding section of this discussion, the proposal must be condemned as an improper attempt on the part of the states to intrude upon the area of action which the people of the United States have established as their exclusive domain. These people may, of course, elect to accede to state challenges of the exclusiveness or paramountcy of federal jurisdiction—witness the tidelands oil statute or the Taft-Hartley Act. And they may choose, wisely or unwisely, to limit their own governmental powers—witness the twenty-second amendment. But in each case it is the act of the people of the United States, not of the states or their legislatures. The present proposal, by which the states seek to withdraw from the people of the United States control over an obligation which the people made a condition of state competence within the federal system, can come legitimately only from the party which established the condition originally.

III

**Court of the Union—An Invitation to Chaos**

The most frivolous of all the proposals here being reviewed, and the one which most clearly reveals the objective of subjugating the federal system to state control, is the one seeking to establish a so-called Court of the Union. Merely to describe a fifty-judge court, or even one with thirty-seven judges on its bench if a three-fourths majority for a quorum is involved, is ludicrous enough. To propose that such a court be an extraordinary agency within the federal system would reduce federal judicial processes and administrations to a shambles, not to mention

147 1 Farrand 558.


150 It would obviously be within the federal system since it would deal with federal questions and, as proposed in one section of the draft amendment, would be financed by Congress.
what it would do to the business of the state courts.\textsuperscript{151} Its greatest mischief, of course, is in the same error which characterizes the other two proposals: that they seek, singly and collectively, to subvert the entire system of federalism and to presume upon what are the exclusive prerogatives of the people of the United States. The greater evil in the present proposal is its assumption that the states should somehow and for some reason have a particular degree of immunity from the responsibilities of membership in the union.

The proposal for a Court of the Union would do violence to the basic framework upon which the three major branches of national government were devised in the Constitution, as well as to the mature system of operation which has grown from 175 years of experience. It would first of all, unsettle the organization of the judiciary as set forth in the first section of article III: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It would further, as would the second section of the proposed malapportionment amendment, delimit section 2 of article III by introducing a negative proviso into the statement of jurisdiction.\textsuperscript{152} Finally, it would contradict the logical and well-proved process, provided in article II, section 2, for appointment of judicial officers of the United States by the President, by and with the consent of the Senate.

Debate at the Constitutional Convention bore directly upon decision-making at the stage of last resort—the power of the Supreme Court over state actions affecting the federal constitution. It was the ultimate stage of an orderly and balanced federal system; if the Court of the Union proposal were accepted, it would tip that balance in the direction of inconsistency and chaos. As will be seen in the next succeeding paragraphs, the convention proceedings lay bare, in three separate series of discussions, progressively logical reasons why a supreme tribunal should be established. First, that as a general proposition, there should be some body to pronounce legislative acts void; that body was the judiciary. Second, that either the Congress or the federal judiciary should have the power to negative state legislative acts; a proposal so to empower the Congress was defeated. And finally, that only a single supreme tribunal could settle with sufficient finality and consistency, the issues arising from the several and diverse state jurisdictions.


\textsuperscript{152} Cf. Corwin 543-44, 554-55, 578-82, 592-610.
That review of all acts of the federal and state governments which raised a question of federal constitutionality would be a responsibility of the federal judiciary was assumed by Hamilton, who argued in support of article III:

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.\[153\]

Perhaps the most significant discussion of the ultimate nature of the federal judicial power took place at the Convention of 1787 in connection with the debate on the powers of Congress. The proposal which precipitated the discussion was that Congress should have the following right: "To negative all laws passed by the several States contravening in the opinion of the Nat: Legislature the articles of Union, or any treaties

\[153\] The Federalist No. 78, at 524-25 (Cooke ed. 1961) (Hamilton).
subsisting under the authority of ye Union."154 Madison favored this proposal declaring that:

The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. . . . They can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legislr or be set aside by the National Tribunals.155

But Gouverneur Morris opposed vesting the power in Congress stating that a law which ought to be repealed "will be set aside in the Judiciary department and if that security should fail; [it] may be repealed by a National Law."156 There being no contradiction of this observation, the proposed congressional review power was voted down by the Convention, seven states to three.157

To the Founding Fathers, it seemed obvious that a single supreme tribunal was required to settle the issues raised from such a diversity of jurisdictions as even thirteen states presented. The principle was very simply stated by Hamilton:

A circumstance, which crowns the defects of the confederation, remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State, a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatures, all nations have found it necessary to establish one court, paramount to the rest—possessing a general superintendance, and authorized to settle and declare in the last resort, an uniform rule of civil justice.

This is more necessary where the frame of the government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts. In this case if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend, that the provisions of the particular laws might be preferred to those of the general laws; for nothing is more natural

154 2 Farrand 27.
155 Ibid. (Emphasis added.)
156 Id. at 28. (Emphasis added.)
157 Ibid.
to men in office, than to look with peculiar deference towards that authority to which they owe their official existence.\textsuperscript{158}

One hundred and seventy-five years later, there is little to add to Hamilton’s statement.

The renowned Judiciary Act of 1789, drafted by the first Congress in implementation of, and within recent memory of, the intentions of the supremacy concept in article III, section 2, stipulated that in the case of final judgment in a state court,

where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution . . .

[the judgment] may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.\textsuperscript{159}

Such issues are validly presented to the Supreme Court, said John Marshall, “whenever its correct decision depends upon the construction of [the Constitution] . . .”\textsuperscript{160} The thread of jurisprudence from \textit{Marbury v. Madison}\textsuperscript{161} to the present has been unbroken, and is too well established in constitutional history to require repeating here.

Thus, diversity of state opinion having been resolved in favor of the establishment of a supreme tribunal, and the authority of the Supreme Court continually being implemented, it remained for the proponents of the Court of the Union to concoct this confederating example of state arbitration over federal constitutional questions. With specific reference to all of the proposed amendments, state courts are probably even less competent than state legislatures to participate in a process of federal government. The sole competence of any state court, on a constitutional question, lies in adjudicating the issue in terms of its own jurisprudence. If—as the Constitution, the Judiciary Act of 1789 and the overwhelming weight of judicial doctrine\textsuperscript{162} throughout our history has set out—the question then requires adjudication in terms of the federal constitution, it goes beyond the area of state court competence. The proposal for a so-called Court of the Union is in the highest degree irrational; either its intention is to give all the state courts of last resort a right to review the question on which one state court had the sole competence in terms

\textsuperscript{158} The Federalist No. 22, at 143-44 (Cooke ed. 1961) (Hamilton).

\textsuperscript{159} 1 Stat. 85 (1789). The current provision in 28 U.S.C. § 1257 (1958) is more comprehensive in scope.

\textsuperscript{160} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).

\textsuperscript{161} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{162} Cf. Erie R.R. v. Tompkins, 304 U.S. 64 (1938), an opinion which, of course, substantially expanded the influence of state common law in federal litigation.
of its own jurisprudence, or it is intended to give these fifty courts a collective right of review of certain federal decisions which can really vest their competence only in one supreme federal court. The proposed amendment flouts the fundamental concept of any government under law, and a concept which the states regard as fundamental in their own constitutional systems—that the ultimate determination of the validity of any government function within that system is to be made by the highest court within that system. After that determination, when the only remaining question is one of validity within the federal system, the United States Supreme Court alone can properly make such a determination.

To pursue this matter further would only serve to belabor it. The proposal, which would destroy the basic operating principle of American federalism that the ultimate determination of federal constitutional questions rests with the Supreme Court of the United States, would, indeed, lead to chaos.163

CONCLUSION

Surely, the inherent dangers of these three proposed amendments are brought to the fore just as much when they are considered as a package as when they were considered individually in the light of constitutional history. Whatever the merits of the arguments based on the non-use of the convention proviso, the “political thicket” of reapportionment cases, and the ever changing and ever changeable Supreme Court, the manner in which these proposed amendments collectively seek to remedy ascendant federalism is alarmingly regressive. The interests of the “people of the United States” would be subjected to the still prevalent parochial interests of fifty diverse state sovereignties.

The road to chaos, or the whirlwind to be reaped, has not been brought across the path of the American people with such determination as this since the Civil War. That event of a century ago, indeed, settled, by force of circumstances as much as by force of arms, the fundamental positions of the states and the federal government in the federal system. The matter was settled at that time by a variety of determinants—economic, political and social as well as military—but all pointing

163 Cf. Report of the Conference of Chief Justices 4 (1958), and Mr. Justice Holmes’ view: “I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” Holmes, Collected Legal Papers 295-96 (1920).
ultimately to the proposition that a nation of such size and diversity could not function effectively except as a unit, or a union; and if a union, then subject to the ultimate assumption of power in matters of national concern by the national government. The issue of the sixties of the last century, as one student of constitutional law has put it, was the choice between the jurisprudence of Marshall, which took the supremacy clause as its keynote, and that of Taney, which took the tenth amendment.\footnote{Corwin xii.} Or, as the same scholar restates it, the choice was between a competitive concept of federalism and a cooperative concept.\footnote{Id. at xiv.} If the settled principle of the cooperative concept has developed in the past generation as the prevailing one, it is because the competitive issue has been resolved finally in favor of the national entity. The Supreme Court itself expressed the proposition in 1913 as follows:

"Every proposition that a nation of such size and diversity could not function effectively except as a unit, or a union; and if a union, then subject to the ultimate assumption of power in matters of national concern by the national government. The issue of the sixties of the last century, as one student of constitutional law has put it, was the choice between the jurisprudence of Marshall, which took the supremacy clause as its keynote, and that of Taney, which took the tenth amendment.\footnote{Corwin xii.} Or, as the same scholar restates it, the choice was between a competitive concept of federalism and a cooperative concept.\footnote{Id. at xiv.} If the settled principle of the cooperative concept has developed in the past generation as the prevailing one, it is because the competitive issue has been resolved finally in favor of the national entity. The Supreme Court itself expressed the proposition in 1913 as follows:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the State and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.\footnote{Hoke v. United States, 227 U.S. 308, 322 (1913).}

The fact is, as respects the federal power, that it is a power defined in part by the original concept of the Convention of 1787 and of the Congresses which have drafted the various amendments which have been added to the Constitution; and in part by the experience and perspectives reflecting the changes in American society over 175 years. But in all instances, federal questions have been the proper and ultimately the exclusive concern of the federal government—whether it be the legislative, executive or judicial branch. And federal questions include any and all questions which involve the position of the states in the federal system, or the compatibility of state policies with federal policies which they affect. This cannot be otherwise—and it is not a matter of competition or cooperation; for, from the outset the nature of the system proposed by the Constitution has been fundamentally different from that obtaining under the Articles of Confederation.

Consider the fundamental difference between the two constitutions: the one being articles unanimously agreed to by the thirteen states and the other being an instrument drafted by the people of the United States. Article 2 under the Articles of Confederation clearly stated: "Every
State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.” Article 3 described the intention of the Confederation: “The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare.” The sense of article 3 is the sense of the preamble of the Constitution; figuratively, if not literally, it could be urged that in the preamble the people of the United States themselves announced this undertaking to attain the goals which the states acting in a league of friendship and commerce had been unable to reach. What is more important, however, is that the assertiveness of state “sovereignty, freedom and independence” in article 2 is not repeated in the Constitution of 1787, but only appears in the tenth amendment.167

Article 2 demonstrates the narrow intentions of the states in creating a “perpetual union”—expressly delegating to the Continental Congress concurrent or joint authority to discharge foreign relations and to wage war (article 6),168 reserving control of the armed forces in the states (article 7), and providing for the financing of the war and the other national expenses from a “common treasury” to be maintained at “the authority and direction of the legislatures of the several States” (article 8). Coinage was to be made uniform by Congress—but it was both a national and a state coinage; and Congress could regulate trade with the Indian tribes “provided that the legislative right of any state within its own limits be not infringed”; and in recess, the Congress was to appoint an executive “Committee of the States” to discharge national affairs (article 9). There were no executive powers; and as for judicial powers, there were only two of the most limited nature, both set out in article 9. Prize courts were to be set up to deal with capture of enemy merchants during the war; while in the case of interstate disputes a system which resembled a process of arbitration rather than adjudication was elaborately described.169

To review the basic features of the Articles of Confederation is to demonstrate the fundamental differences between the league of the states and the federal union for which the people themselves ordained and

167 Jensen, The Articles of Confederation, ch. 7 (2d ed. 1948).
169 Cf. id. ch. 6, on interstate disputes before Congress; also the renowned appendix of unreported Supreme Court opinions and pre-constitutional cases in 131 U.S. (1889).
established the Constitution. The details are familiar constitutional history—although we appear to be courting conditions reminiscent of Santayana's aphorism that those who ignore history must suffer the penalty of repeating it. In the present context, it is worth pointing out that by this Constitution, the people of the United States: (1) granted much more definite and exclusive legislative powers to the national government and vested them in Congress; (2) created a new body of governmental powers—executive—and vested these powers in the President; and (3) established a distinct judicial power and vested it in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Articles of Confederation bound together thirteen sovereignties in certain limited areas of action; the Constitution established a federal sovereignty which was paramount to the state sovereignties in all matters which time and experience should demonstrate to be of national concern. The Confederation failed of full effectiveness precisely at these points where the Constitution provided the essential national strength. The 1963 proposals of the General Assembly of the States would remove that essential strength and return us to the limited capabilities of a Confederation.
JUDICIAL REVIEW OF DISABILITY DETERMINATIONS

LANDON H. ROWLAND*

Examining the disability benefit amendments to the Social Security Act and analyzing the role of the Secretary of Health, Education and Welfare in rendering disability determinations, the author contends that the courts have engaged in the administration of the disability benefit program contrary to congressional intent. Citing pre-emption of the Secretary's right to define evidentiary standards as indicative of judicial intrusion, the author concludes that the Secretary's statutory discretion has been substantially abridged by reviewing courts.

INTRODUCTION

The disability benefit amendments to the Social Security Act have provided the federal courts with a severe test of their ability to deal effectively with an administrative process. In the nine years since Congress passed the first part of the disability program, agency determinations have fared poorly in the reviewing courts, to the extent that 35.3 per cent of the decisions rendered by the district courts have been reversals. While this percentage of reversals is unusual in itself, what is more significant is the fact that the percentage reflects a trend toward

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<table>
<thead>
<tr>
<th>Year</th>
<th>Total Decisions Rendered by District Courts Through June 1963</th>
<th>Reversals</th>
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<tr>
<td>1955-58</td>
<td>24</td>
<td>4</td>
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<tr>
<td>1959</td>
<td>53</td>
<td>14</td>
</tr>
<tr>
<td>1960</td>
<td>152</td>
<td>56</td>
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<tr>
<td>1961</td>
<td>210</td>
<td>83</td>
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<tr>
<td>1962</td>
<td>264</td>
<td>88</td>
</tr>
<tr>
<td>1963 (6 months)</td>
<td>166</td>
<td>62</td>
</tr>
<tr>
<td></td>
<td>869</td>
<td>307</td>
</tr>
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</table>

The percentage of 35.3 was derived by dividing the total number of decisions rendered by district courts in disability cases by the number of reversals between 1955 and June 1963.

For a breakdown by state and circuit see Appendix. These figures and all others not attributed to different sources were provided by Arthur E. Hess, Director, Division of Disability Operations, Social Security Administration, Department of Health, Education and Welfare, Baltimore, Maryland.
increasing judicial review of disability determinations. Furthermore, it is noteworthy that there has also appeared a trend toward use of the remand as a more subtle means of interfering with agency action.

The disability program thus offers a fresh opportunity to observe a dispensing agency adapt the claims of efficient administration to the agency's statutory premises. Since these labors of accommodation have been most instructively demonstrated as disability determinations have been reviewed by the courts, the following discussion will be principally concerned with judicial review. At the outset, however, some necessary attention will be given, first, to the statutory pattern, second, to the administrative pattern, and third, to those interests which the legislative history shows are reflected in the law.

I
THE STATUTORY PATTERN

There were repeated attempts to add the disability provisions to the Social Security program prior to the 1954 enactment. Specific statutory language and the all-important definition of disability in the present law came from the 1949 bill. As contemplated by that bill rulings on applications for benefits would have been by federal administrators. This aspect of the legislation met great opposition on the floor of the House when the proposal was re-introduced in 1952 because it was feared that federal administration would lead to indirect supervision of doctors by the government and to socialized medicine. Controversy over who should ad-

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Disability Cases Remanded by District Courts Through June 1963

<table>
<thead>
<tr>
<th>Year</th>
<th>At Request of Department</th>
<th>At Request of Plaintiff</th>
<th>By Court Direction</th>
<th>Total Remands</th>
<th>Remanded Cases Pending Before Appeals Council (End of Period)</th>
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<tr>
<td>July 1955-Dec. 1959</td>
<td>162</td>
<td>7</td>
<td>14</td>
<td>183</td>
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<td>138</td>
<td>229</td>
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<tr>
<td>1961</td>
<td>46</td>
<td>19</td>
<td>33</td>
<td>98</td>
<td>127</td>
</tr>
<tr>
<td>1962</td>
<td>64</td>
<td>24</td>
<td>43</td>
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<tr>
<td>1963 (6 months)</td>
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<td>674</td>
<td>727</td>
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</tbody>
</table>

6 98 Cong. Rec. 5471, 5472, 5475, 5482 (1952).
minister the program and over the merits of disability benefits prevented passage of the 1952 legislation.

THE 1954 AMENDMENTS

The amendments in 1954 represented an attempt to accommodate both the goals and the criticisms of earlier proposals. These amendments provided that a person totally disabled could have his insured status frozen at the time of disability.\(^7\) Since Old Age Survivors Insurance benefits are based on an average wage received in employment covered by the Social Security Act,\(^8\) the new law eliminated the period of disability from computation of those benefits. This exclusion of an unproductive period from the worker's record of contributions was called the "disability freeze"; it was a version of waiver of premium provisions used in private life insurance to continue coverage of the disabled worker without premium payments.\(^9\)

To qualify for the "freeze" the claimant had to meet insured status or coverage qualifications.\(^10\) Initially these requirements emphasized recency of coverage in that six of the last thirteen and twenty of the last forty quarters had to be quarters of coverage under title II of the act.\(^11\) Part of the recency of work test—six out of thirteen—was eliminated in 1958 and replaced by a requirement that the claimant be merely a fully insured individual.\(^12\) Elimination of the former test was thought to help those with progressive illnesses since such claimants would have had to stop work and lose their insured status before the ailment was severe enough to meet the statutory definition.\(^13\)

\(^13\) See H.R. Rep. No. 2288, 85th Cong., 2d Sess. 14-15 (1958). Progressive liberalization of the coverage requirements has been paralleled by congressional extension of retroactivity provisions in an obvious effort to include all persons who might be disabled. SSA § 216(i)(4), added by 68 Stat. 1081 (1954), as amended, 42 U.S.C. § 416(i)(4) (Supp. IV, 1963). The tendency to make the technical obstacles to benefits less formidable should be compared with congressional refusal to re-examine the definition of disability. See notes 18 and 78 infra.
Besides these technical aspects, the 1954 bill required referral of disabled persons to state rehabilitation agencies in order that "the maximum number of disabled individuals may be restored to productive activity." This section evidences the strong interest Congress showed in linking the disability program to established rehabilitation plans. Congressional adoption of the 1954 arrangement for state determination of disability seemed particularly appropriate since the state agency would also be administering rehabilitation plans approved under the Vocational Rehabilitation Act. Speaking of state agencies acting in this way, the House Committee on Ways and Means reported:

This would serve the dual purpose of encouraging rehabilitation contacts by disabled persons and would offer the advantages of the medical and vocational case development undertaken routinely by the rehabilitation agencies. These agencies have well-established relationships with the medical profession and would remove the major load of case development from the Department.

The definition of disability is the crucial section of the 1954 statute. Under the law the claimant is disabled if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." The phrase "long continued and indefinite duration" was preferred by Congress to the word "permanent," which was used in the unsuccessful bills, because it was felt that the earlier language discouraged rehabilitation efforts. The statute made it clear that an individual was not to be considered disabled unless he furnished such proof as the Secretary required.

THE 1956 AMENDMENTS

Although the 1956 amendments which provided for monthly disability insurance cash benefits did not bring serious change to the administrative scheme enacted in 1954, certain minor modifications were enacted. For example, the blindness qualification, a prima facie disability under

15 Ibid.
the earlier law,\textsuperscript{21} was changed so that even those who were "blind" had to meet the statutory definition of disability to get the monthly benefit.\textsuperscript{22} The cash benefit was also limited to those between fifty and sixty-five years old.\textsuperscript{23} Benefits were payable beginning July 1, 1957, and there were retroactive payments if application was made before January 1, 1958.\textsuperscript{24} The applicant had to be fully insured under section 214, currently insured as the phrase was used in the "freeze," and twenty quarters of coverage in the last forty was needed.\textsuperscript{25} There was a six month waiting period before benefits would be paid.\textsuperscript{26}

There was also an "offset" whereby the cash payments were reduced when the individual was receiving another disability benefit or a state workmen's compensation payment.\textsuperscript{27} If the claimant refused rehabilitation under a state plan, benefits would be withheld.\textsuperscript{28} Furthermore, the 1956 law provided cash payments for disabled dependent children of retired or deceased workers if the child was disabled before he became eighteen.\textsuperscript{29} These benefits were governed by the same definition and administrative provisions as the benefits for the disabled worker.\textsuperscript{30} The cash benefits were financed by a $\frac{1}{2}$ per cent increase in the payroll tax contributed by employers and employees and a $\frac{3}{8}$ per cent increase levied on self-employed persons.\textsuperscript{31} Finally, to maintain the actuarial soundness of the Old Age Survivors Insurance program, a separate trust fund was established for the disability program.\textsuperscript{32}

**RECENT STATUTORY CHANGES**

The most significant change produced by the 1958 amendments was the elimination of the offset.\textsuperscript{33} These amendments also dropped the

\textsuperscript{23} Social Security Amendments of 1956 [hereinafter cited as 1956 Amendments], ch. 836, § 103(a), 70 Stat. 815.
\textsuperscript{24} 1956 Amendments, ch. 836, § 103(a), 70 Stat. 818.
\textsuperscript{26} Ibid.
\textsuperscript{27} 1956 Amendments, ch. 836, § 103(a), 70 Stat. 816.
\textsuperscript{28} 1956 Amendments § 103(b), 70 Stat. 817, 42 U.S.C. § 422(b) (1958).
\textsuperscript{31} 1956 Amendments § 103(e), 70 Stat. 820, as amended, 42 U.S.C. § 401(b) (1958).
\textsuperscript{32} Ibid.
“currently insured” requirement, the House Committee on Ways and Means noting that the recency of work test was harmful to persons with progressive illnesses since in such cases the claimant might lose his insured status before the impairment became sufficiently severe to meet the definition. Further, supplementary benefits were added for dependents of disability insurance beneficiaries. Finally, applications for the cash benefits were made retroactive for twelve months to prevent their loss where a beneficiary failed to file a timely application.

The amendments in 1960 changed the age requirement; the applicant is no longer required to be fifty years old to qualify for benefits. It is noteworthy that this particular change, as well as other recent changes in the program, occurred without increasing the contribution rate, a fact of some importance to Congresses persistently concerned about the actuarial soundness of the program.

The Kennedy administration has made the most recent proposals for liberalization of the program. It recommended substantial elimination of the prognosis requirement; i.e., that the impairment “be expected to result in death or to be of long-continued and indefinite duration.” Total disability would be presumed to satisfy the statute after six months; there would be no need to prove its prognosis. The recommendation was rejected by Congress because its effect might have been to add temporary sickness to the program’s coverage and endanger its actuarial soundness. Congress did, however, approve an extension from June 30, 1961, to June 30, 1962, in which applicants could file for a “freeze” beginning with the actual commencement of the impairment.

39 Executive Hearings on H.R. 4571 Before the House Committee on Ways and Means, 87th Cong., 1st Sess. 9 (1961).
40 Ibid.
II

THE ADMINISTRATIVE PATTERN

Applications for the "freeze" or cash benefits are filed with local district offices of the Social Security Administration.\(^4\) There, the applicant is advised about eligibility, insured status requirements, and the evidence necessary to establish his claim. If a person does not meet the insured status requirements or fails to submit any evidence to support his allegation of disability, his application does not require further processing.\(^5\) Other than a broad survey of the applicant's materials on these two points, the district office performs no review function and simply forwards the application to the appropriate state agency where the merits of the claim are considered.

A special disability unit of the state agency makes the determination according to standards provided by the Secretary of Health, Education and Welfare.\(^6\) This unit is a two-man team consisting of a physician and a non-medical specialist who is highly skilled in rehabilitation and non-medical factors.\(^7\) The physician reviews the medical evidence to see if the clinical facts (1) confirm the diagnosis made by the reporting physician; (2) describe the severity of the impairment, its beginning and course; (3) establish the extent of functional limitation; and (4) report the indicated treatment and the claimant's response to treatment.\(^8\) If the physician finds this evidence inconclusive he may ask the claimant or his doctor for additional material. An examination at government expense is authorized if the reviewing physician finds it necessary or helpful. Such outside examinations are performed by specialists in private practice under an


\(^{5}\) The Bureau itself makes some initial determinations. For cases not covered by state agreements, determinations are made in the Bureau's central office. In 1955 one out of four disability applications were sent to a state agency and in 1959 over four out of five went to a state agency for initial determination. The proportion sent to a state agency appears likely to increase. Fact Book 46, 119.

\(^{6}\) SSA § 221(a), added by 68 Stat. 1081 (1954), as amended, 42 U.S.C. § 421 (1958). See Model Agreement, like that usually signed with the states, in Fact Book 86-91. The terms of the agreement require the determination to be made by a medical consultant and by another individual or individuals qualified to interpret and evaluate medical reports relating to the physical or mental impairment and to determine the capacity of the claimant to engage in substantial gainful activity. Id. at 88.

\(^{7}\) Id. at 46, 83, 88.

\(^{8}\) Ibid.
agreement with the state agency. The non-medical member of the team then combines the physician's interpretation of the clinical facts with the applicant's potentialities for rehabilitation and employment. With substantial interplay between the two members, the evidence is weighed and a decision reached.

This decision and supporting matter are forwarded to the Bureau's Division of Disability Operations. Although determinations of state agencies that are unfavorable to the claimant may not be revised by the Bureau, some informal control is exercised on adverse decisions. The Bureau may raise a question and send it back for reconsideration. Substantial adjustment to conform to national standards is thus possible even though express review by the Bureau is prohibited by the statute. Determinations favorable to the claimant are not so gently treated since the law gives the Bureau power to reverse or revise such decisions.

Following review by the Administration, notice is sent to the claimant informing him of the decision and his rights to reconsideration and appeal. A claimant whose application for benefits has been denied by the state agency is entitled to a hearing. Prior to such a hearing before an examiner appointed by the Secretary, however, reconsideration by the state agency which denied the claim is required. The Subcommittee on the Administration of the Social Security Laws in its 1960 examination of the disability program objected to this requirement. It commented on the numerous levels of appeal already present in the program, on the inability of the claimant to examine the initial determination or the supporting evidence at this stage in contrast to the hearing where he is

48 Id. at 47, 88. For a case where such a consultant's examination was important as the evidence principally relied on in the agency's finding of nondisability, see Ferricks v. Flemming, 188 F. Supp. 656, 658 (E.D. Pa. 1960).
49 Fact Book 47.
51 Fact Book 4, 47.
52 Id. at 110-16.
54 Ibid.
entitled to examine the findings and the record, and finally on the possibility that mandatory reconsideration might be illegal under present law which seems to require a "hearing" after any decision the Secretary has rendered. 59

If reconsideration is unsatisfactory to the claimant, he may then proceed to a hearing with one of the hearing examiners. 60 Under the Regulations, the hearing examiner is to explore the issues completely, to receive into evidence testimony of witnesses and relevant documents, to allow the appellant reasonable time to present argument and examine witnesses, and generally conduct the proceedings so as to give the claimant a fair hearing. 61 If, as he may, the claimant waives his right to appear at a hearing and present his case, the hearing examiner decides the claim on the basis of the record from the state evaluation team 62 and "whatever additional relevant and material evidence the party or parties may present in writing for [his] consideration . . . ." 63 The hearing examiner makes his decision in writing affirming, reversing or modifying the prior decision; he may occasionally certify the case to the Appeals Council. 64

The claimant is given notice of his right to appeal within sixty days of the hearing examiner's decision. 65 Within ninety days of the notice to the claimant the Appeals Council may review on its own motion, 66 if the hearing examiner's decision appears to conflict with the law. In any appeal, if the Appeals Council decides the hearing examiner's determination is correct, it may deny the request for review. In such case the hearing examiner's decision stands as the Secretary's. 67

When review is granted, the procedure is much the same as that at the hearing level; i.e., the claimant has an opportunity to appear in person or

59 Ibid.
62 For cases suggesting the extent of the hearing examiner's reliance on the state determination, see Roberts v. Flemming, 187 F. Supp. 649, 651 (W.D. Mo. 1960), and Ferricks v. Flemming, 188 F. Supp. 656, 658 (E.D. Pa. 1960). There is some evidence that Congress intended the federal stages of the process to rely on "the medical and vocational case development" of these agencies. H.R. Rep. No. 1698, supra note 17, at 23-24 (1954). Thus, the hearing examiner would hardly be performing his usual and customary job.
by representative before the Appeals Council to present evidence and argument on the merits. 68 This decision of the Appeals Council, or that of the hearing examiner when the Appeals Council denies review, becomes the final decision of the Secretary. 69 The claimant’s administrative remedies are thus exhausted. He may obtain further review by starting a civil action in a federal district court within sixty days of notice of the Appeals Council action. 70

Finally, the Secretary is empowered to suspend payment of benefits if he believes an individual is no longer disabled; this suspension continues until a re-determination of disability is made or the Secretary believes that the disability has not ceased. 71

For a program processing disability claims at a rate of approximately 40,000 a month, 72 the administrative routine just described may seem to offer anything but speedy decisions. Even with the significant reductions in processing time from the early days of the program, the schedule for a disability determination seems unfortunately long and drawn out. This process hardly rewards the expectations of those who anticipate in this and similar mass benefit programs the prompt and efficient amelioration of personal and public ills.

III

The Legislative History of the Disability Program

Congress was concerned about the unpredictable character of its new adventure in social legislation when the first installment in the disability program was offered in 1954. Uncertainty about costs and difficult problems of application have continued to trouble the succeeding legislators who improved the disability benefits. 73 Those worries account for the defensive and carefully worded definition of “disability” found in the statute.

Repeated statements in the legislative history of the disability law are to the effect that the definition is “strict” or “conservative.” 74 Speaking

72 See Fact Book 148.
on the floor of the House in 1954, Congressman Reed, Chairman of the House Ways and Means Committee, reiterated the strict character of the statutory language by emphasizing that the disability must be medically determinable, must rest on medical rather than non-medical factors, and there must be present inability to engage in "substantially gainful work." The system was largely conceived to meet the problems of the permanently disabled. Thus, some parts of the statute are rationalized by their elimination of the "temporarily" disabled from the ranks of potential beneficiaries. The prognosis requirement and the waiting period were designed to have that effect.

Several considerations seemed to justify the congressional attitude. Speculation that a liberal definition and its loose application would endanger the Old-Age Survivors Insurance trust fund has persisted in the debates and in testimony before the congressional committees. This speculation was especially dramatic and appealing when the 1956 amendments adding cash benefits were proposed. Uneasiness about the possible danger to the established program finally led Congress to place disability funds in a separate trust.

The difficult medico-legal judgment required by the disability scheme presented further problems. Congressman Kean, the sponsor of the 1952 bill, noting dissatisfaction with medical evidence, commented on the duty of the administrator under the proposed 1952 law to weigh the doctor's judgment as any other item of proof and to develop uniform medical guides. Former Secretary Ribicoff's testimony on a proposal to drop the definition's prognosis requirement was based on the unreliability of evidence on this point. The dynamic nature of medical science and disability concepts was similarly troublesome. Though he was speaking primarily on the addition of cash benefits to the 1954 legislation, Nelson Rockefeller, then Under-Secretary of Health, Education and Welfare, testified that the problem of determining what is long term disability

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75 100 Cong. Rec. 7429 (1954).
82 98 Cong. Rec. 5473 (1952).
becomes increasingly difficult as medical science advances and rehabilitation becomes more effective.\textsuperscript{84} The difficulty with medical constituents of one kind or another becomes an excuse for erring on the side of exclusion. A conservative definition, it was thought, would leave more of the uncertain cases to other programs.

A congressional apprehension that the scheme would become another type of unemployment benefit led to the requirement that the claimant be unable "to engage in any substantial gainful activity."\textsuperscript{85} It is to be noted that the statute did not contemplate an occupational definition.\textsuperscript{86} That is to say, the law will not give benefits if the claimant is merely unable to work at his old job. The program was not meant to be insurance of employment but insurance against disability.\textsuperscript{87} Notwithstanding these intentions, however, Congress seemed aware that there were questions as to what constitutes such "activity" within the limited definition of the statute. Testifying on the 1954 program, Oveta Culp Hobby, then Secretary of Health, Education and Welfare, suggested a standard: The claimant must be unable to do a job that he might be retrained for at the vocational rehabilitation centers.\textsuperscript{88} Though there is no indication that Congress approved this standard, her statement is very helpful. It indicates the exact role rehabilitation was to have in the administrative process; it may also be taken to show the belief that the law was directed to the permanently disabled.

At this juncture the experience in workmen's compensation may be appropriately introduced to illustrate several problems with the disability concept and the implicit statutory goal of rehabilitation. It has been observed that the disability concept is a blend of two ingredients: the first being disability in the medical sense evidenced by medical testimony that the claimant cannot use a muscle or make certain movements; the second being inability to earn wages.\textsuperscript{89} Thus, inability to get work, traceable to

\textsuperscript{84} Hearings on H.R. 7199 Before the House Committee on Ways and Means, 83d Cong., 2d Sess. 138 (1954).


\textsuperscript{86} 100 Cong. Rec. 7444-45 (1954).

\textsuperscript{87} Hearings on H.R. 7225 Before the Senate Committee on Finance, 84th Cong., 2d Sess. 37 (1956). The example was given of a farm hand who could not do farm work but who might be a watchman. He was said not to be disabled even if such a job were not available. Ibid.

\textsuperscript{88} Hearings on H.R. 7199, supra note 84, at 68.

\textsuperscript{89} 2 Larson, The Law of Workmen's Compensation § 57.10 (1961) [hereinafter cited as Larson].
an injury or impairment, may be as effective in establishing disability as inability to perform work. The neat antinomy—ability to do a job vis-à-vis ability to get a job—is unrealistic and harmful. Wage loss caused by refusal of employment may reflect disability just as significantly as a severed member or maimed body. Therefore, the following test has been proposed: "[L]oss of employment should not be deemed due to disability if a worker without the disability would lose employment under the same conditions . . . ."

Acceptance of such a rule would bring the existing program a good deal closer to the unemployment compensation context Congress purported to avoid. More intricate judgments about economic causation of inability to engage in "any substantially gainful" work would be required. Interesting cases are offered where a worker will apply for and receive unemployment benefits on the strength of his representation that he was available for work, and then later apply for disability benefits under the compensation program on the ground that he was, in the same period, totally disabled. With the use of this test the apparent mutual exclusivity of the claims is resolved; the disabled worker may honestly represent to the unemployment office that he is able to do some work, and with equal honesty tell the compensation board later that he was totally disabled because, though he could do some work, no one would give him a job as a result of his impairment.

The disability benefits are administered by a federal body with judicial access limited to federal courts; unemployment benefits are administered by the states with judicial access limited to state courts. Thus, there is no opportunity for the judicial reconciliation found in the states where this multiple benefit situation occurs. Were cases of this sort to

90 2 Larson § 57.61.
91 2 Larson § 57.63. See Randall v. Flemming, 192 F. Supp. 111, 114 (W.D. Mich. 1961), for evidence of disability in this employment sense, i.e., the claimant could work but his "disability" was an obstacle to employment.
92 Formerly, the Secretary and the Regulations had rejected evidence of unsuccessful efforts by the claimant to secure or continue to do work. 20 C.F.R. § 404.1502(b) (1960). Larson's rule would require this material and the Secretary has amended the Regulations to accept such evidence. 20 C.F.R. § 404.1523 (Supp. 1963). The Regulations have, however, persistently indicated that if a claimant remains unemployed because of the hiring practices of certain employers, he is not disabled. 20 C.F.R. § 404.1502(b) (1960).
93 2 Larson § 57.65. See Thone v. Ribicoff, 199 F. Supp. 106 (E.D.N.Y. 1961), where application for unemployment benefits was used to negative disability.
94 Ibid.
95 Riesenfeld and Maxwell, Modern Social Legislation 574 (1950).
come to congressional attention, a re-instatement of the offset might be appropriate, though the repeal of the offset section was an explicit indication of disinterest in "double recovery" of any sort. 97 Perhaps the orientation of the statute around rehabilitation may serve to avoid a fragmented program that is both awkward and unresponsive to the needs of the beneficiaries.

Congressional interest in rehabilitation has been observed.98 There is a natural and persuasive connection between efficient objective disability determinations and an interest in rehabilitation. Earlier, Congressman Kean's statement on the uncertainties of medical evidence was offered as a reason for federal administration of the program.99 The problem of interested medical evidence appears in other contexts. It has bothered the courts in the trial of personal injury cases; it especially bothers agencies whose express purpose is to eliminate the trials' litigious atmosphere in the interest of a superior fairness and speed. The inevitable carry-over of the medical problem into the administrative process operates only to preserve an undesirable feature of judicial process. Congressional establishment of a dispensing agency acting sine ira ac studio to resolve conflicting or ambiguous medical evidence was an attempt to prevent such a carry-over into the disability program.100

The rehabilitation role of the program is related to this acute problem of medical judgment. Observers of the workmen's compensation plans have suggested that medical treatment of work-connected disability is of poor quality, that it is unsupervised and unrelated to the ultimate rehabilitation of the worker.101 They have noted the medical profession's resistance to new concepts of "total medical care" in which rehabilitation plays a vital role.102 The treating physician's unfamiliarity with rehabilitation (and in many cases his disinterest) infects his judgment on the matter of disability. Thus, not only will judgment on employability be of uncertain value but also that on the facts of physical impairment.103

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98 See notes 15-17 supra and accompanying text.
102 Id. at 263.
103 See id. at 176. Indeed the authors of this fine survey of compensation problems have declared that difficulties with unreliable and indifferent rehabilitation as well as with unreliable medical evidence might require government medical services in addition to testimony by government doctors. Ibid.
Thorough-going federal responsibility for disability and disability-connected rehabilitation would eliminate some of these problems. The present statute reflects the compromise required by the politics of 1949 and 1952, but it still allows general federal supervision by way of control and creation of medical standards for the program.\textsuperscript{104}

As Congress indicated there were distinct advantages in state participation.\textsuperscript{105} However, as has been noted, there are complexities inherent in a state-federal decision-making process. In the administrative routine, there is a close relationship between the claim development in the district office and the actual disability determination.\textsuperscript{106} Duplication of effort there has the effect of increasing processing time and cost. Both the General Accounting Office and the AFL-CIO criticized the present arrangement for that reason.\textsuperscript{107} Similarly, the Secretary’s present devious control over state agency denials wastes time and money.\textsuperscript{108}

Finally, though the relation between federal and state agencies is determined by contract, with federal substantive law controlling, the operative state agency has its own administration and functions against a background of activities in other state statutory programs.\textsuperscript{109} Thus, the requisite harmony between rehabilitation and disability programs may be sadly lacking. Variations from state to state may also have a serious effect on processing time, operating costs, purchases of medical evidence, state cases reviewed by the Secretary and, consequently, on fairness.\textsuperscript{110}

**THE 1960 SUBCOMMITTEE REPORT**

With this background, the 1960 subcommittee report on administration of the disability program becomes more significant. This report evinced unusual concern for the protection of the disability claimant’s rights in the administrative process.\textsuperscript{111} The report noted the unusual

\textsuperscript{104} See notes 20, 71 and 72 and accompanying text. See also 1956 Amendments § 103(b), 70 Stat. 818, as amended, 42 U.S.C. § 422(c) (Supp. IV, 1963), which allows a trial work period during rehabilitation without loss of benefits. Congress felt this provision would encourage rehabilitation. Subcommittee Report 33.

\textsuperscript{105} See text accompanying note 17 supra.

\textsuperscript{106} Subcommittee Report 6. Almost three times as many days are spent in the district offices as in the state agency. Id. at 11. See Fact Book 45-46.

\textsuperscript{107} Subcommittee Report 8.

\textsuperscript{108} Id. at 9.

\textsuperscript{109} Id. at 5.

\textsuperscript{110} Id. at 12. See the discussion of more serious interstate variations in the public assistance program in Hearings on H.R. 7199, supra note 84, at 171.

\textsuperscript{111} Subcommittee Report 26-45.
demands made on the district office personnel for assistance and advice and showed concern with the denial letter in which it is not the practice to state why the claim was denied.\textsuperscript{112} There was also concern that the district office employees were being asked to serve two interests which prevented them from giving the applicant a helpful and fair evaluation of his claims.\textsuperscript{113} Furthermore, the subcommittee commented on the infrequency and poor quality of representation by counsel.\textsuperscript{114} In this connection it also noted the exercise of three functions by the hearing examiner. Testifying examiners felt they could not be adjudicator, investigator and claimant’s protector at the same time.\textsuperscript{115} They urged that the Secretary have a representative at the hearing to relieve them of their duty to cross-examine the claimant and his witnesses.\textsuperscript{116} The subcommittee indicated the availability of independent advice and assistance to claimants under other federal disability programs and rudiments of such help in the disability system.\textsuperscript{117}

Concern was expressed about confidential materials unavailable to the claimant, including, for example, the state manual containing medical evaluation guides, memoranda from the Office of Hearings and Appeals making broad policy statements or commenting on specific cases, General Counsel’s opinions, and decisions of the Appeals Council.\textsuperscript{118} The subcommittee called for publication of all precedent material on the ground that it was essential to a fair hearing but the Secretary especially resisted

\textsuperscript{112} Id. at 28. The claimant is told that he may inquire of the district office if he wants such information. The report suggests this procedure may discourage many applicants. Ibid.

\textsuperscript{113} Id. at 27-28.


\textsuperscript{115} Subcommittee Report 30. But see 2 Davis, Administrative Law § 13.01 (1958) [hereinafter cited as Davis], where it is stated that such a combination may be harmless and even affirmatively desirable in claims agencies which are as much interested in making payments to the deserving as in withholding payments from the undeserving.

\textsuperscript{116} Subcommittee Report 30.

\textsuperscript{117} Id. at 30-31.

\textsuperscript{118} Id. at 33-35. Some examiners felt these materials were more than advisory and a failure to follow them invited reversal. They also complained of “summaries of action” prepared by the Bureau of Old-Age and Survivors Insurance, that division of the Secretary’s department primarily in charge of administering the disability program. Examiners called them briefs for the Bureau. Use of these particular materials had been dispensed with by the time the subcommittee report was published. Id. at 35.
publication of the medical guides. Since the primary function of medical guides is to provide a mechanism for presumptive allowance of many clear cut cases, the Secretary's spokesmen felt it would be unwise for examining physicians to know exactly what it takes to qualify for benefits. However, the subcommittee itself said it was important that the claimant be informed of substantive standards used in the determinations.

Other areas of concern noted in the report were the use of medical consultants whose advice and comment to the hearing examiner did not always appear in the record, interference with the independence of hearing examiners, and certain actions of the Appeals Council and the Bureau with respect to the examiner's decision. Since the Appeals Council may assert jurisdiction and review the hearing examiner's decision on its motion, criticism was directed at the Council for acting outside a pure appeal capacity. The Administration's activity in these cases excited the most concern. If it is dissatisfied with the hearing exam-

119 Id. at 16.
120 Ibid.
122 Subcommittee Report 36.
123 The American Bar Association thought the supervisory authority embodied in the regional hearing representative could be used to put pressure on hearing examiners who disregarded official policy. Id. at 36-37. In response to this complaint, the subcommittee conceded the necessity for training and supervision of these examiners but strongly urged maintenance of their independence. Id. at 38.
124 Id. at 38-40. The relation between the Appeals Council and the examiners has not been the subject of extensive judicial concern. Compare Julian v. Folsom, 160 F. Supp. 747, 753 (S.D.N.Y. 1958), where the power of the Council to make inferences from the facts and thereby modify or reverse the examiner was recognized, with Perkins v. Flemming, 191 F. Supp. 137, 141-42 (S.D. Cal. 1961), where in reinstating an examiner's award which the Appeals Council had upset, the court emphasized the importance of credibility and the examiner's personal contact with the claimant. The Perkins decision overlooks the usual case where most of the proof is in documentary form. See Griffin v. Ribicoff, 1 CCH Unemployment Ins. Rep. ¶ 14319 (S.D. Ill. 1962).
125 20 C.F.R. § 404.947 (1960). Subcommittee Report 38. This action is usually taken when the examiner allows the claim at the request of the Bureau. Ibid.
126 Subcommittee Report 38-39. The Council contended it was the "agency" within § 7(a) of the Administrative Procedure Act, 60 Stat. 241 (1946), 5 U.S.C. § 1006(a) (1958), and hence had the power to take new evidence and issue revised findings of fact.
iner's decision, it may request that the Appeals Council review the case on its own motion.127

The extended reference to the subcommittee report is intended to demonstrate that all is not well even in this example of the "pure" administrative process. A requirement that the Secretary be more precise and less superficial concerning claimant's capabilities, and employment opportunities for persons with claimant's capabilities, would begin to eliminate the present defects in the procedure.128 The intricacies of the present administrative scheme and the difficult substantive questions to be resolved would provide resistance, however. The probable reliance of the examiner on the state team's disposition of the claim,129 the place of the examiner as a kind of review officer, and the unusual technical demands made on him130 all militate against a completely satisfactory response to such a judicial standard.131

IV
JUDICIAL REVIEW OF DISABILITY DETERMINATIONS

THE SUBSTANCE OF JUDICIAL REVIEW

In reviewing disability determinations, the courts have assumed that the use of the term "substantial evidence" in both the Social Security

Those who argued that the Secretary was the "agency" within § 7 evidently forgot that § 205(1) of the APA, 53 Stat. 1371 (1939), 42 U.S.C. § 405(1) (1958), permits delegation of the Secretary's statutory power.

127 Subcommittee Report 39. The fact of Bureau "appeal" and the grounds for "appeal" are not noted in the record or made available to the claimant. When the Bureau proceeds in this fashion, the subcommittee observed it may be "prosecuting" or "participating in the decision" within the meaning of § 5(c) of the APA, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1958).

128 See note 62 supra and accompanying text. It is doubtful that the examiner performs in this scheme as the applicable sections of the Administrative Procedure Act contemplated. See 60 Stat. 237 (1946), 5 U.S.C. §§ 1006, 1007, 1010 (1958).

130 See Subcommittee Report 35-38. The large backlog of cases awaiting hearings in the early days of the program required the use of temporary examiners recruited from the Bureau. The subcommittee thought this practice was highly undesirable since these temporary examiners were taken from the very agency whose decisions were being reviewed. Id. at 36.

131 See Clifton v. Ribicoff, 195 F. Supp. 673 (D. Colo. 1961); Joki v. Flemming, 189 F. Supp. 365 (D. Mont. 1960); Corn v. Flemming, 184 F. Supp. 490 (S.D. Fla. 1960), for cases where the findings leave much to be desired. On occasion the Secretary over-glamorizes a small skill. Thus, in one case the ability of the claimant to fix light switches or sockets was taken without other findings to show ability to do electrical work, bench work and allied trades. Joki v. Flemming, supra at 371.
Act\(^{132}\) and the Administrative Procedure Act\(^{133}\) is equivalent; i.e., reviewing courts are authorized to set aside agency decisions "unsupported by substantial evidence." Thus, in *Universal Camera Corp. v. NLRB*,\(^ {134}\) the Supreme Court construed this authorization to entitle a court of appeals to upset agency determinations when the record before it "clearly precludes the [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."\(^ {135}\)

The courts, however, have used different verbal formulae in construing the meaning of "substantial evidence." Some adopt a directed verdict standard, i.e., enough evidence to justify, if the trial were before a jury, a refusal to direct a verdict where the conclusion to be drawn from the evidence is one of fact for the jury.\(^ {136}\) For others, substantial evidence is not a mere scintilla, but enough evidence for a reasonable mind.\(^ {137}\) Whatever description is offered, the courts seem to be avoiding the requirements of the substantial evidence test with such alternatives. Under the directed verdict analysis, any evidence may suffice to approve the agency finding.\(^ {138}\) But "substantial evidence"—viewed in light of the entire record—calls for wider review.\(^ {139}\)

Conversely, it has been observed that the difficulty with the "reasonable mind" formulation, which originated in *Consolidated Edison Co. v. NLRB*,\(^ {140}\) is that it "shifts attention from the adequacy of the process of reasoning on the evidence in terms of the legal standards to the character

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\(^{133}\) 60 Stat. 237 (1946), 5 U.S.C. § 1009(e) (B) (5).

\(^{134}\) 340 U.S. 474 (1951).

\(^{135}\) Id. at 490.


\(^{140}\) 305 U.S. 197, 229 (1938).
of the verdict as the social judgment of a decent layman."\textsuperscript{141} The temptation to make such a shift is particularly strong in disability cases.\textsuperscript{142}

Apart from such vagaries in characterization, however, the courts' application of the substantial evidence rule veers from the careful balance established by the Supreme Court in \textit{Universal Camera}. Mr. Justice Frankfurter, delivering the opinion of the Court, stated:

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialization field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it \textit{de novo}. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.\textsuperscript{143}

Justice Frankfurter's opinion yields nicely to a sophisticated balance between the dynamic premise of review and a cultivated appreciation of the agency's special function. Resort to apparently less demanding criteria of the substantial evidence rule may conceal the responsibility of a court from itself. It is implicit in the \textit{Universal Camera} scheme that awareness of the scope of this responsibility restrains each judge. Thus, Professor Jaffe, analyzing the \textit{Universal Camera} opinion has observed "underlying the vexed word 'substantial' is the notion or sense of fairness."\textsuperscript{144}

\textsuperscript{141} Jaffe, Judicial Review: Question of Fact, 69 Harv. L. Rev. 1020, 1021 (1956). (Emphasis added.) Professor Jaffe is generally critical of the courts for their application of the \textit{Universal Camera} rule.


I somehow got the impression that there was before me an individual of honest intent and character, but one who had suffered a great deal from the hard knocks of life over her years spent under very trying circumstances. To say the least she appears to be one who has been tied onto the treadmill of economic bondage.

Harris v. Ribicoff, supra at 863.

\textsuperscript{143} 340 U.S. at 488.

\textsuperscript{144} Jaffe, Judicial Review: Substantial Evidence on the Whole Record, 64 Harv. L. Rev. 1233, 1239 (1951).
Even as to conclusions of law, the import of *Universal Camera* and its progeny necessarily require a more sensitive analysis of the decisional process. In *O'Leary v. Brown Pacific-Maxon*, Justice Frankfurter suggested a functional description of the operation of this process. A finding of fact concerns a combination of happenings and inferences drawn from them:

[T]he inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."146

The inference from evidence to "fact" demonstrates the theory of the administrator's special experience.147 Thus, in identifying the fact he makes law. Elimination of "law making" from "fact finding" would be difficult enough in the application of a statutory term to a given fact situation.148 The problem is more embarrassing and the law-fact dichotomy less realistic when substantial discretion is conferred on the agency.149 Even where such discretion is found, however, as it is in the disability statutes, the courts must provide that guarantee of fairness our system demands.150

**THE DISABILITY ISSUES: WEIGHING EVIDENCE ON REVIEW**

Without appreciating these difficulties with review of conclusions of law, the courts reviewing disability decisions proceed to examine the legal question: Was there substantial evidence to support the Secretary's determination?251 Accepting that part of the canon which suggests the reviewing court must not itself weigh the evidence,152 much of such weighing may be found in the disability cases under the guise of finding substantial evidence.

For example, in *Aaron v. Fleming*, the United States District

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146 Id. at 507-08.
149 Jaffe, supra note 147, at 248-49. See Jaffe, supra note 144, at 1257-61.
150 Jaffe, supra note 147, at 276.
Court for the Middle District of Alabama reversed the Secretary's decision that the plaintiff was not disabled under the statute. The claimant was approximately sixty years old. He had worked in the automobile and grocery businesses; he had been a traveling salesman and a post-master. He stopped work in 1953 complaining of heart, back and foot trouble, and touches of arthritis, prostatic and spastic colon. His personal physicians had warned him that he would have to stop working "if he wanted to live longer" so he subsequently refused offers of employment. A report by a doctor submitted by the claimant showed fatigue on limited exercise, tenderness of spine, pain on flexation and palpable arteries. The doctor added that the plaintiff was unemployable.

A detailed report was rendered by the Veterans' Administration in May 1954. It showed lumbar arthritis, flat feet, chronic rhinitis, prostatitis amenable to therapy, generalized arteriosclerosis, arterial vessels thickened, pulse rapid, no pedal edema, electrocardiogram normal and respiratory system normal. No psychiatric therapy was recommended and neurological examination was negative. On the basis of this evidence, and considering the claimant's ability to travel, the referee determined that the impairments were not so serious as to render him unable to engage in any substantial gainful activity. The court's decision to reverse rested primarily on its inability to find substantial evidence in the face of diagnoses and opinions of unemployability from the claimant's own physicians and proof of disability payments by an insurance company.

The case may be variously criticized. First, proof of insurance company disability payments is irrelevant to a finding of statutory disability. Second, insofar as the court relied upon the judgments of the physicians that the claimant was "disabled" or "unemployable," it overlooked the obvious intent of Congress to guard against the subjective judgment of the plaintiff's personal physician. However, the court's dismissal of the Veterans' Administration report, on the

154 Id. at 293 n.1.
155 Id. at 294.
157 See pp. 52-53 supra.
ground that it did not constitute substantial evidence required to support the referee’s decision, was perhaps the most questionable aspect of the case.168 Though it is difficult to decide what was troublesome about the report, it appears that the state evaluating team, especially the doctor member, relied on the report to decide in favor of non-disability. This doctor’s report in turn was the principal evidence relied on by the referee.169 The court may have regarded the referee’s act as a kind of bootstrap operation, i.e., he used a subordinate’s decision to reach his own. Whatever the case, the court’s attitude seems to negate the agency’s judging function.

Read this way, the case finds opposing statements of disability or non-disability as evidence, one way or the other, of the matter at issue. There seems to be no recognition of the administrator’s expert evaluation of clinical data; the facts of the alleged impairment would recede before accumulation of opinions on the ultimate question. Nor did the court appreciate the special role of the (hearing examiner) as a reviewing officer in a bifurcated process where his usual functions have been substantially modified.160 The Aaron decision reflects the difficulty which the courts face in evaluating such technical evidence. Resort to the opinions of doctors in an effort to find substantial evidence would be an unhappy resolution.

Finally, the court admonished the referee on the proper attitude to be taken in disability cases. Use of an objective standard was rejected: "But surely the test must be subjective—surely our ever-enlarging bureaucracy has not yet reached the state of expertise that it can depersonalize a person’s illnesses."161 This last statement must illustrate how severe a test of the conscientious judge this disability area can be.

Another example of judicial intrusion by way of the weighing of evidence is the case of Hill v. Fleming.162 Here the claimant was a machine operator who hurt his back in 1945. After six months of care by a specialist, he was told he could return to light work. He went back to work, but after a few days of heavy labor he had to quit. Examining doctors reported that the claimant had an arthritic ailment in his lower

161 168 F. Supp. at 294.
back. Two of the doctors noted that he was unable to work. The claimant also said he had three broken vertebrae, but none of the medical examinations confirmed his assertion. Finally, there was a detailed report from the Falk Medical Clinic of the University of Pittsburgh.\(^{168}\)

From this evidence the referee decided there was no statutory disability. The district court reversed, treating the Clinic’s report in a startling manner. The report was described as “secondhand hearsay evidence” made by the medical librarian and thus not substantial evidence.\(^{164}\) Furthermore, the court characterized this evidence as too remote and not of probative value.\(^{165}\) It relied instead on “uncontradicted” statements to overturn the Secretary’s determination.

The criticism of the Aaron case is also relevant here. Moreover, it is to be noted that characterization of the clinical report as “secondhand hearsay evidence” would require similar treatment of any institutional medical examination where a variety of tests and observations are gathered by central administrative offices. Would the court dismiss, as hearsay, reports copied by secretaries from the doctor’s own notes, even though these rules of evidence are not supposed to be applicable to agency proceedings?\(^{166}\)

Difficulties with the proposition that courts are not to weigh the evidence become more acute when the Secretary appears to base a decision on his expertise where there is uncontradicted evidence to the contrary. Posed in the abstract a disability case may be imagined in which an opinion by the claimant’s own physician, concluding that his patient is unable to engage in any substantial gainful employment, constitutes the sole medical evidence before the agency. Professor Davis has observed that the expert tribunal may use its own judgment in the face of uncontradicted testimony to the contrary.\(^{167}\)

Thus, the distinction between weighing and supplying evidence is suggested to be important for the disability determination.\(^{168}\) If there is express reference to use of non-record fact sources, the courts will apply a fair hearing test. There must be opportunity to rebut and the facts must be reasonably non-prejudicial.\(^{169}\) But if there is no express

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163 Id. at 244.
164 Id. at 245.
165 Ibid.
166 2 Davis § 14.01.
167 2 Davis § 14.13 and cases cited therein. See Contractors v. Pillsbury, 140 F.2d 310, 313 (9th Cir. 1945).
168 2 Larson § 79.51. See Note, 60 Harv. L. Rev. 620 (1947).
169 Note, supra note 168, at 624.
reference to use of non-record fact sources, and it is nevertheless apparent that the agency has based its determination on its outside expertise, the courts will apply the substantial evidence rule which avoids a fair hearing test. The contiguity of weighing and supplying evidence and its relation to a fair hearing demonstrate once more the general fairness standard which animates the rule of Universal Camera. A discernible trend away from making a contest of agency expertise in every case, as the official notice doctrine promises, would seem to be the result of Mr. Justice Frankfurter's opinion.

The reluctance of the judiciary to admit expertness and its qualms about fairness may motivate the courts in disability cases. Teeter v. Flemming illustrates the courts' dilemma when the agency acts in the face of uncontradicted opinion to the contrary. The applicant, a traveling salesman for Swift and Company, complained that he was unable to work because he could not stand still for more than ten minutes, and that when he became extremely tired, he had migraine headaches. Of the three medical reports submitted by the claimant, the Mayo Clinic Report showed that Mr. Teeter had been examined in 1945 when he stopped working for Swift; that he had two types of headaches, one a migraine, the other a severe form of tension headache; that their studies had failed to reveal evidence suggesting organic disease within the central nervous system; that they had recommended a regimen reducing the element of tension; and that their laboratory and x-ray studies were reported as normal or negative except for some arthritis of the spine. The clinic recommended heat treatments, massage, lumbosacral belt, a firm bed, and a reduction of his traveling. In a second report in 1955 the Clinic noted there had been improvement and the migraine was now essentially controlled.

The other two reports came from the claimant's personal physicians. One physician observed that the back pain of which Mr. Teeter complained was increased by walking, lifting or riding in a car, and concluded that the claimant "should have been considered as having been unable to engage in a substantial gainful occupation during the period from early 1946 until now." The other physician stated that the claimant had shown a weakening resistance to a general physical collapse for the past several months and that it was doubtful whether relief could be effected

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170 Ibid. See McCarthy v. Industrial Comm'n, 194 Wis. 198, 215 N.W. 824 (1927), a memorable example of this problem in workmen's compensation.
171 270 F.2d 871 (7th Cir. 1959).
172 Id. at 873.
without a complete separation from work. Upon this evidence the referee denied the application, on the ground that the applicant's retirement from work did not prove that his condition was such as to render him incapable of engaging in any other occupation.

Nevertheless, on appeal, the district court's order reversing the referee's decision was affirmed. In reaching its decision, the court noted that the expert opinion of the claimant's own doctor that he was unable to carry on any gainful employment, where uncontroverted by substantial evidence, was enough to support disability.\footnote{173} Under these circumstances, the court concluded that the referee could neither form his own medical conclusion as to what constitutes physical or mental impairment nor disregard the conclusion of those more expert than he.\footnote{174}

This case may prove, with many of the others, that where you come out depends upon where you went in. If the court decides the Secretary had no expert judgment to be applied in this case because evidence contrary to his determination was uncontroverted, the \textit{Teeter} decision becomes almost meaningful.\footnote{175} Moreover, even if the court adopts the view that the claimant was not put on notice with respect to such expertise and therefore had no opportunity to meet it, the case would pose a modest problem of fair hearing at best.\footnote{176} Thus, despite the fact that such a decision continues to pay lip service to agency experience and legislative intent, the \textit{Teeter} court has reached a conclusion which denies the under-

\footnote{173}{Id. at 874.}

\footnote{174}{Ibid. See 20 C.F.R. § 404.1526 (Supp. 1963), where the Secretary states than an opinion by a physician that an individual is or is not totally or permanently disabled or unable to work, being a conclusion on the ultimate issues to be decided by the Secretary, shall not be determinative of the question whether an individual is under a disability. Some courts have gone quite far to read this provision out of the Regulations. See, e.g., Rice v. Celebrezze, 315 F.2d 7 (6th Cir. 1963); Little v. Celebrezze, 310 F.2d 636 (7th Cir. 1962). In Hall v. Celebrezze, 314 F.2d 686 (6th Cir. 1963), the court pointed out that since two doctors did not express any opinion on the issue of plaintiff's ability to work, the medical testimony of the claimant's physicians that he was unable to work was uncontradicted. In holding that it was competent for medical experts to testify as to what effect plaintiff's ailments had on his health and ability to perform work, the court declared that while the Secretary might have "expertise in some matters, he did not supplant the medical expert." Id. at 689-90. But see Julian v. Folsom, 160 F. Supp. 747, 753-54 (S.D.N.Y. 1958), where the court noted dissatisfaction with doctors who state their findings in terms of the ultimate issue and indicated that the Secretary is entitled to weigh and evaluate their testimony.}


\footnote{176}{See generally 2 Davis § 146.}
lying rationale of agency action, namely, the ability to make binding and conclusive determinations upon the disputed issues of law and fact presented.

THE DISABILITY CASES: THE PROGNOSIS AND EARNINGS REQUIREMENTS

The cases in the preceding section have dealt with the problem of weighing medical evidence in a relatively direct manner. Less conclusive evidence and more problematic judgments are offered when a given case focuses on the prognosis aspect of the statutory definition that the impairment "be expected to result in death or to be of long continued and indefinite duration." 177 The Secretary has published a regulation interpreting these words:

(f) ... Indefinite is used in the sense that it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity. Thus, for example, an individual who suffers a bone fracture that has prevented him from working for an extended period of time will not be considered under a disability if his recovery can be expected in the foreseeable future.

(g) An individual will be deemed not under a disability if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in any substantial gainful activity. 178

Few cases have developed the difficulties of prognosis evaluation or the closely associated problem of finding disability within the period when the claimant satisfies the earnings' requirement. In Wray v. Folsom 179 the claimant, a truck driver with little education, appealed from a denial of a disability freeze. Initially, he asked for reversal of the Secretary's determination. After some progress through the appeal, however, he changed his mind, offered a new medical report and asked for a remand to include this new material in the determination.

In his original application for the freeze the claimant submitted two


medical reports. He had gone to the first doctor with a carbuncle on the back of his head. The doctor diagnosed diabetes, hypertension and obesity, and placed the plaintiff on insulin and a diet. The claimant complained that the insulin weakened and nauseated him. The doctor attributed this effect to the plaintiff's size though he had lost 112 pounds. The second doctor made a similar diagnosis but observed substantial improvement brought about by the diet and insulin, and anticipated "optimum improvement" in six months. Primarily on the basis of this last report, the referee denied the claim for a "freeze," stating that the impairment would not be of long continued or indefinite duration. On appeal the plaintiff's new evidence, for which he had requested a remand, substantially repeated the diagnosis of the other two doctors but was pessimistic about the claimant's possibilities for improvement. The court sustained the motion to remand.

This decision raises a serious question: How long after the claimant met the law's earning requirements may he continue to gather evidence, the effect of which will be to make a diagnosis of his alleged impairment as of some past date on the basis of contemporary knowledge? As the statute was written, the claimant needed fully insured status, currently insured status, and twenty quarters of coverage during the last forty quarters, to qualify for benefits and at the time of the case the currently insured status requirement was still the law. The elimination of that requirement does not, however, make the question moot. As the earnings requirements presently read, a worker needs fully insured status and twenty of forty quarters of coverage in the period ending with the quarter of disability. In the phrases here relevant an individual may be fully insured by having forty quarters of coverage or one quarter of coverage for each year after 1950. Since workers below fifty may now apply for disability benefits, the latter requirement may present an obstacle to qualification; there will be less likelihood of the long term association with the labor market that would give a worker permanent fully insured status. Thus the problem survives.


181 1956 Amendments, ch. 836, § 103(a), 70 Stat. 815.


This interpretation would be consistent with the aims of Congress in its removal of the recency of work test. At the time the change was made, the House Ways and Means Committee stated that it wanted a reliable means of limiting such protection to those persons who have had sufficiently recent covered employment to indicate that they probably have been dependent on their earnings.\textsuperscript{184} Under the old requirement and to some extent under the new one, the fact that the plaintiff satisfies the disability test at some date after he last met the earnings requirements of the statute would not suffice.\textsuperscript{185} In the doubtful cases the examining physician will be called on to say what the illness or impairment was like at an earlier date.

The difficulties encountered by the agency when claimants attempt to base prior disability upon contemporary medical findings are exemplified in the case of \textit{Pruitt v. Flemming}.\textsuperscript{186} In that case the claimant had an accident in 1952, and at the date he applied for benefits, had to show disability between September 30, 1952, and September 30, 1954. An examination at the time of injury showed residual ability to work. At a later time the examining doctor changed his mind and said the claimant was totally disabled from 1952 to 1954.

The district court, reversing the Secretary’s determination, granted the benefits, on the ground that a fifty-seven year old man with negligible formal education who has worked for over forty years as a coal miner and who has sustained an injury which prevents him from ever again performing manual labor, is unable to engage in substantial gainful activity.\textsuperscript{187} By resort to this analysis, the court overlooked the difficulty of finding a diagnosis as of the period of coverage. It seemed, rather, to base its decision on the present condition of the claimant.\textsuperscript{188}

\textsuperscript{187} Id. at 162.
\textsuperscript{188} See id. at 162-63. See Grindstaff v. Flemming, 188 F. Supp. 44 (W.D.N.C. 1960), for a firm holding that even though the claimant applied three and one-half years after the claimed disability had arisen, he must show it arose during a time when he met the earnings requirements. In Aniol v. Flemming, 188 F. Supp. 233, 234 (D. Kan. 1960), atrophy...
The Pruitt and Wray cases illustrate the uncertainties of prognosis with respect to retrospective medical determinations. The situation in Wray is perhaps the more ordinary case since it involved a determination within the coverage limits. There, the court remanded when the plaintiff introduced evidence from a post-determination report refuting the prognosis of the earlier period. A practice of this sort would be undesirable. So long as the coverage and prognosis requirements remain in the law, they require attention and respect. Their combined application in a given case by an administrative officer with statutory discretion to determine satisfactory standards of proof and in an administrative scheme concerned with rehabilitation should give finality to these determinations. Medical opinion on prognosis, as on rehabilitation, is relatively inexpert. The agency routine, however, with its explicit reference to rehabilitation concerns, may provide a more practical indication of the course of an illness and its effect on the claimant. Use of the remand to provide one more look around "just in case" hardly encourages efficient administration of the statute.\textsuperscript{189}

developed in the claimant's leg because of non-use since his accident but there was no suggestion during the period he satisfied the statute that such condition was likely or inevitable. He had also turned down opportunities for employment. His application was denied. Cf. Layden v. Flemming, 189 F. Supp. 499 (E.D.N.Y. 1961).

The courts have had less difficulty with cases involving multiple claims based on the same impairment. In Phillip v. Ribicoff, 211 F. Supp. 510 (E.D. Pa. 1962), plaintiff last met the earnings test in September 1954. Her application for disability benefits was filed in December 1958 and in September 1960 she was notified that the claim was denied and that she had a right to obtain review. The claimant, however, did not institute court action within the prescribed sixty days, but in December 1960 she filed another application for benefits which was then denied as res judicata. After exhausting her administrative remedies, she started a court action. Citing 20 C.F.R. § 404.937, the court defined the issue as "whether or not . . . an appeal should have been taken to this court within sixty days . . . [from the date the Secretary denied the original request] . . . or whether having failed to do so plaintiff could at a later date reapply on the same facts . . . ." Id. at 513. The court stated further:

[W]e are of the opinion that the sixty-day period of limitation ran from the original decision and it could not be thwarted by a later application unless the second application was based on facts dissimilar from those contained in the original application or which conceivably consist of a different work period having evolved since the original application.


\textsuperscript{189} SSA § 205(g), added by 53 Stat. 1370 (1939), as amended, 42 U.S.C. § 405(g) (Supp. IV, 1963). Under this section the reviewing court is given extensive power to remand for the taking of new evidence on a showing of good cause. See Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960), for views on what constitutes good cause.
The case of *Kohrs v. Flemming*\(^{190}\) raises questions concerning prognosis and its relation to remedial ailments. The claimant, a practical nurse, had worked twenty years for a doctor and as a food packager for one and one-half years before disability. She had injured her left arm and shoulder in 1947. A series of operations had done little to improve her condition, and at the time she applied for the disability “freeze” she had lost the use of her arm. Minimal functioning of the limb was achieved with a brace, but that apparatus, compounded by the injury, left her in pain. There was evidence that a cordotomy—removal of a nerve in the affected arm—would diminish her discomfort, but its benefits were problematical. Her application for a “freeze” was denied.

The court of appeals construed the Secretary’s decision to be that because the claimant was unwilling to submit to the proposed operation, she was not disabled.\(^{191}\) The court said the operation would relieve pain, not disability, and it proceeded to suggest that under the Secretary’s interpretation the claimant would have to lose two arms to qualify.\(^{192}\) Moreover, it indicated that the administrative findings rested on an excessively strict interpretation of what “substantially gainful” meant. Finally, the court held that the Secretary’s decision was adverse to uncontroverted evidence; *i.e.*, opinions that she was disabled within the law, and was based merely on suspicion.\(^{193}\)

The court’s treatment of the medical factor is complicated by the diffuse character of its holding. Since a finding on the issue of remediability was essential to the Secretary’s determination that the claimant was not unable to engage in any substantial gainful employment, it may be that the court’s holding addressed itself to that matter. Even if this analysis is correct, the court’s rebuke to the Secretary for a decision adverse to uncontroverted medical opinion makes the remedial question turn on an evaluation of the evidence. The decision is susceptible to this final interpretation and, as in other cases, betrays the feeling that expertness is lacking. Since an evaluation of remediability should consider such factors as: (1) whether treatments would involve significant risk to life or health of the claimant; (2) medical acceptability of the proposed procedures; (3) probability of restoring function; and (4) the results of previous therapy, the court, in holding that the proposed

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\(^{190}\) 272 F.2d 731 (8th Cir. 1959).

\(^{191}\) Id. at 735.

\(^{192}\) Id. at 736. See 20 C.F.R. § 404.1502(a)(1) (1961), which uses as an example of a disabling impairment loss of the use of two limbs.

\(^{193}\) 272 F.2d at 736.
operation would relieve pain and not disability, appeared to make an evaluation without the benefit of the agency's skill.\textsuperscript{194}

The review of the evidence in Kohrs was perfunctory and relied heavily on the opinion of the claimant's personal physician that the operation was unusual and of doubtful value.\textsuperscript{195} Though the court did not pass on the validity of the regulation, it would seem to be valid in view of the general prognosis requirement and the statutory history. The court adopted the argument of other cases and characterized the Secretary's interpretation in this case as unduly harsh. If, however, the major part of the claimed disability was pain and there were other reports suggesting this operation as a means of eliminating that pain, the Secretary's determination would seem to be the more reasonable one.\textsuperscript{196} The case neither develops the significant difficulties of remediability nor suggests affirmative guidelines for the disposition of future cases involving similar issues. Had the court demanded more detailed proof on the factors important for judging remedial impairments, there would be less quarrel with its decision.

On the other hand, Martin \textit{v. Ribicoff}\textsuperscript{197} analyzes the fairness of the proposed remedial treatment with greater candor. In that case the claimant had what appeared to be a herniated disc between the fourth and fifth lumbar vertebrae, and complained of pain and limitation of movement. Several doctors who treated the claimant urged that he consent to a lumbar laminectomy since they felt this operation would make possible rehabilitation and restoration of the claimant to a working life. However, the claimant refused surgery. The Tennessee Division of Vocational Rehabilitation would not attempt to rehabilitate so long as improvement could be anticipated with the proposed treatment. The Secretary regarded this failure to undergo helpful surgery or take ad-

\textsuperscript{194} See HEW, Report and Recommendations of Medical Advisory Committee on the Administration of the OASI Disability Provision 12 (1960).

\textsuperscript{195} 272 F.2d at 735.

\textsuperscript{196} Compare Butler \textit{v. Flemming}, 288 F.2d 591, 595 (5th Cir. 1961), for the view that pain per se will create disability status. Rejecting Theberge \textit{v. United States}, 87 F.2d 697 (2d Cir. 1937), the Fifth Circuit in Butler and subsequent cases has regarded pain as a highly significant factor bearing on a claimant's ability to work. Page \textit{v. Celebrezze}, 311 F.2d 757 (5th Cir. 1963); Hayes \textit{v. Celebrezze}, 311 F.2d 648 (5th Cir. 1963); Park \textit{v. Celebrezze}, 214 F. Supp. 153 (W.D. Ark. 1963). These cases appear to overlook the necessity for proof even if such a per se rule were adopted. Lightcap \textit{v. Celebrezze}, 214 F. Supp. 209 (W.D. Pa. 1962). See "Disability Evaluation," 60 Medical Trial Technique Q. 215 (1960).

\textsuperscript{197} 195 F. Supp. 761 (E.D. Tenn. 1961).
vantage of vocational rehabilitation as sufficient to defeat his application for a "freeze." On review, the court addressed itself to the question of whether the plaintiff's conscientious refusal to have a major surgical operation precluded him from establishing a period of disability under the act.  

The court, while making no appraisal of the evidence in favor of the operation or its probable effect on the claimant, did refer to the assertion by the claimant that one doctor had said the operation might cause paralysis and that the chance of recovery was only fifty-fifty. The doctor, however, denied that he made such statements. Moreover, four other doctors had recommended the operation. As support for its holding that the claimant was not required to have the operation, the court accepted the opinion of the Tennessee Supreme Court in Edwards v. Travelers Ins. Co. In that workmen's compensation case also involving a laminectomy, the Tennessee court stated that the Industrial Commission had no authority to compel an employee to submit to a major operation where there was a risk of life involved "in the slightest degree" merely in order that the pecuniary obligations created by the law in his favor against his employer might be minimized. The Martin court considered that reasoning helpful, though it noted the state court decision was not binding. The claimant's fear of the operation was deemed sufficient to warrant his refusal of surgery, and the refusal was held not to preclude him from establishing a period of disability.

Furthermore, the court did not believe the applicable regulation required the plaintiff to have the operation. Even if it did, the court suggested the regulation might be invalid. Cases cited to the court as

198 Id. at 769.
199 See Whalen v. Ribicoff, 197 F. Supp. 1 (D. Mass. 1961), where the court, answering the Secretary's claim that the impairment was remediable, said that while there was evidence of remediability there were no findings of fact on the issue. The claimant had suffered a laceration of his left hand from a human bite while working as a bartender. The injury resulted in generalized muscle atrophy of his left arm.
200 195 F. Supp. at 770.
201 Ibid.
202 304 S.W.2d 489 (1951).
203 304 S.W.2d at 491-92.
204 195 F. Supp. at 772.
205 Ibid. See 5 St. Louis L. Rev. 144 (1958), and 25 Tenn. L. Rev. 405 (1920), for articles concerned with fear as the basis for refusal of remedial treatment in workmen's compensation cases.
206 195 F. Supp. at 772. The regulation referred to was 20 C.F.R. § 404.1501(g) (1960).
requiring disability were distinguished on their facts as not involving similar injuries. The one case directly in point was rejected outright, because among other things, the court did not have access to the report.²⁰⁷

Thus, the district judge used a state court case interpreting a state workmen's compensation law as the principal source for his decision. That statute, while similar to the federal law, did involve the special concerns and case development of Tennessee workmen's compensation law. The significance of this holding, however, is to recognize fear of a remedial measure as a means of escaping the effect of the regulations. Since without exception the examining doctors recommended the operations,²⁰⁸ the court's view would allow the claimant to determine the significance of risk to life or health. Thus, no objective determination of remediability would be required. As a caveat, the court warned:

There have been instances where the employee magnified greatly his injury. Back injuries are difficult to evaluate. Undoubtedly, there have been cases where employees refused to submit to an operation, not through fear, but solely to receive compensation benefits. This case will not stand in this court as a precedent for decisions in future cases of this character. It is judged on its facts as will be future cases involving ruptured inter vertebral discs.²⁰⁹

Whether this case will require a trial of the claimant's good faith in the district court remains to be seen. In any event the Martin decision hardly adds to the disability program's effectiveness.²¹⁰

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²⁰⁷ 195 F. Supp. at 773.
²⁰⁸ For the Secretary this unanimity may have demonstrated the medical conclusion that the laminectomy was clinically acceptable, that it would restore the claimant's function and that it involved no significant risk to life or health. Perhaps the Secretary's assumption of these conclusions as self-evident and the absence of precise findings contributed to the court's failure to acknowledge their importance, but on this point the opinion is ambiguous.
²⁰⁹ 195 F. Supp. at 773.
²¹⁰ Recent cases have suggested how the problem of determining remediability may boil down to a matter of evidence. In Ward v. Celebrezze, 311 F.2d 115 (5th Cir. 1962), a claimant developed a herniated lumbar disc a few years after surgery for a cervical disc. In affirming a denial of benefits the court of appeals cited with approval the Secretary's conclusion "that the reports of all the neurosurgeons who saw claimant and who, from training, are best qualified to determine the remediability of claimant's impairment . . . clearly show that his condition is remediable and . . . could be substantially improved." Id. at 116. Until the recommended treatment had been tried and found unavailing, plaintiff's impairment was not "of long continued and indefinite duration." Id. at 117. Accord, Bradey v. Ribicoff, 298 F.2d 855 (4th Cir. 1962) (suggesting the burden is on the claimant to show permanence). The other side of the coin is illustrated by Jarvis v. Ribicoff, 312 F.2d 707 (6th Cir. 1963). Accord, Ribicoff v. Hughes, 295 F.2d 833 (8th Cir. 1961), where the court's reversal of a denial of benefits appeared to rest on the absence of documentation on all aspects of the issue of whether plaintiff's back impairment was remediable.
As the Kohrs and Wray cases indicate, questions of prognosis are difficult in either a medical or legal context.211 The Secretary has done little to eliminate the embarrassment either in regulations suggesting what kind of evidence the claimant would find most useful on this question,212 or, falling short of such a desirable goal, in a program to investigate this nebulous matter.213 The reviewing courts are thus left to decide the cases uninformed and unaided. The imprecise quality of the opinions evokes the suspicion that the courts are as unprepared to determine what fairness requires as the administrator is to demonstrate his expertise. It seems less than fair to make a multitude of claimants wander in limbo with the agency and the courts.

THE CRUX: INABILITY TO ENGAGE IN ANY SUBSTANTIAL GAINFUL ACTIVITY

Courts which have reviewed disability determinations have concentrated most of their efforts upon that part of the definition requiring inability "to engage in any substantial gainful activity." Although it is unrealistic to isolate any part of the entire definition for special attention, concentration on this phrase is useful nonetheless to demonstrate the expanding character of the disability determination and the agency-court response to that phenomenon.

Several dicta attempting to characterize the general disability scheme have provided indirect antecedents to specific judicial pronouncements as to what constitutes "substantial gainful activity." Thus, in the case of Klimaszewski v. Flemming214 it was suggested that the statute must be given a reasonable interpretation, that it is a remedial statute and must be construed liberally, and that Congress intended neither to impose

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212 See 20 C.F.R. §§ 404.1502(f), (g) (1961), and 20 C.F.R. §§ 404.1510-19 (Supp. 1963). The absence of regulations describing medical factors more specifically, until 1961, left the courts and the claimants without any notion of the evidence sought by the Secretary. Subcommittee Report 42.

213 The Secretary sponsored a pilot medical research program investigating the reliability of diagnostic procedures used to evaluate cardiopulmonary ailments. HEW, Report and Recommendations of Medical Advisory Committee on the Administration of the OASI Disability Provision 13 (1960).

upon the claimant a test as severe as that required by the Secretary nor to exact as a condition precedent to maintenance of a claim the elimination of every possibility of gainful employment.\textsuperscript{215} Similarly, other courts have held that the statute does not require “complete helplessness.”\textsuperscript{216}

The phrase “substantial gainful activity” has come to live a life of its own; it has become especially popular as the vehicle by which the courts rationalize reversal of the Secretary’s decision.\textsuperscript{217} Uncritical acceptance and repetition of such rationale, however, can serve only as substitutes for the more difficult job of statutory interpretation.\textsuperscript{218} These redemptive formulae may ease the conscience of the court,\textsuperscript{219} but in the end they fail the court in the exercise of its review function. Congress was aware of the burden the statute placed on the administrative process,\textsuperscript{220} particularly with respect to that part of the definition now under consideration.\textsuperscript{221} For the courts the burden has proved almost unbearable.

The situation presented in the leading case of Kerner v. Flemming\textsuperscript{222} is illustrative of the typical fact pattern confronting the courts when the thrust of the phrase “substantial gainful activity” is at issue. The claimant had worked as a carpenter, automobile salesman, mechanic, and most recently as a self-employed furniture reupholsterer. Though he suffered from diabetes, he had controlled the disease with a diet. In June 1956, when he was sixty years of age, he suffered a heart attack. He was treated at a Veterans’ Administration Hospital for “arteriosclerotic heart disease” and “diabetes mellitus.” At the end of his stay at the hospital he was admitted to a veteran’s camp where he was assigned to a group engaged in no physical activity. Finally in 1958 he entered a veteran’s domiciliary. He applied for the “freeze” in 1956 and the monthly cash payments in 1957. The referee concluded that the claimant was not

\begin{itemize}
\item \textsuperscript{215} Id. at 932.
\item \textsuperscript{218} SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943).
\item \textsuperscript{220} S. Rep. No. 2133, 84th Cong., 2d Sess. 3-4 (1956).
\item \textsuperscript{221} 101 Cong. Rec. 10784 (1955).
\item \textsuperscript{222} 283 F.2d 916 (2d Cir. 1960).
\end{itemize}
disabled within the act since there was no evidence that his physical condition had been so seriously affected that he would be unable to engage in any kind of substantial gainful activity including some form of light or part-time sedentary work. In the opinion of the referee the fact that work within his capacity was not readily available could not be substituted as a standard of disability for the strict standard found in the statute. \[223\]

The Veterans' Administration had found the claimant to be totally disabled, but as was observed by the court, that determination involves an "average person" standard, whereas the Social Security Act proceeds on an individual basis. \[224\] Nevertheless, the New York Vocational Rehabilitation Agency had refused to accept a referral of the applicant because of the severity of the claimant's impairment. Moreover, his cardiac rating, as determined by both his personal physician and a physician from the Veterans' Administration pursuant to a formula devised by the American Heart Association, described him as being afflicted with cardiac disease, "resulting in marked limitation of physical activity." \[225\] The court of appeals was unable to discern any substantial evidence upon which the Secretary could make any reasoned determination that claimant was unable to engage in any substantial gainful activity. The court suggested that:

Such a determination requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available. \[226\]

Applying this analysis to the record before it, the court found no satisfactory evidence upon either issue. First, the court leveled criticism at the Secretary's failure to present evidence demonstrating the extent of impairment of function or the residual capacities retained by the claimant. \[227\] This criticism was overdue. Though such detailed examination of residual faculties would be unnecessary in a case which turned on a purely medical controversy (if that case exists), the ordinary claimant in disability cases would benefit from such a requirement. It would provide that modicum of fairness which heretofore the Secretary's unpolished expertise assumed away and which the courts have sought

\[223\] Id. at 918-19.
\[224\] Id. at 920.
\[225\] Id. at 920 n.6.
\[226\] Id. at 921.
\[227\] Ibid.
laboriously to articulate. The relation of a findings requirement to a general concern for fairness is obvious throughout the *Kerner* opinion. Second, the court expressed dissatisfaction with the meager evidence as to employment opportunities for a man in the claimant's situation. Reviewing courts have often been dissatisfied with the Secretary's reference to "sedentary work" or "light employment" as evidence of ability to perform substantial gainful activity; they have felt that such allusions denied the claimant bread because he had a stone. This dissatisfaction has led some of them to adopt an occupational standard: The plaintiff has carried his burden if he has shown (1) inability to engage in his usual or lifelong occupation, or (2) occupational disability and inability to perform work available in his vicinity. These interpretations plainly thwart congressional intent and fly in the face of statutory language.

Somewhat more consonant with a reasonable construction of the statutory scheme was the sharp delineation of responsibility suggested in *Parfenuk v. Flemming*:

It is not the burden of the claimant to introduce evidence which negatives every imaginable job open to men with his impairment and of his age, experience, and education. It is quite enough if he offers evidence of what he has done, of his inability to do that kind of work any longer, and of his lack of particular experience and particular education for any other type of job. If there are other kinds of work which are available and for which the claimant is suited, it is the Secretary's burden to go forward to offer evidence of those types of work.

Undoubtedly, the burden distribution made explicit by the *Parfenuk* court represents an extension of the responsibility implicitly placed upon the Secretary by the *Kerner* decision. For, although the effect of the remand in *Kerner* was to require the Secretary to provide evidence of employment opportunities available to persons of the claimant's skills

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229 283 F.2d at 921.
232 See Sparks v. Ribicoff, 197 F. Supp. 174, 177 (W.D. Va. 1961). See also Drake v. Celebrezze, Civil No. 7987, N.D. Ga., March 7, 1963, where the court required evidence not only of jobs within claimant's capabilities, but also of jobs within his community.
235 Id. at 536.
and limitations, the *Kerner* court declined to place upon the Secretary the affirmative burden of going forward to offer such evidence.\(^{236}\) Rather, it recognized the impracticability of requiring the Secretary to treat each disability application as a personal injury case, and relied upon the Secretary’s expertise to collect sufficient evidence to permit a rational determination.\(^{237}\)

The impact of Judge Friendly’s opinion in *Kerner* is reflected in the later case of *Butler v. Flemming*.\(^{238}\) In that case a domino parlor operator applied for a disability freeze. A fall which resulted in a spinal fusion and a nervous breakdown accounted for the severe back pain of which he complained. The referee’s rejection of the claim apparently rested on the following factors: The claimant was ambulatory, had earned money as a domino parlor proprietor subsequent to his fall, had offered no medical testimony to the effect that he was positively unable to do any work whatsoever, and had shown great resourcefulness in setting up his modest enterprise.\(^{239}\)

In reversing the referee’s decision, the court not only approved Judge Friendly’s analysis but also re-emphasized the overriding consideration of fairness to the claimant:

> If there was any work which this Claimant was able to perform, the record fails to disclose it. We do not mean by that to suggest that the formal burden is on the Government to make any such specific showing since the statute puts the general burden on the Claimant. But in the context of this Act and the manner in which, out of necessity, it has to be administered with much informality and in great volume, satisfaction of the claimant’s statutory obligation is to be judged in a practical way. *Kerner v. Flemming*, 2 Cir., 1960, 283 F.2d 916, 921-922. . . . When the Claimant could no longer even shuffle dominoes, he was not required by the use of a catalogue of the nation’s industrial occupations to go down the list and verbally negative his capacity for each of them or their availability to him as an actual opportunity for employment.\(^{240}\)

Since the decision in *Kerner v. Flemming*, its language has enjoyed judicial popularity.\(^{241}\) As applied by the courts the test has shifted the

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\(^{236}\) 283 F.2d at 922.

\(^{237}\) Ibid.

\(^{238}\) 288 F.2d 591 (5th Cir. 1961).

\(^{239}\) Id. at 592.

\(^{240}\) Id. at 595. Compare Bowden v. Ribicoff, 199 F. Supp. 720, 722 (S.D. W. Va. 1961), where the suggestion of sedentary work was thought adequate, with Hockenbury v. Ribicoff, 199 F. Supp. 666 (E.D. Pa. 1961), where a similar suggestion was thought inadequate.

\(^{241}\) See, e.g., King v. Flemming, 289 F.2d 808 (6th Cir. 1961); Hall v. Flemming, 289 F.2d 290 (6th Cir. 1961). In Pollak v. Ribicoff, 300 F.2d 674 (2d Cir. 1962), Judge Friendly applied his test to an arthritic woman who spoke three languages and who was a jewelry artisan. He seemed to require evidence of personal employment opportunities.
burden onto the Secretary, apparently without any responsibility on the claimant of the kind the Parfenuk court endeavored to preserve. Thus, in Jarvis v. Ribicoff, the court pointed to the absence of vocational-opportunity evidence and indicated the burden was on the Secretary to adduce such evidence where the claimant had established impairment severe enough to cause inability to pursue his accustomed occupation. Likewise, in Rice v. Celebrezze, the Sixth Circuit reversed a finding by the hearing examiner that claimant was able to perform sedentary work although, admittedly, he could no longer perform his former work as a stationary engineer or engage in any other similar employment. The court stated:

The general statement, without any proof, that appellant can perform many forms of sedentary work, without disclosing any knowledge on the part of the Hearing Examiner or the Appeals Council of what that sedentary work could be, cannot detract from appellant's claim, because the law places the burden of proof upon the government, and not upon appellant, to show that he was able to perform some kind of substantial gainful activity.

Further evidence of judicial intrusion into the administrative process is afforded by the courts' rejection of the Secretary's determination that a particular job is within the claimant's capabilities if such job is in conformity with his vocational background and existing functional capacities, or there is evidence indicating the claimant could, in fact, perform such jobs. Thus, in Little v. Celebrezze, the court was unwilling to accept as within the claimant's capabilities, following surgery, certain jobs suggested for him by the Secretary. The court determined that the claimant, "a man with little more than a grade school education [ninth grade], with experience only in occupations [traveling salesman, cabinet maker, machinist] requiring physical exertion far beyond his present capabilities," could neither perform his last job nor any other job for which he was qualified. The court rejected the Secretary's "speculation" that the claimant could work as a cashier, checker, dispatcher, or receiving or shipping clerk. Similarly, in Hall v. Celebrezze, the court refused

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242 312 F.2d 707 (6th Cir. 1963).
243 Id. at 710. Accord, Hayes v. Celebrezze, 311 F.2d 648 (5th Cir. 1963).
244 315 F.2d 7 (6th Cir. 1963).
245 Id. at 17. (Emphasis by the court.) Accord, Drake v. Celebrezze, Civil No. 7987, N.D. Ga., March 7, 1963.
246 310 F.2d 636 (7th Cir. 1962).
247 Id. at 639.
248 Id. at 638-39.
249 Id. at 639.
250 314 F.2d 686 (6th Cir. 1963).
to recognize general government and industrial studies bearing on the availability of jobs for handicapped persons as evidence meeting the vocational requirements of the *Kerner* test. The claimant in *Hall* had an eighth-grade education and had been employed for nearly thirty years making patterns for pipe fittings and plaster molds. On the basis of this experience, the Secretary referred to certain governmental studies to suggest numerous jobs in which the claimant could use his skill and suggested several specific job titles.\(^{251}\) In refusing to accept such evidence, the court indicated the studies failed to show claimant’s ability to do the jobs recommended.\(^{252}\)

The tendency to remand cases where, in the court’s opinion, the record does not reflect sufficient vocational-opportunity evidence has been strongest in the Sixth Circuit,\(^{253}\) but remands for this purpose are found in other circuits as well. The effect of such remands is as pernicious and destructive of an administrative scheme as outright reversals. Though procedural in character, the courts’ remands for the taking of vocational-opportunity evidence obviously interfere with the substantive task assigned by statute to the Secretary. Even where a judge is willing to admit the expertise of the Secretary in substantive matters, he is reluctant to admit any such expertise or to defer to it in procedural matters. After all, procedure is primarily directed toward matters of fairness, and the judge can surely claim expertise in this respect. Moreover, the judge may be free from the agency’s drive for accomplishment of its program; he can test by more fundamental standards the neatly packaged routine devised by the agency to give form to its statutory substance. But these judges fail to realize that even as to procedure there is discretion.\(^{254}\) Under the statute conferring his authority, the Secretary has broad power to determine evidentiary standards of disability and to confer and withdraw benefits under the law. With these powers the Secretary is really deciding about priorities in every aspect of the disability program. Considering the vast and unusual number

\(^{251}\) Id. at 687, 689.

\(^{252}\) Id. at 689. Accord, Farley v. Celebrezze, 315 F.2d 704 (3d Cir. 1963).

\(^{253}\) Since the Kerner decision there have been 103 remands for vocational documentation of the type required by Judge Friendly. The Sixth Circuit accounted for 50 of the 103 district court remands and 6 of the 11 courts of appeals remands.

\(^{254}\) See Jaffe, Judicial Review of Procedural Decisions and the Philco Cases: Plus Ca Change?, 50 Georgetown L.J. 661, 664 (1962). In this article Professor Jaffe makes several original and useful comments concerning the interference with agency procedure by judges, who though foreclosed from an agency’s decision in “substantive matters,” feel they have a special interest in deciding how much substance is articulated and given form.
of claims processed by this agency and the difficult and ambiguous economic and scientific questions to be resolved, it is clear that procedural decisions are made to serve the substantive task. If the Secretary has expertness in matters of the substance of disability, as the statute and the legislative history show, then such expertness is relevant to the exercise of a procedural discretion which was also conferred by law.

The substantial question which remains unanswered is whether the statute as enacted and amended can reasonably maintain the distinction between ability to do a job and ability to get a job. The effect of Kerner was to identify the impossibility of this distinction. Judge Friendly argued there could not be a rational disability determination without evidence of employment opportunities. The legislative history of the program indicates Congress thought a rational determination was possible without such evidence. Consistent with its habit of providing social legislation on a piecemeal basis for specially defined groups of beneficiaries, Congress attempted to protect those persons whose disability reflected physical or mental impairment rather than an employer's imprecise reaction to their condition or the existence of a market for their services. "Inability to engage in any substantial gainful activity" was the qualification. That phrase was left to the Secretary for administrative development, but it seemed clear the claimant would not qualify if a man of his education, experience and capacity could perform any work, however inaccessible or ideal.

If the effect of Judge Friendly's test is to require a more realistic and candid appraisal of substantial gainful activity, it would simply emphasize the administrator's duty to be more precise about the claimant's physical and vocational qualifications—about his ability to do a job. Any ambiguity in his test, however, has been resolved by other courts in favor of shifting the burden to the Secretary. As applied by these courts there would have to be an estimate of personal employment opportunities.

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255 Ibid.
256 Ibid.
258 283 F.2d at 922.
259 See Subcommittee Report 19. But see Representative Mills' statement in 101 Cong. Rec. 10785 (1955), where he noted both the conservative character of the definition and the impracticability of relying on rehabilitation for older claimants to excuse benefit denials.
260 Id. at 21.
261 See Graham v. Ribicoff, 295 F.2d 391, 395 (9th Cir. 1961).
262 See, e.g., King v. Flemming, 289 F.2d 808 (6th Cir. 1961); Hall v. Flemming, 289
This approach appears to adopt something of Larson's view that inability to get a job traceable to injury or impairment is the qualifying disability within the law.263 Since it was wage loss due to long term disability which Congress hoped to remedy,264 an interpretation of the statute satisfied with disability vis-à-vis employment would be appealing. To properly limit this modified test of disability there would have to be a showing of efforts to engage in gainful employment.265

Further extension of this formulation would plainly fall outside the statutory scheme. There should be a re-examination of the law by those courts which declare the claimant's burden satisfied once he has shown occupational disability and which beyond that require the Secretary to show job possibilities for this particular claimant.266 Short of an ideal government program which recognizes a generalized interest in unemployment, disability, rehabilitation, job retraining and relocation, there must be a limit on the duty of the Secretary to produce evidence of employment potential. Some post-Kerner cases have understood the need for such a limit.267 The Secretary in Graham v. Ribicoff268 took notice of industrial and government studies to show employment opportunities for people with the claimant's background and disability. The court citing Kerner was satisfied that this reference offered more than "mere theoretical ability" to engage in substantial gainful activity.269

To be true to its avowed purpose Congress might have provided

F.2d 290 (6th Cir. 1961); Butler v. Flemming, 288 F.2d 591 (5th Cir. 1961); Hockenbury v. Ribicoff, 199 F. Supp. 666 (E.D. Pa. 1961).

263 2 Larson §§ 57.61, 57.63. An intent to make the disability benefit program "the basic protection" was given as a reason for removing the offset. H.R. Rep. No. 2288, 85th Cong., 2d Sess. 5 (1958). And see the emphasis on coverage tests as a means of limiting protection afforded by the law to those dependent on earnings. Id. at 6, 14.

264 The Secretary has recently adopted a regulation which accepts a showing of efforts to secure employment as evidence of disability. 20 C.F.R. § 404.1523 (Supp. 1963). But see Scales v. Flemming, 183 F. Supp. 710, 714 (D. Mass. 1959), where Judge Wyzanski suggests a showing would be impractical for the claimant.

265 2 Larson §§ 57.61, 57.63. In Randall v. Flemming, 192 F. Supp. 111, 114 (W.D. Mich. 1961), there was some evidence that though the claimant was able to work his "disability" prevented employment.


267 295 F.2d 391 (9th Cir. 1961).

benefits for those who could work but whose disability prevented them from getting a job. Indeed, congressional reliance on rehabilitation to provide for those who failed to meet the statutory test was misplaced and unfortunate, if only because of the very small number rehabilitated.\footnote{270} Rehabilitation potential does not signify employment potential; rehabilitation is not always built around realistic preparation for available job opportunities.\footnote{271} It would not be inconsistent with some rehabilitation goals to teach an individual sewing or carpentry though no market for his newly acquired skills existed. Furthermore, the advanced age of the majority of early disability referrals tested the rehabilitation process at its weakest point.\footnote{272} Should the Kerner test become the operative reviewing standard and thereby force the Secretary into more personal measurements of employability, the vocational rehabilitation system would seem to require major overhauling before it could give him any help. Nevertheless, the Secretary's statutory power to develop evidentiary requirements, and to withdraw benefits on the belief of disability termination or refusal of rehabilitation, is sufficient to supervise and promote restoration of many disabled persons to meaningful labor.\footnote{273}

**Conclusion**

Judicial review, as it acts to control the rationality of the administrative process and to protect the right to that process, occasionally

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\footnote{270} Subcommittee Report 22-23. By the end of September 1959, the office of Vocational Rehabilitation reported that of the 1,417,000 disabled persons referred to the vocational rehabilitation agencies, 4000 had been rehabilitated. The subcommittee expressed concern over the statistical tangle and the confusion resulting from the fact that the statistics are derived from different sources at different times. Id. at 23. See the comment on differing definitions of rehabilitation in Somers & Somers, Workmen's Compensation 241 (1954). Congressman Curtis protested about the inadequacy of congressional knowledge of rehabilitation and the blind reference to the subject. 101 Cong. Rec. 10783 (1955).


\footnote{272} Subcommittee Report 23.

\footnote{273} The subcommittee feared it was inaction on the Secretary's part that accounted for the judicial broadening of the statute. Id. at 41-42. It also appeared to leave an exact formulation up to the agency. Id. at 21. The Secretary, however, has used an earnings figure of $100 per month above which an applicant is presumed non-disabled. It did not appear in the Regulations until 1961 and now appears in 20 C.F.R. § 404.1534(b) (Supp. 1963). This presumption has not been challenged in the courts. See Pollak v. Ribicoff, 300 F.2d 674 (2d Cir. 1962); Butler v. Flemming, 288 F.2d 591, 593 n.2 (5th Cir. 1961); Flemming v. Booker, 283 F.2d 321, 324 (5th Cir. 1960).
oversteps its bounds, as evidenced by judicial attempts to control legislative rationality as well. The administrator is guided by the supremacy of impersonal ends, their rational consideration and their obligatory recognition. The conflict between the sometimes irrational demands of the legal beneficiaries and the highly rationalized process the administrator creates and nurtures for his agency's protection must find its resolution in the legislature.

In the disability cases this conflict has impressed the reviewing judges profoundly and may account for their departures from the statutory text. A temptation to indulge in more review could easily thwart the helpful impulse of the legislature and its agent, and mire the disability program in the litigious bog Congress meant to skirt. Should the courts insist on the authority of a physician's opinion as to disability, they may find the agency resorting to more sympathetic diagnosticians as a self-legitimating tactic; a battle of experts would be the consequence.274

This article began with a suggestion that the disability program offered a fresh opportunity to observe a dispensing agency adapt the claims of efficient administration to the agency statutory premises. It was also suggested that the disability program provided the federal courts with a severe test of their ability to deal effectively with an administrative process. Obviously, these separate aspects of the disability program are very much interrelated. The courts as they interpret the applicable statutes will ultimately decide what kind of "administration" is permitted and what kind is not. Despite this fact of agency life, the courts reviewing disability cases, and all courts reviewing similar decisions, have a rather special responsibility to an administrative body whose acts and policies are under scrutiny. That special responsibility is the heart of the ethics of judicial review. It requires the court to know the statute that is the agency's reason for being and not just repeat selected phrases in a hasty and meaningless way. It requires the court to see and appreciate those economic and social facts which qualify the statute's administration without permitting the appeal of a particular case to obscure the program created to contain such facts. Finally, it requires the court to leave to the agency that which is the agency's—especially in the disability program where the Secretary's power to produce evidentiary standards is the power to decide for what disability the statute will pay benefits.

274 See Bramlet v. Ribicoff, 298 F.2d 858 (4th Cir. 1962), and Underwood v. Ribicoff, 298 F.2d 850 (4th Cir. 1962), which present a curious reaction to the Secretary's use of objective medical data to support his opinion. The courts criticized overemphasis on such material and said subjective evidence also must be examined.
In terms of the vast number of claimants and the difficult and ambiguous questions to be resolved, the agency responsible for the administration of the disability laws has an unprecedented task. Both the statutory provisions and the legislative history of the disability program have been extensively reviewed to demonstrate the power and discretion conferred on the Secretary of Health, Education and Welfare by the disability law. By conferring such discretion the disability statutes have established the power to choose, the occasions for choice, and have stated quite clearly who is to make those choices. Yet, in the face of these statutes and their legislative history, the courts have displayed a consistent indifference to the Secretary’s statutory discretion, his power to produce evidentiary standards, and his attendant policy-developing power. An awareness of the special responsibility owed an administrative agency by a reviewing court seems peculiarly absent from the language and reasoning of courts reviewing disability determinations.
## APPENDIX

**United States District Court Disability Decisions on Merits:**
**By Circuit and State, Through June 1963**

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Division of Disability Operations
September 1963
REGIONAL ENFORCEMENT MEASURES AND THE UNITED NATIONS

JOHN W. HALDERMAN*

Examining the measures taken by the Organization of American States against the Dominican Republic in 1960, and Cuba in 1962, in the light of the Charter of the United Nations, the author points out the various legal explanations and justifications heretofore propounded. Mr. Halderman concludes that the “quarantine” measure was in the nature of collective self-defense and not an “enforcement action” such as would require United Nations authorization under the Charter. As to the earlier cases, which did not involve imminent threats to peace, it is considered that the authorization requirement might have been applicable. It is also suggested that in perhaps none of these cases was this requirement given sufficient consideration in light of its importance as a Charter principle.

INTRODUCTION

In 1960 the Organization of American States found the Dominican Republic responsible for wrongful actions directed against Venezuela and decided that “collective action is justified under . . . the Charter” of the OAS. It proceeded to apply the following measures:

(a) breaking of diplomatic relations of all the member states with the Dominican Republic;

(b) partial interruption of economic relations of all the member states with the Dominican Republic, beginning with the immediate suspension of trade in arms and implements of war.1

At the Punta del Este Conference of January 1962, the OAS resolved to suspend all trade in arms with Cuba, on the part of the member states, as a measure designed to deal with the threat to the hemisphere brought about by Cuba’s introduction of communism into the region.2

In October 1962, the OAS authorized a “quarantine” of Cuba, which was carried out mainly by the United States, designed to prevent the further introduction of strategic Soviet missiles into Cuba and directed especially against Soviet shipping approaching that country. The OAS resolution in question considered that the secret introduction of such weapons into Cuba had endangered the peace of the hemisphere within the

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* World Rule of Law Center, Duke University School of Law; LL.B., University of Oregon; formerly a member of the United States Department of State and Foreign Service; Secretary of Committee IV/1 at the San Francisco Conference.

1 Res. of Aug. 20, 1960, 43 Dep't State Bull. 358 (1960).

meaning of Article 6 of the Inter-American Treaty of Reciprocal Assistance3 and recommended that

the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capacity from ever becoming an active threat to the peace and security of the Continent.4

The present discussion is concerned with the applicability to these measures of Article 53 of the Charter of the United Nations, which requires Security Council authorization of “enforcement measures” undertaken by regional organizations:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . .

In none of the cases mentioned was such authorization obtained or requested by the OAS.

The question of the applicability of article 53 to different situations involves the fundamental problem of the over-all world role of the United Nations on the one hand as opposed to the activities of regional organizations on the other. This problem was recognized as fundamental at the outset of the San Francisco Conference where the advocates of regional powers (especially the states of the inter-American system) who feared the veto of regional measures in the Security Council under the provision which became article 53, obtained as a compromise the recognition, in article 51, of the right of “collective self-defense” in the case of armed aggression. Later, as the United Nations proved unable to provide collective security in the face of cold-war developments, the concept of “collective self-defense” was developed in such important forms as the North Atlantic Treaty Organization and other regional defense arrangements. It was argued in favor of such arrangements that they were designed to create conditions which would enable the United Nations to function in the manner originally contemplated.5 At the same time, fears

3 See text accompanying note 24 infra.
were expressed that too much emphasis on regional powers would be detrimental to the goals of the United Nations. Thus, Secretary-General Hammarskjold said in 1954:

[D]evelopments outside the organizational framework of the United Nations, but inside its sphere of interest, do give rise to certain problems which require serious consideration. In the short view, other approaches than those provided by the United Nations machinery may seem more expedient and convenient, but in the long view they may yet be inadvisable. To fail to use the United Nations machinery on those matters for which Governments have given to the Organization a special or primary responsibility under the Charter, or to improvise other arrangements without overriding practical and political reasons—to act thus may tend to weaken the position of the Organization and to reduce its influence and effectiveness, even when the ultimate purpose which it is intended to serve is a United Nations purpose.

The balance to be struck here must be struck with care.6

One set of arguments advanced in justification of the non-application of article 53 to the Dominican and Cuban measures above referred to maintains that these measures were not "enforcement actions" within the meaning of the Charter. However, different and somewhat inconsistent arguments are made in this connection with respect to (1) measures short of force (diplomatic sanctions and arms embargoes) and (2) the "quarantine measure." With respect to the "quarantine" action, one of the arguments has naturally been that it was a measure of "collective self-defense" and therefore not an "enforcement measure." The conclusion is reached below that this is the only satisfactory theory of interpretation as among those theories which would deny the status of "enforcement measures" to actions of the kind under consideration; however, it is applicable only to situations such as the Cuban crisis of October 1962, which involved immediate threats of aggression.

A different approach to the problem, which has been taken by some governments, appears to assume that United Nations authorization is not required for the actions under discussion. In effect the Charter seems to be regarded as amended so as to eliminate the pertinent requirement of article 53 in this respect. While it is considered, in the ensuing discussion, that Charter modification is not to be rejected in principle, doubt is entertained as to whether this particular suggested change is the best solution of the problem being faced. This doubt arises from the fact that the "authorization" clause reflects, and in an important sense embodies, the principle of universality which is indispensable to the United Nations

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if it is ever to fulfill its major purposes. Possible alternative courses of action are therefore considered with respect to the different types of cases under consideration.

Before taking up these questions it is desirable first to consider what is meant by "enforcement action" under article 53, and the scope of the concept of "self-defense" which the Charter regards as legitimate.

**Nature of "Enforcement Action"**

The Charter definition of "enforcement action" is believed to be found in articles 1(1), 39, 41 and 42 which read:

**Article 1**

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression . . . .

**Article 39**

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

**Article 41**

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

**Article 42**

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

In article 41, while diplomatic and economic sanctions are specifically referred to, the range of possible measures short of force appears to be unlimited. Also, with respect to the use of force under article 42, possible measures appear to be without limit so long as they are deemed necessary "to maintain or restore international peace and security."

The measures authorized thus seem to be comprehensive in character, and no reason is perceived for doubting that they were intended to embrace any and all applications of tangible pressure by the United Nations
for the maintenance of international peace and security. They describe, in short, the "police" function of the Organization.\(^7\)

So far as terminology is concerned, article 1(1) refers to "collective measures," and article 39 to "measures." In other parts of the Charter the terms "enforcement measures" and "enforcement action" are used, the latter being the phraseology employed in article 53. The tendency at the San Francisco Conference was to refer to these measures generically as "enforcement" arrangements or measures, notwithstanding the word "enforcement" is not used in the articles defining the concept.\(^8\)

The term "enforcement action" in article 53 is used, of course, with reference to measures taken by organizations other than the United Nations, namely regional organizations. However, since no special definition of the phrase in this context is given, it is only to be assumed that the same concept is involved here as elsewhere in the Charter. This may be referred to generically as the "police" function.

**Collective Self-Defense**

Another Charter concept under which regional organizations may apply tangible pressures to international situations is that of "individual and collective self-defense," dealt with in article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

This provision did not appear in the Dumbarton Oaks Proposals, but was

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\(^7\) A narrower scope for this concept is indicated by Mr. Abram Chayes, Legal Adviser for the Department of State, in expressing the view that "Security Council discussion of sanctions imposed by the O.A.S. against the Dominican Republic and Cuba, as well as the opinion of the International Court of Justice in the United Nations Assessment Case, have treated 'enforcement action' as a rigorously narrow category." Chayes, Law and the Quarantine of Cuba, 41 Foreign Affairs 550, 556 (1963). The effect of these precedents on the subject matter under discussion is considered in the principal text below.

\(^8\) For example, the Steering Committee of the Conference gave the generic designation "enforcement arrangements" to the terms of reference of Committee III/3, which was charged with the drafting of Chapter VII of the Charter, including articles 39, 41, and 42. United Nations Conference on International Organization: Selected Documents, U.S. Dep't State, Pub. No. 2490, at 23 (1946).
adopted at the San Francisco Conference as the means of resolving a dilemma which appeared early in the Conference. This dilemma was precipitated, on one hand, by fears that effective regional action would be frustrated by too great a degree of Security Council control, including fears of possible vetoes of regional action. The provisions of article 53, making Security Council authorization a prerequisite to "enforcement action" by regional organizations, appeared first in the Dumbarton Oaks Proposals and undoubtedly precipitated the fears of the veto which were brought out in the initial statements on matters of substance in the committee charged with drafting the Charter provisions on "Regional Arrangements." The other aspect of the dilemma facing the Conference was the fear that the necessary universality of the world Organization would be impaired if too great a latitude were given to regional organizations.

One proposal for resolving the dilemma was to make the veto power in the Security Council inapplicable to regional enforcement measures. However, this proposal was not adopted and, instead, it was decided to incorporate in the Charter a recognition of the right of collective self-defense in case of armed aggression. The point which it is desired to emphasize in the present connection is that the concept of "collective self-defense" was incorporated in the Charter primarily for the purpose of enabling regional organizations to take initial action on their own responsibility to deal with aggression without being delayed by United Nations debates or obstructed by possible vetoes in the Security Council.

DENIAL THAT MEASURES CONSTITUTE "ENFORCEMENT ACTION"
OAS MEASURES SHORT OF FORCE

The diplomatic and economic measures imposed by the OAS against the Dominican Republic in 1960 were brought before the Security Council by the Soviet representative for the avowed purpose of obtaining that body's authorization for the measures which he claimed to be required by article 53 of the Charter. It was suggested by some states during the debate that the Soviet representative had an ulterior motive in bringing the item onto the agenda. It seems probable that the motivation was, in part, to preserve for possible use the power which article 53 implicitly gives to the Soviet Union to obstruct inter-American "enforcement action."

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10 Ibid. (Remarks of Australian representative.)
ever, there was no intent to obstruct the particular measure under consideration since it was directed against the Trujillo regime in the Dominican Republic.

Representatives on the Council of members of the inter-American system and of some other states denied that Security Council approval was required for the measures in question, and asserted that it was sufficient if the OAS action were brought to the attention of the Council pursuant to article 54 which provides: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." To this effect the Argentine, United States and Ecuadoran representatives proposed a resolution, which was adopted by the Council, in which that body merely took note of the OAS action in the Dominican case.12

With regard to the action of the OAS taken at the Punta del Este Conference of 1962, suspending trade with Cuba in arms and war materials, Cuba brought a complaint before the Security Council asserting that this was an "enforcement action" which should have had the approval of the Council, and proposing to have the issue adjudicated by the International Court of Justice.13 This complaint, like the earlier Soviet proposal with respect to the Dominican action, was rejected by the American states and by a majority of the Council on various grounds, one of which was that the actions in question were not "enforcement actions" and consequently not within the meaning and scope of article 53.

One of the grounds advanced for this position was suggested by the Ecuadoran representative during the Council debate on the earlier case in 1960:

We might also ask whether the Security Council's authorization is necessary only for action which, like the use of force, would be a violation of international law if it were taken without the Council's authorization, but not for action like the breaking of diplomatic relations, which is within the exclusive right of a sovereign state.14

The argument thus suggested was, perhaps, best stated by the United Kingdom representative as follows:

In the opinion of the United Kingdom Government, it is common sense to

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interpret the use of this term in Article 53 as covering only such actions as would not normally be legitimate except on the basis of a Security Council resolution. There is nothing in international law, in principle, to prevent any State, if it so decides, from breaking off diplomatic relations or instituting a partial interruption of economic relations with any other State. These steps, which are the measures decided upon by the Organization of American States with regard to the Dominican Republic, are acts of policy perfectly within the competence of any sovereign state. It follows, obviously, that they are within the competence of the members of the Organization of American States acting collectively.\textsuperscript{15}

This argument was also advanced by several representatives in the Council during the debate on the Punta del Este resolution of 1962.\textsuperscript{16} The United States representative indicated that the issue had been decided on this basis during the earlier debate of 1960.\textsuperscript{17}

The argument may, it is believed, be questioned on the ground that the states concerned were here acting not on the basis of their rights and duties as individual sovereign states under international law but on the basis of the rights and duties which they had undertaken as members of the OAS.\textsuperscript{18} The measures were clearly initiated by the OAS pursuant to treaties which, \textit{inter alia}, proclaim this to be a regional agency within the meaning of the United Nations Charter.

A variant of the argument under discussion, also raised in debates over the proposed 1960 Council action and the 1962 Punta del Este resolution, was that the phrase "enforcement action," as used in article 53, refers only to measures involving the use of physical force.\textsuperscript{19} This proposition appears to be at variance with the language of articles 1(1), 39, 41 and 42 which, as indicated above, appear to define such measures as including both the use of force and measures short of force.\textsuperscript{20}

\textsuperscript{15} Id. at 16.


\textsuperscript{17} Id. at 53.

\textsuperscript{18} The Ceylonese representative pointed this out during the 1960 debate in the Council U.N. Security Council Off. Rec. 15th year, 894th meeting 4 (S/PV.894) (1960). As the Legal Adviser for the Department of State later pointed out: "The [Rio] Treaty is explicit as to the measures which may be taken 'for the maintenance of the peace and security of the Continent.'" Chayes, supra note 7, at 555.


\textsuperscript{20} The Ceylonese representative pointed this out during the 1960 debate, U.N. Security
ARGUMENT BASED ON "RECOMMENDATION"

It has been observed above that Security Council authorization was not sought for the "quarantine" measure which was instituted in the Cuban crisis of 1962 pursuant to a recommendation of the OAS. Although there was no debate in the Security Council as to whether such authorization was legally required, this question nevertheless exists by reason of article 53.

The Deputy Legal Adviser for the Department of State, Mr. Leonard C. Meeker, has recently indicated that the United States regards the "quarantine" as not being an "enforcement action," and therefore as not requiring authorization under article 53, on the ground that this measure was instituted pursuant to a "recommendation" of the OAS, rather than by a binding order. In the course of his argument he stated:

Council actions under Articles 40, 41, and 42 are to be distinguished from recommendations made by the Council under Article 39 or by the General Assembly in the discharge of its responsibilities as set forth in Chapter IV of Council Off. Rec. 15th year, 894th meeting 3 (S/PV.894) (1960), and it was, of course, of the essence of the Soviet position at that time. The Soviet representative said, for example:

As is known, the measures provided for in Article 41 of the Charter are, of their nature, enforcement measures because they are employed by the Security Council for the very purpose of forcing an aggressor to cease acts of aggression against another State and of preventing the recurrence of aggression. How, in the light of this, can one assert that the breaking of diplomatic relations and the interruption of economic relations do not constitute enforcement action?

Id. at 11-12. An answer to this last question had, in fact, been attempted earlier by the renowned Soviet lawyer Vyshinsky in defending Soviet support of a proposed Assembly recommendation of 1946 that member states withdraw their diplomatic representation from Spain. The question came up during the Assembly debate on the "Uniting for Peace" Resolution in 1950, when the Soviet Delegation was asked how it could reconcile this earlier position with its then current position that all "enforcement measures" were the monopoly of the Security Council. In reply, Mr. Vyshinsky admitted that such measures are enforcement measures, but the main thrust of his rather involved argument seems to have been that they are only in this category if they involve the use of force. Thus he said: "We are asked whether the severance of diplomatic relations is not in fact enforcement action. Of course it is enforcement action, but you forget that when we speak of enforcement action we connect it with the possibility of using armed forces." U.N. Gen. Ass. Off. Rec. 5th Sess., Plenary 334 (A/PV.301) (1950).

21 During the Council debate of October 23-25, 1962, there was only one reference to article 53, which was by the Ghanian representative in asserting that Council authorization for the measure in question was required. U.N. Security Council Off. Rec. 17th year, 1024th meeting 49-50 (S/PV.1024) (1962). The Soviet representative appeared at one point to be denying that the OAS had any right to take action in the premises; however, he did not advance a legal argument in support of this position. U.N. Security Council Off. Rec. 17th year, 1022d meeting 86 (S/PV.1022) (1962).
the Charter. This distinction between a Security Council measure which is obligatory and constitutes "action," on the one hand, and a measure which is recommended either by the Council or by the General Assembly, on the other, has been supported by the Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations (July 20, 1962). The Court held that the measures taken by the General Assembly and the Security Council in Suez and the Congo were not enforcement action, in part, because they were only recommendatory as to participating states.

Thus, in the context of United Nations bodies, it may be persuasively argued that "enforcement action" does not include action by a United Nations body which is not obligatory on all the Members. As used in Article 53(1), "enforcement action" refers to action by a regional organization rather than to action by an organ of the United Nations, but the words are properly given the same meaning in this context.

The constitutional instrument upon which the "quarantine" measure was based is the Inter-American Treaty of Reciprocal Assistance concluded at Rio de Janeiro on September 2, 1947. Article 6 of the treaty refers to various situations, other than armed attack, which might threaten the peace of America and provides that in such event the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

According to article 8 of the treaty, the measures to be agreed upon in such event might include diplomatic or economic measures or the use of force. As to the binding force of such decisions, article 20 of the treaty provides:

Decisions which require the application of the measures specified in Article 8 shall be binding upon all the Signatory States which have ratified this Treaty, with the sole exception that no State shall be required to use armed force without its consent.

As stated in the argument under discussion, the OAS resolution authorizing the "quarantine" measure was in the form of a "recommendation";

23 Ibid.
it is also true that any OAS decision under these provisions involving the use of force is non-binding and therefore, in effect, recommendatory. In asserting that no such measure can be an "enforcement action" by the OAS, the argument in question seems to state that any action taken pursuant to such a resolution is taken by the state or states concerned on their own responsibility and essentially outside the Organization.

This point of view appears to have some weight of history and acceptance behind it, since it is believed to correspond to the generally prevalent view of the nature of the Korean action and of the measures contemplated by the "Uniting for Peace" resolution. The argument under discussion concerning the "quarantine" measure seems to be invoking the United Nations precedents, since it cites in its support the Advisory Opinion in the "assessments" case, which is concerned with questions of United Nations Charter law.

The present writer has endeavored elsewhere to set forth reasons for questioning the view which holds that the Korean action was taken, and that measures under the "Uniting for Peace" resolution would be taken, by the states concerned on their own responsibility and essentially outside the Organization. This point of view may be sketched briefly in the present context insofar as it appears to have relevance to the "quarantine" measure authorized by the OAS.

The prevailing point of view concerning the force and effect of "recommendations" in such matters is believed to have received its basic expression by the United Kingdom representative in the Security Council in support of the resolution "recommending" that member states take action to deal with aggression in Korea:

[H]ad the agreement provided for in Article 43 of the Charter been concluded . . . the action to be taken by the Security Council . . . would no doubt have been founded on Article 42. As it is, however, the Council can naturally act only under Article 39, which enables the Security Council to recommend what measures should be taken to restore international peace and security.

Since the recommendation in question was directed to the member states, the force and effect of this statement seems necessarily to be that the anticipated measures would be taken on the responsibility of the states concerned and outside the Organization.

Article 39, referred to in the preceding passage, authorizes the Security Council to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42” in order to deal with a threat to the peace, breach of the peace or act of aggression. Article 42 authorizes the use of force, if necessary, and article 41 authorizes measures short of force. We thus have, standing side by side in article 39, what appear clearly as substantive provisions authorizing the making of “recommendations” and “decisions” respectively. The prevalent assumption seems to be that the Council may proceed on this basis to recommend that member states take measures to deal with situations such as the Korean aggression.28 Is this assumption justified?

Articles 1(1), 39, 41 and 42 of the Charter appear intended to set forth the measures involving tangible pressures which the United Nations is authorized to apply. The area of activity thus encompassed is obviously an important one, and article 39 seems to treat it as such in specifying that such measures are only to be taken in situations comprising threats to peace, breaches of peace or acts of aggression. It would seem that the Charter cannot contemplate that measures of this kind should be authorized by the United Nations and that they should then be undertaken by states essentially on their own responsibility and outside the Organization. The effect of a “recommendation” (as in the Korean case) in conferring the United Nations sanction and authorization is inescapable. It is a committal of the prestige of the Organization and that of its members. It seems essential that United Nations actions of such importance should be treated and categorized in accordance with their true nature and consequences.

The United Nations did not, in fact, attempt to disavow the Korean operation once it was in progress. Rather, efforts were made to stress the United Nations connection by such means as the authorized use of the United Nations flag and United Nations decorations. The Collective Measures Committee, established pursuant to the “Uniting for Peace” resolution, has recommended that similar efforts be made to stress the United Nations connection with any future operation initiated under that resolution (which provides for action pursuant to General Assembly “rec-

28 These measures would be sharply distinguished from those provided for in article 42 for the reason stated by the United Kingdom representative, namely the non-conclusion of the agreements provided for in article 43. This point of law, which seems to be peculiar to the Charter and not applicable to the “quarantine” measure, is considered in Haldeman, supra note 26, at 984-85.
ommendation") as a means of mobilizing public support behind it.29

Thus, it might be argued that the legal consequence widely regarded as
flowing from the use of the "recommendatory" procedure—namely, the
divorce of the operation from the Organization—is not genuine, but is
merely a device to overcome what is regarded as a technical obstacle in
the Charter to direct United Nations action.

Similarly, with respect to the "quarantine" measure, the OAS resolution
was very much desired by the American states and others in order that the
action would be regarded as an OAS action. The argument denying that
the operation was an "enforcement action," appears to be advanced only for
the purpose of justifying the non-application of the "authorization"
provision of article 53.

According to the view just outlined, measures of the United Nations or
regional organizations involving the application of tangible pressures
should, from a legal point of view, be treated and categorized in accord-
ance with their true nature and consequences and not in accordance with
the particular procedure by which they are brought into operation. It is
suggested that these measures do not find their Charter authority in pro-
visions authorizing the making of recommendations; rather, the "rec-
ommendatory" aspect is here nothing more than a procedural device.

In the first place, it may be observed on this point, that the substantive
power of recommendation in the Charter is very broad so far as subject-
matter is concerned. Corresponding to this broad scope of applicability is
the fact that the force and effect of recommendations are limited to the
application of moral pressure. By contrast "enforcement actions" involve
the application of tangible pressures, but the scope of applicability of
such measures is correspondingly limited to situations comprising threats
to peace, breaches of peace or acts of aggression.

Considering the scope of the "recommendatory" power in the narrower
context of Charter functions pertaining to the maintenance of peace and
security, it will be observed that this power is here largely concerned with
what may be called the "peaceful settlement" function. By its nature this
is separate and distinct from the "enforcement" function, even though the
two are interdependent for their successful functioning.30 The "peaceful

30 See remarks in Commission I of the San Francisco Conference by the Rapporteur of
Committee I/1 (Zeineddine) and by Lord Halifax. The United Nations Conference on Inter-
national Organization: Selected Documents, U.S. Dep't State, Pub. No. 2490, at 534, 536-37
(1946).
settlement” function is concerned with the substantive issues in international disputes and situations and it was, of course, deliberately intended that the powers of the Organization in such matters would not go beyond those of recommendation.31 “Enforcement action” is quite different in comprising action by the Organization itself; action, in turn, connotes a power of decision.

Turning again to the substantive power of “recommendation” found in article 39—in Chapter VII, concerned with “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”—there was, indeed, a suggestion made at the San Francisco Conference that the word “recommendation” should here be given a different meaning than it has in Chapter VI (dealing with “Pacific Settlement of Disputes”) since, in Chapter VII, “the question was not one merely of a dispute but of a threat to the peace which had gone beyond the stage of a dispute.”32 The proposal was, however, rejected33 and the report of the committee in which the discussion took place contains a note of explanation designed to remove any doubt that the word “recommendation” was here used in order to show that, with respect to this more serious class of dispute, the same “peaceful settlement” function was open to the Council as that outlined in Chapter VI.34

The Charter distinction between the “peaceful settlement” function and “enforcement action” is perhaps manifested most sharply in article 11(2). The first sentence of this paragraph authorizes the General Assembly to discuss, or make recommendations concerning, any question relating to the maintenance of peace and security.35 The second sentence then pro-

31 In its report to Commission III, Committee III/2 of the San Francisco Conference, which was charged with the preparation of Chapter VI of the Charter dealing with “Pacific Settlement of Disputes,” made the following statement concerning an amendment proposed by the sponsoring powers to the provision which became article 37:

As the result of this amendment, the Security Council may, in the cases envisaged, “recommend” terms of settlement as well as procedures and methods of adjustment. In the course of discussion on an amendment offered by the Delegation of Belgium, the Delegates of the United Kingdom and the United States gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the parties.


33 Id. at 381.


35 Delegations supporting the “Uniting for Peace” resolution, which asserts the
vides that “any such question on which action is necessary shall be referred to the Security Council by the General Assembly . . . .”

The Advisory Opinion in the “assessments” case makes the same sharp distinction, as is indicated in the following passage:

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peace-keeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when “action” is necessary the General Assembly shall refer the question to the Security Council. The word “action” must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The “action” which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.” If the word “action” in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character . . . .

Assembly’s right to “recommend” measures when the Security Council is paralyzed by the veto, seemed generally of the opinion that such action would find its Charter basis in article 11(2) and related articles of the Charter. See the statements of the United States, Chile, France, Peru and Cuba, U.N. Gen. Ass. Off. Rec. 5th Sess., 1st Comm. 64, 67, 70, 75, 79-80 (A/C.1/SR.354-57) (1950). The “recommendatory” aspect of the resolution was modeled on the procedure followed in the Korean operation and it seems clear that here, as in the earlier case, the members supporting the measure sought a substantive “recommendatory” clause upon which to base it. It would seem to follow that they considered that the resulting action would be taken by the individual member states concerned, rather than by the Organization. The writer’s disagreement with this attribution of Charter authority is indicated in Halderman, supra note 26, at 993-94.

This sentence has reference to the United Nations Emergency Force deployed in the Suez Crisis of 1956 as, apparently, does Mr. Meeker’s statement that “In the exercise of its powers under Arts. 10 and 11, the General Assembly has in the past recommended the use of armed force.” He goes on to say that “since the Assembly’s powers are only recommendatory in the field of peace and security, the exercise of these powers by the Assembly could not be considered either ‘preventive’ or ‘enforcement’ action.” Meeker, supra note 22, at 521 n.14. Since the sentence of the Advisory Opinion here referred to states that operations based on the substantive power of recommendation are to be undertaken “at the request, or with the consent, of the States concerned,” it seems necessary to distinguish the “quarantine” measure from this category, since this was directed against the Soviet Union without that country’s consent.
affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.37

It would therefore appear that the Advisory Opinion cannot be cited for a single all-embracing rule to the effect that no measures taken by "recommendation" can be regarded as "enforcement measures." The opinion seems clearly to follow the Charter in subdividing into two categories activities bearing on the maintenance of peace and security: (1) measures based on provisions authorizing the making of recommendations, which measures must be "permissive" in character and (2) "enforcement action." While, in the former category, the "recommendatory" nature of the action seems clearly based upon a substantive power of recommendation found in the Charter, this would not appear to be true of "enforcement actions." Here it seems essential that there be an appropriate Charter authority for the taking of action. If, on this basis, resulting measures are initiated by recommendation, this would only be a mode of procedure unrelated to "recommendation" as a source of authority. This latter question was not discussed by the judges concurring in the Advisory Opinion, since they did not consider that the measures they had under consideration were of the "enforcement" variety.

It is therefore suggested that there is no basis for the theory which holds that the United Nations may "recommend" measures in the nature of "enforcement measures" and that the resulting actions are taken, not by the Organization, but by the states concerned on their own responsibility and outside the Organization. For reasons above indicated it seems evident that this theory arose out of conditions peculiar to the United Nations Charter.

The position is clearer when we turn to the "quarantine" measure. Here the basic constitutional instrument is the so-called Rio Treaty of 1947, relevant parts of which were referred to at the outset of the present section. Although it is true that decisions to apply force pursuant to this treaty are not binding upon the members, and that such measures are, in effect, "recommendatory," there is nothing in the language of the treaty to encourage the drawing of distinctions on this basis or the view that actions of this kind are taken by the member states apart from the Organization. It would seem that all such measures taken pursuant to decisions of the

OAS, whether binding or not, would fall within the relevant language of Article 53 of the United Nations Charter, which refers to actions "taken under regional arrangements or by regional agencies."

No basis is therefore perceived for attempting to apply to this or any OAS measures the theory based on "recommendation" which has been developed in the context of the United Nations Charter.

It is further concluded that the "quarantine" measure has the character of an "enforcement action" within the meaning of article 53.

The preceding subsection was concerned with arguments designed to deny the status of "enforcement actions" to certain OAS measures short of force; the present is concerned with an argument denying this status to an application of force by the OAS, namely the "quarantine" measure of October 1962. In both cases it has been ventured to disagree with these arguments. In concluding this phase of the discussion it may further be observed that they seem to contradict each other. With respect to the measures short of force it was argued that these were not "enforcement actions" because they were kinds of actions (diplomatic sanctions and arms embargoes) that might have been taken in their individual sovereign capacities by the states concerned and it was pointed out in this connection that these measures did not involve the use of force. There was thus implied a basic difference between acts not involving force which states might take on their own responsibilities, and applications of physical force which, it would seem to follow, could not legally be taken by states, but only by competent international organizations. This line of argument, however, seems to run directly counter to the prevailing theory which maintains that the Korean operation was not an "enforcement measure" of the United Nations, but was rather taken by states on their own responsibilities and outside the United Nations. This is also the theory attempted to be applied to the "quarantine" measure by means of the argument discussed in the present section.

Amendment or Modification of the Charter

Another line of approach designed to justify the non-application of the "authorization" principle of article 53 was what may be referred to as the "tacit Charter amendment" theory.

This theory was advanced in the 1960 Council debate concerning the diplomatic sanctions and arms embargo imposed against the Dominican Republic. The Argentine, United States and Ecuadoran representatives co-sponsored the resolution which was adopted by the Council and which merely took note of, instead of authorized, the OAS action. In support of
this resolution the Argentine representative said that it would amount to a "complete demonstration of the coordination which should exist between the regional agency and the international Organization." He went on to say:

It is therefore our conviction that, however Article 53 of the Charter may be interpreted in the future, legally organized regional groups . . . must have sufficient authority to solve problems confined within the limits of the region involved.

The United States representative devoted most of his statement in this debate to emphasizing the background and importance of the inter-American system, and concluded by asserting that "the Security Council can best affirm its faith in the inter-American system by the adoption of the draft resolution submitted by the members of the Organization of American States in the Council."

The representative of Ecuador, the third co-sponsoring state, stated that:

[T]he relations between the Council and the regional agencies should be so flexible as to permit these agencies to take effective action for the maintenance of international peace and security in the light of regional conditions and without necessarily bringing regional problems before a world forum.

Following is an official summary of the statement of the Chilean representative in the Security Council during the debate of 1962 concerning the Punta del Este resolution of the OAS imposing an arms embargo against Cuba:

His delegation . . . believed that the OAS, in accordance with the principles of the United Nations Charter, had the power and authority to adopt decisions, which, when communicated to the Security Council, did not require the Council's approval. He said that it would be disturbing to set a precedent of interference by the Security Council in matters that concerned regional organizations.

These statements can hardly be said to serve the purpose, believed important from the standpoint of constitutional development, of explaining to the world public that a major modification in terms of Charter language is taking place, or of explaining the reasons for what is being done.

This is not to say that the statements are wholly devoid of explanation. One such explanation, which seems to place a limit on the position being

39 Id. at 7.
40 Id. at 9.
41 Id. at 12.
taken, emphasizes that the American regional organization should have the power of decision and action with respect to regional problems. Whether the use of Cuba as a site for Soviet missiles would fall within this limitation would at least seem to be a question. If it were not such a regional problem, the Cuban crisis of October 1962 would appear to require a somewhat different approach from the one just considered. The question was not debated in the Council and has not, indeed, received extensive consideration up to this time.

The Legal Adviser for the Department of State has, however, in this connection given an indication that the Charter should be regarded as, in effect, amended:

The drafters of the Charter demonstrated their wisdom, however, by making Security Council responsibility for dealing with threats to the peace “primary” and not “exclusive.” Events since 1945 have demonstrated that the Council, like our own electoral college, was not a wholly viable institution. The veto has largely disabled it from fulfilling its intended role in keeping the peace.

This paralysis of the Security Council has led to a reliance on alternative peace-keeping institutions. In the United Nations itself, the General Assembly and the Secretary-General have stepped into the gap. Less dramatically, so has the O.A.S., pursuant to the provisions of Chapter VIII of the Charter on “Regional Arrangements.”

He believes that this change is accompanied by an evolution in the scope of article 53, which he proceeds to describe in terms of Charter interpretation:

A technical part of this evolution, if a quiet one, has been the construction of Article 53 so as to limit its scope. . . . [T]he debates in the Security Council in the case of the Dominican Republic revealed a widespread readiness to conclude that the requirement of “authorization” does not import prior approval, but would be satisfied by subsequent action of the Council, or even by a mere “taking note” of the acts of the regional organization. In this context, it is important that the Security Council met in emergency session before the quarantine of Cuba went into effect. The Soviet Union introduced a resolution of disapproval, but by general consent it was not brought to a vote.

This narrowing process of interpretation may be resisted by those who seek the comforting certainty of “plain meaning” in words—forgetting that they are, in Holmes’ phrase, the skin of living thought. But surely it is no more surprising to say that failure of the Security Council to disapprove regional action amounts to authorization within the meaning of Article 53 than it was to say that the abstention and even the absence of a permanent member of the Security Council met the requirement of Article 27(3) for “the concurring votes of the permanent members.”

43 Chayes, supra note 7, at 556. For a statement to similar effect by the same authority, see 47 Dep’t State Bull. 763, 765 (1962).
44 Chayes, supra note 7, at 556.
This explanation seems to regard in a new light the efforts which were made to justify the course of action followed by the majority in the Dominican case of 1960. As indicated above, the attempt there made at Charter interpretation seems to have been mainly in the direction of holding that diplomatic sanctions and arms embargoes were not "enforcement actions" and therefore not covered by the "authorization" requirement of the article in question. In the passage just quoted, the view seems to be that the "authorization" clause was, in fact, observed and satisfied by the Council's action in "taking note" of the OAS action.45 There was no equivalent action by the Council with respect to the arms embargo imposed by the OAS against Cuba at the Punta del Este Conference; however, with respect to this case it may be considered by the Legal Adviser that the "authorization" requirement was fulfilled under the theory that "failure of the Security Council to disapprove regional action amounts to authorization within the meaning of Article 53." Whether such an evolutionary process is best described as a "narrowing process of interpretation" or as a process of Charter modification may be arguable, but is not the essence of what is being done. The author has felt justified in considering this line of thought under the heading of "Amendment or Modification of the Charter."

**Article 53 and the Problem of Constitutional Development**

If it is the "paralysis of the Security Council" that "has led to a reliance on alternative peace-keeping institutions," as indicated by the Legal Adviser for the Department of State in the first of the passages quoted immediately above, it seems necessary to take account of the "Uniting for Peace" resolution, which was adopted specifically to deal with the problem and is regarded as a major constitutional development of the United Nations.46 It is therein provided that if the Council is prevented by lack of unanimity from carrying out its primary responsibility for the main-

45 The possibility that the line of thought here indicated by Mr. Chayes may have been modified, so far as it pertains to the "quarantine," is suggested by the subsequent statement of Mr. Chayes' deputy, Mr. Meeker, to the effect that the "quarantine" was not regarded by the United States as an "enforcement action" and that it did not, therefore, require authorization under article 53. See text accompanying note 23 supra. A modification of Department of State thinking along this line would not detract from the importance of the theory of interpretation here under discussion, since it might find application in other situations.

tenance of peace and security in a particular case, the General Assembly may act in a residual capacity to assure that the necessary measures are taken. It gives effect to the basic Charter propositions that the Security Council is an organ of the United Nations and that it is charged with responsibilities on behalf of the United Nations with respect to the maintenance of peace and security; it further asserts the principle that if the Council is unable to carry out such responsibilities, the Assembly should, in a residual capacity, assure that they are fulfilled. The underlying principle of the "Uniting for Peace" resolution would seem to be applicable to the United Nations function set forth in article 53 of approving or disapproving regional enforcement measures.47

In terms of constitutional development, the redistribution of the Charter power in question as between the Security Council and Assembly, as envisioned by the "Uniting for Peace" resolution, is a relatively modest step compared with the undertaking to relinquish it to regional organizations, which are juridically distinct entities.

The reason why recourse has not been had to the Assembly in the cases under consideration evidently involves practical political considerations. Whereas the "Uniting for Peace" resolution contemplated action by the United Nations itself, the measures here under discussion were initiated and taken by the regional organization; in this context the tendency may have been, on the part of states favorable to the proposed measures, to regard the Security Council and General Assembly as potential threats to the measures in question rather than as means for carrying them out. The changed political character of the Assembly resulting from the admission of a large group of states of "neutralist" persuasion may have been a factor entering into the decision of the American states, and the majority of the Council, not to resort to the Assembly as a means of giving effect to the "authorization" clause of article 53.

The policy which has been followed, although it involves a modification

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47 The substantive basis of Charter authority for such Assembly actions may perhaps be found in article 1(1), which states it to be a major purpose of the United Nations to maintain international peace and security and, to this end, to take "effective" collective measures when necessary. The fulfillment of this major purpose being essential to the survival of the Organization and its capability of fulfilling any of its other purposes, it can readily be implied from this statement of it that if the Council falls in its primary responsibility to take necessary measures in a particular case, the Assembly must have the residual power to step in and do what is necessary. This theory of interpretation is discussed more fully in Halderman, supra note 26, at 991-94. The same principle, if valid, would seemingly apply to the giving of authorization for the taking of "enforcement action" by regional organizations.
in the Charter, does not mean that the United Nations would lose all control over enforcement measures taken by regional agencies. The world Organization of course retains its basic purpose and responsibility for the maintenance of peace and security. Even though the Charter modification under consideration would enable regional organizations to initiate enforcement measures on their own volition, these must still conform to the principle stated in article 2(4) of the Charter according to which all members of the Organization must refrain from the use of force in any manner inconsistent with the “Purposes” of the United Nations. If the United Nations should consider that a given measure by a regional organization constituted a wrongful threat to, or breach of international peace, it could decide accordingly and proceed to take such action as seemed to be called for, acting in accordance with its general powers for the maintenance of international peace and security.48

Nevertheless, the authority conferred upon the United Nations by article 53, enabling it to control such measures from the outset, may be considered as a fundamentally important power, abandonment of which would be divisive in admitting that regional organizations might proceed on their own volition to interpose measures of force or other tangible pressures into international situations. It is obvious that regional groups may sometimes have their own ideas as to what is necessary or appropriate in particular situations, and that these may be at variance from what is considered right or appropriate in other parts of the world, or in the world as a whole.

It may be thought by some that there is here, in fact, no question of Charter modification in a real sense, since conditions never came into existence which would permit the Organization to carry out its security functions in the manner contemplated when the Charter was drafted. In other words, this argument might run, there was no such change in the real nature of international relations as would justify a lessening of the role of the inter-American system, which had been worked out previously in light of the real situation.

This point of view has validity in the same sense in which it is true to say that the United Nations has never had a “real” constitution in the sense of one capable of fulfilling the purposes of the Organization so far as concerns the maintenance of peace and security. The question is whether the “peoples of the world” want to proceed to give effect to the powers which, in principle, they granted to the United Nations in 1945.

48 Chayes, supra note 7, at 557.
In 1950 a strongly affirmative answer to this question was given by means of the “Uniting for Peace” resolution.

If the development of an effective constitution continues to be a goal of policy, then the question of the abandonment of an important principle like the “authorization” principle of article 53 should be considered in this light.

As has been indicated above, it is believed that the effect of such modification would be detrimental in terms of this objective. Are there any other possible courses of action?

 Basically different answers to this question emerge when it is considered in the light of an immediate threat to security such as gave rise to the “quarantine” measure and, on the other hand, lesser threats such as gave rise to the measures short of force earlier undertaken against the Dominican Republic and Cuba.

CASES INVOLVING THREAT OF AGGRESSION

So far as concerns the category of cases involving immediate threats of aggression, the course followed in the Cuban crisis of October 1962 is at least indicative that cases can arise concerning which there would be no practical possibility of obtaining United Nations approval prior to a resort to regional measures. The resort to article 51—“collective self-defense”—in such cases naturally suggests itself since this provision was included in the Charter specifically to enable the regional organizations to act in emergency situations without being obliged to seek United Nations authorization.

A question of Charter interpretation is posed by the language of this article, which recognizes the right of self-defense “if an armed attack occurs.” Does the Charter, as a result of this clause, recognize the right of self-defense only in cases of actual armed attack?

It is believed too narrow an approach to consider this question solely as one of interpretation of the Charter language. Rather, it seems preferable to give first consideration to the question of what would constitute the most appropriate answer to the main problem under consideration. From this point of view some guidance may be furnished by the approach which some governments have taken toward the problem, which is herein referred to as the theory of “tacit Charter amendment.” It is, of course, to be understood that Charter modification is not to be ruled out in principle. Some modifications have already taken place and it is clear that if this instrument is to be able to serve as the framework of a stable world order based on law it must be capable, like any successful
constitution, of adapting to changing conditions. The goal of change should be to build up the United Nations as a true international entity and, simultaneously, to gain for it the support and backing of world opinion which it must have if it is ever to serve as the framework of a successful world order system. When choices of possible courses of action involving the interpretation and possible modification of the Charter are presented, the decision should be, from this point of view, in favor of the perpetuation and strengthening of those principles which are relatively more important and basic to the achievement of this goal.49

What choices are available with respect to the "quarantine" and similar measures? In the first place we are assumed to be here dealing with a class of cases of such urgency that the possibility of refraining from action does not exist as a practical matter. The first possible course of action is then considered to be not "non-action," but rather the possibility that the action taken may be contrary to the Charter and illegal. The second possible course would be the modification of the Charter so as to eliminate the "authorization" requirement of article 53. As has been observed above, some important steps in this direction have already been taken. Some objections to this course have also been indicated.

The principal remaining possibility would seem to be to regard such measures as falling within the concept of "collective self-defense" recognized as legitimate under article 51. If the applicability of this concept were held to be limited to cases of armed attack under article 51, it would still be possible to remove the difficulty through Charter modification, just as some governments have moved in the direction of removing the "authorization" clause of article 53. It is not, however, at all certain that the effect of article 51 is to limit the right of self-defense to cases of armed attack. An important school of thought holds that it does not. Strong elements of reason underlying this point of view tend also to favor the broad solution under consideration, even though this might necessitate a modification of the Charter as against the alternatives which have been suggested.

Article 51, in recognizing the "inherent" right of self-defense "if an armed attack occurs," appears to contain an internal contradiction since the "inherent" or traditional right50 is not limited to cases of armed


50 "Obviously, the right of individual or collective self-defense does not derive from the Charter; rather it is an inherent right of all states which is expressly recognized and
attack. As Professor Bowett states: “[T]he right has, under traditional international law, always been ‘anticipatory,’ that is to say its exercise was valid against imminent as well as actual attacks or dangers.” The fundamental Charter provision defining the rights of states with respect to the use of force is article 2(4) which provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This provision, it is believed, does not derogate from the traditional or inherent right of self-defense. So it was said by Committee I/1 of the San Francisco Conference, which was responsible for the preparation of this important part of the Charter which defines the basic “Purposes” and “Principles” of the United Nations: “The use of arms in legitimate self-defense remains admitted and unimpaired.”

It seems clear, on the other hand, that article 51 was not included in the Charter for the purpose of defining or limiting the right of self-defense; it rather had the purpose of enabling regional organizations to act in appropriate cases without the necessity of seeking United Nations authorization. Probably the most important factor leading to the insertion of the provision was the desire of the American states to secure recognition of the right of regional self-defense as they had recently formulated it in the Act of Chapultepec—a formulation which by no means limits the right to cases of actual armed attack.

Why this limitation to “armed attack” was included in the description of the right in article 51 is not clear in the published records of the San Francisco Conference. It may have been an essential part of the compromise embodied in article 51 and may have been regarded at the time as describing the permissible limits of self-defense. The course of world history, however, has since taken a course not then anticipated, reflected particularly in the inability of the Security Council fully to discharge preserved by Article 51.” S. Exec. Rep. No. 8 on Exec. L., 81st Cong., 1st Sess., 95 Cong. Rec. 9820 (1949).

52 Id. at 184-85.
the role which it was intended to fulfill with respect to the maintenance of peace and security.

Whatever may be the merits of the various points of view concerning article 51 as a matter of Charter interpretation,\(^5^7\) it is herein considered, as above indicated, that there is at least an element of reasonableness in the proposition that this article was not intended to limit the traditional right of self-defense as it applied to threatened, as well as to actual, attack.\(^5^8\) This point of view serves, in turn, to weight the balance in favor of having recourse to this concept as the Charter basis for the "quarantine" measure and similar actions, in preference to the other possible courses of action outlined above. This line of thought, if valid, would apply equally to the OAS.\(^5^9\)

This approach to the problem appears to be further supported by reason when the matter in issue concerns nuclear weapons, as was the case in the Cuban crisis of October 1962. In his initial public statement concerning this crisis President Kennedy said:

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.\(^6^0\)

As early as 1946 the United States Delegation to the United Nations

\(^{5^7}\) On this subject generally see Bowett, op. cit. supra note 51, at 182-93, and authorities there cited. A more recent survey is found in Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law, 31 Geo. Wash. L. Rev. 335, 360-64 (1962).

\(^{5^8}\) An illustration of the point may be found in the fact that, notwithstanding the essentially defensive mandate of the United Nations armed force in the Congo, the force did not wait, when, in December 1961, it observed hostile military preparations being carried out against it by Katangese troops. It took an initiative in a use of force to avoid being placed in an indefensible position, and was held by the United Nations, rightly it is believed, to have been acting within its basically defensive terms of reference. Report of the Officer-in-Charge of the United Nations Operation in the Congo concerning the situation in Elizabethville (Pt. II), U.N. Security Council Off. Rec. 16th year, Supp. Oct.-Dec. 1961, at 47 (S/4940/Add. 17, Dec. 9, 1961).

\(^{5^9}\) Article 3 of the Inter-American Treaty of Reciprocal Assistance provides specifically for self-defense against "armed attack" in terms of Article 51 of the United Nations Charter; however, provision is also made (article 6) for "measures which should be taken for the common defense" against "an aggression which is not an armed attack." See text accompanying note 24 supra.

\(^{6^0}\) Interdiction of the Delivery of Offensive Weapons to Cuba, 47 Dep't State Bull. 716 (1962).
Atomic Energy Commission made the following observation on this problem in a memorandum submitted to the Commission:

Interpreting its provisions [article 51] with respect to atomic energy matters, it is clear that if atomic weapons were employed as part of an “armed attack,” the rights reserved by the nations to themselves under Article 51 would be applicable. It is equally clear that an “armed attack” is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define “armed attack” in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.61

Although the Soviet Delegation appeared to be protesting that this suggestion would lead to the amendment of the Charter by unauthorized means,62 the Commission, in its first report to the Security Council, took up the suggestion to some extent, as follows:

4. In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations.63

Professor Jessup has pointed out, in connection with the above suggestion of the United States, that “if Article 51 justified the use of force in self-defense in anticipation of an armed attack but before such an attack had actually been made, the suggested clarification would not be necessary.”64

In going on to express the hope that no future crisis would arise in which states would decide this question on their own responsibilities, Professor Jessup was no doubt motivated in part out of concern that the Charter should play its full role in reducing the danger of possible preemptive nuclear strikes launched in anticipation of attack, and in minimizing in all possible ways the danger of nuclear war.65

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62 Id. at 118.
Is it possible that the danger of preemptive nuclear strikes would be enhanced by the interpretation of "self-defense" which would hold—in accordance with its traditional meaning—that it applied to threatened attack as well as to actual attack? It hardly seems credible that such would be the case. Any state which entertained bona fide fears of attack, and was also concerned as to the legality of its actions, would certainly be mindful of the basic rule which holds that measures of self-defense must be reasonable and appropriate in relation to the actual or threatened attack being defended against. The OAS "quarantine" measure was, for example, carefully calculated to ward off the threatened danger while reducing to a minimum the danger that the crisis might lead to war.66

For the reasons indicated the best solution of the problem under consideration would seem to be to regard the "quarantine" measure as legitimate "self-defense," and to give the pertinent Charter concept a corresponding interpretation. This course of action is considered preferable to that which would entail the elimination of the "authorization" requirement of article 53. The preservation of this provision, embodying the basic principle of United Nations control over uses of force and other tangible pressures in international situations, is believed to be important. If it cannot be realized now in all cases as a practical matter, it is still a goal to be sought after.

CASES NOT INVOLVING THREAT OF AGGRESSION

The continuing importance of the "authorization" principle is demonstrated when we turn from such crisis situations as the Cuban case of October 1962 to the cases which gave rise to the measures short of force applied by the OAS against the Dominican Republic in 1960, and against Cuba at the Punta del Este Conference in early 1962.

In the first place, the non-application of this principle to these measures does not have the same ready means of justification as exists for the type of case just discussed. The concept of self-defense is not available, since it requires, at the least, an imminent threat of attack, which is not here present.67 On the other hand, the measures in question are applications of tangible pressure to deal with threats to the peace and thus seem to fall

66 See Mallison, supra note 57, at 358-59, 379-80, 393-94.

67 The OAS action of 1960 against the Dominican Republic rested in part upon a complaint of "aggression and intervention" brought against that country by Venezuela. See 43 Dep't State Bull. 224 (1960). However, this was not the kind of aggression involving actual or imminent armed attack such as seems to be required to justify action in self-defense.
readily within the category of "enforcement actions" as defined in the Charter.

The problem here under discussion is thus, in the nature of the case, basically different from that posed by such emergency situations as gave rise to the "quarantine" measure. Here the real problem concerning the application of article 53 appears to be the same as that which formed one aspect of the dilemma that confronted the delegations at San Francisco, namely, that if regional organizations were given too much latitude for the application of tangible pressures, this would tend to be divisive and to destroy the unity of the world Organization which was essential to the performance of its main functions. With the passage of time the nature of the dilemma has become more concrete and less theoretical than it was at San Francisco. However, it still exists and poses the question whether the world still wishes, in the face of difficulties, to proceed to the building of a system, based on the Charter, which will permit the United Nations ultimately to fulfill its function of maintaining international peace and security.

The OAS resolution adopted at Punta del Este, imposing an arms embargo against Cuba, is an example of a case in which the non-application of this clause would seem to be detrimental from the point of view just mentioned. However, had the attempt been made to obtain Security Council approval of this measure, the result would surely have been a Soviet veto. It is believed that recourse might then have been had to the General Assembly, under the principle of the "Uniting for Peace" resolution, in an effort to obtain authorization in that body. However, in the prevailing circumstances, sympathy for Cuba on the part of a number of governments would have made success in that forum problematical.

If the effort had failed also in the General Assembly, the American states might still have imposed the arms embargo by their own independent actions taken independently of the OAS. However, some embarrassment might have been attendant upon such a course of action in view of the previous unsuccessful effort to obtain United Nations approval of an equivalent action on the part of the OAS.

From the point of view of the United States and the other American states, therefore, the effort to obtain United Nations approval of the arms embargo applied in this case might have proved unsuccessful, and the results unsatisfactory from the point of view of the immediate objective. Against this result could only be weighed the intangible gain that might have accrued in terms of the development of a stable world
order based on law, through having preserved the principle of United Nations control over regional enforcement measures.

**Conclusion**

At San Francisco the effort was made to resolve the problem brought about by the claim of regional organizations to be authorized to apply "enforcement actions," as against the needs of the United Nations for world-wide authority and solidarity. In the recent cases considered in the present discussion, the problem has reappeared in the context of concrete disputes, with the result that while the OAS has proceeded to take measures in the nature of "enforcement actions" where such action seemed advantageous, the Charter arrangement which was designed to safeguard the needs and interests of the United Nations in connection with such measures appears to have been more or less relegated to the background. This may simply reflect the attitude toward the United Nations which has come to prevail as the result of nearly two decades of political conflict among its major members. Nevertheless, the elements of the problem which were attempted to be dealt with at the San Francisco Conference are with us today as strongly as they were then. It is submitted that the Charter dispositions made at San Francisco were, in fact, well designed to permit the legitimate functioning of regional organizations while, at the same time, safeguarding the position of the United Nations; they perhaps deserved greater consideration than they received in the cases in question.
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119
NOTES

A STUDY OF GARNISHMENT PROCEDURE UNDER SECTION 15-312 OF THE DISTRICT OF COLUMBIA CODE

INTRODUCTION

The word "garnishment" is derived from the word "garnir" meaning to warn1 and a writ of garnishment is in reality a warning to a third party that a plaintiff is attempting to reach funds, effects or credits of his defendant which may be in the hands of the third party. Although the remedy of garnishment was derived from the custom of London,2 it has been held throughout the United States to exist only by virtue of statute.3 Despite the fact that a garnishment proceeding grows out of or depends upon another original or primary action, there is a split among the jurisdictions as to whether it is to be regarded as a distinct separate action4 or as an ancillary or auxiliary proceeding.5

The remedies of attachment and garnishment are available in actions in federal courts.6 In fact, Rule 64 of the Federal Rules of Civil Procedure, which governs garnishment prior to judgment,7 takes into account the wide variety of state garnishment statutes and provides that garnishment is available under the circumstances and in the manner provided by the state in which the federal district court is held.8 Rule 69 which governs garnishment proceedings in aid of execution9 is similar in nature to

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3 E.g., McLeod v. Cooper, 88 F.2d 194 (5th Cir. 1937); Central Mkt. v. King, 132 Neb. 380, 272 N.W. 244 (1937); Hollis v. Bender, 34 Ala. App. 4, 40 So. 2d 876 (1948).
8 See Fed. R. Civ. P. 4(e), as amended, July 1, 1963, which now expressly allows resort in original federal actions to the procedures provided by state law for effecting service on nonresident parties and permits the institution of original federal actions against nonresidents by use of state procedures to bring property of the defendants within the custody of the court.
Rule 64 and provides that in aid of execution the judgment creditor can examine any person either according to the Federal Rules for taking depositions or in accordance with the practice of that state. However, both Rule 64 and Rule 69 while contemplating the use of state statutory procedure and practice, include that any existing statute of the United States governs to the extent to which it is applicable. A Federal Rule has statutory effect and will also govern to the extent applicable. A major problem to be resolved here is whether the sanctions imposed by Section 15-312 of the District of Columbia Code against an uncooperative garnishee are so different from the sanctions allowable under the Federal Rules of Civil Procedure as to conflict with the Federal Rules.

GARNISHMENT IN AID OF EXECUTION UNDER THE DISTRICT OF COLUMBIA CODE

The District of Columbia appears to treat garnishment proceedings, in execution of a prior judgment, as ancillary and dependent upon the original action. Since the courts of the District of Columbia follow the general rule which finds garnishment to be a harsh and extraordinary remedy, they construe the statute narrowly and interpret it strictly against the garnishee.

A plaintiff having obtained a valid judgment in the District of Columbia need only file an “Attachment on Judgment” containing therein the

11 7 Moore, Federal Practice ¶ 69.04(2), at 2413 (2d ed. 1955).
16 “Attachment on Judgment” of the United States District Court for the District of Columbia which reads in pertinent part:

YOU ARE HEREBY COMMANDED to attach the goods, chattels, and credits of the defendant . . . of value sufficient to satisfy the plaintiff’s judgment against the defendant . . . and, if said goods, chattels, or credits be attached in the hands or possession of any person or persons other than the defendant, notify such person or persons of such seizure, and warn him or them to appear before said Court, within the time aforesaid, to show cause why the same should not be condemned and execution thereof had according to law . . .

. . . .

NOTICE

To .........................................................., Garnishee.

YOU ARE HEREBY NOTIFIED that any property or credits of ............... in your hands are seized by virtue of the foregoing writ of attachment, and you are hereby warned to appear in said Court, on or before the tenth day after service hereof,
notice of garnishment and "Interrogatories in Attachment"17 with the clerk of the district court. The "Attachment on Judgment" requires the insertion of the name of the original plaintiff, defendant, civil action number and amount of the judgment. Plaintiff's attorney upon payment of one dollar and fifty cents can then insert the name of anyone he desires to make a garnishee. The "Interrogatories in Attachment" are completed in much the same manner, and are issued with the "Attachment on Judgment" by the clerk of the district court and served upon the garnishee by the United States Marshal. If the garnishee admits in the interrogatories that he has credits of the defendant or if the plaintiff later successfully traverses the garnishee's negative answer, judgment will be entered against the garnishee in an amount not to exceed the credits of the defendant actually held by the garnishee.18

However, a harsh result is possible under section 15-312 as is shown by the case of Austin v. Smith.19 In that case the plaintiff had previously re-

and show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had, unless the credits hereby attached are wages as defined by Public Law 130, signed August 4, 1959, in which event you are admonished to comply with the terms of that Law. A copy of the referred to Law may be obtained from the Clerk of this Court upon request.

U.S. Marshal

17 "Interrogatories in Attachment" of the United States District Court for the District of Columbia which provides in pertinent part:

NOTICE

To ................................................................., Garnishee:

You are required to answer the following interrogatories, under penalties of perjury within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Attorney for Plaintiff

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

ANSWER: .................. 

2nd. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER: .................. 

I declare under the penalties of perjury that the answers to the above interrogatories are, to the best of my knowledge and belief, true and correct as to every material matter.

Signed this .... day of ....... A.D. 19...

19 312 F.2d 337 (D.C. Cir. 1962).
covered a 7,000 dollar judgment against the defendant, and thereafter attempted to make Clarence Austin, the defendant's brother, a garnishee. Clarence failed to answer the interrogatories allegedly served with the "Attachment on Judgment" and the district court entered a default judgment for 7,000 dollars and costs. Later, the plaintiff sued Clarence on the default and a judgment was entered ordering the sale of real estate described in that complaint. Four years after the original action, Clarence moved to vacate the default judgment and also the judgment ordering sale of the realty. The lower court ruling, which denied the motions to vacate, was reversed by the court of appeals which held the original default judgment void since the record did not disclose that interrogatories were served on the garnishee even though the lower court found that the marshal had served them.

Thus, it appears from Austin, a garnishee's failure to answer the interrogatories within ten days after their service may result in a default judgment against the named garnishee in the full amount of plaintiff's original judgment even though the garnishee may have property of the defendant of a lesser value or may not have any property of the defendant.

HARSHNESS OF DISTRICT OF COLUMBIA GARNISHMENT PROCEDURE

The District of Columbia is certainly to be classified as a "creditor jurisdiction" concerning this provisional remedy. The present garnishment section has been in existence since 1901 with only slight change in 1959. Unlike many jurisdictions, the District of Columbia requires no complaint, affidavit or other allegations to secure a notice of garnishment. Furthermore, no special relationship between the original defendant and the named garnishee, as required elsewhere, need be shown. For one dollar and fifty cents, plus a judgment and the name of any person residing in the District of Columbia, the plaintiff can have a notice of garnishment issued. Neither the plaintiff nor his attorney need show any cause nor even allege that they have reason to believe that the proposed garnishee does in fact have goods, chattels or credits of the defendant or that he

20 See, e.g., 7 Moore, Federal Practice ¶ 64.04(3), at 1511 (2d ed. 1955).
is indebted to the defendant. Presumably, subject only to the requirements of section 15-304(b), plaintiff's attorney can cause any number of attachments on judgment to be issued. It is certainly not a stretch of the imagination to suppose that if a plaintiff were to total up the relatives, business associates and friends of his judgment proof defendant, he might well have a list in excess of fifty names. The *Austin* case interprets section 15-312 to operate so as to give the plaintiff a default judgment in the entire amount of his original judgment against a garnishee who fails to answer duly served interrogatories within ten days even though the garnishee may in fact owe nothing to the defendant. An attorney could feel reasonably certain that an investment of seventy-five dollars to obtain fifty attachments on judgment would result, in the normal course of events, in at least one unanswered set of interrogatories and, therefore, in a default judgment against a garnishee who hopefully would not be as judgment proof as the original defendant. An attorney may not bring a purely vexatious suit and the Canons of Ethics state that a lawyer must decline to conduct a suit when he is convinced that it is intended merely to harass or to injure the opposite party. However, since this action is not really a suit but rather an ancillary proceeding in which the garnishee is asked only to answer a few questions, the attorney has great latitude of judgment. Furthermore, although an action will lie for abuse of process, the gist of the action lies in the improper use of the process after its issuance. Improper motives will not make the use of the machinery of the law tortious.

The District of Columbia Code provides that the courts may censure, suspend or expel a member of the bar for malpractice, professional misconduct or conduct prejudicial to the administration of justice. However, concerning the hypothetical problem posed, how could an attorney's conduct come within this sanction? Nowhere in the papers necessary to institute garnishment need he nor his client state their belief that the named garnishee might have property of the defendant. Hence, there is no necessity for falsification or misstatement. Furthermore, the District of Columbia garnishment statutes concerning attachment and garnish-

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25 D.C. Code Ann. § 15-304(b) (1961) provides in pertinent part:
Where more than one such attachment issued against the same judgment debtor has been served on any garnishee such attachments shall be satisfied in the order . . . served upon the garnishee.


27 Canon 30, *Canons of Professional Ethics of the American Bar Association*.


ment after judgment require no probable cause for naming a particular person as garnishee.

Judge Miller, writing for the majority in *Austin*, perhaps best highlighted the harshness of section 15-312. Although stating that Smith's counsel had conceded that Austin probably owed nothing and that no assertion had been made that Austin owed anything to anybody, Judge Miller wrote:

This Code provision may be construed to authorize a judgment against a garnishee for the full amount of the plaintiff's claim against the principal defendant if the garnishee fails to answer the interrogatories, or to appear and show cause why a judgment of condemnation should not be entered, even though in fact the garnishee had no property or credits belonging to the principal defendant. So construed, the statute permits the imposition of a penalty or forfeiture upon a garnishee who owed the principal defendant nothing, simply because he neglects to answer and assert that fact.

Aside from mere harshness, the interpretation given to section 15-312 by the court in *Austin* borders on an unconstitutional denial of due process. However, the normal judicial construction of section 15-312, which requires both failure to appear and failure to answer before default may be entered, saves it from unconstitutionality. Due process is protected by this construction since even a garnishee who has failed to answer is given the right to a later hearing. Also, since notice of the motion for

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30 312 F.2d 337, 341 (D.C. Cir. 1962).
31 Id. at 340.
32 See Hovey v. Elliot, 167 U.S. 409 (1897), where the Court said: "To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court . . . into an instrument of wrong and oppression . . ." Id. at 414.

However, *Hovey* is limited by the concept of Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), which distinguishes the present situation from *Hovey* and clearly limits *Hovey* to a situation where a court exercising its inherent powers struck answers and entered a default judgment merely as a punishment for contempt. In *Hammond*, the Court stated: "[P]reservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." Id. at 351. Therefore, the *Austin* case does not seem to violate due process since the presumption, however logical or valid, has been recognized. Also, even more basically, it would seem that cases falling under § 15-312 avoid the due process pitfalls of *Hovey* since in these cases no answer has been given at all and therefore the court is not denying a hearing by striking an answer.

default judgment is given to the garnishee, although this is not obvious from the Austin case, it would seem that this fact is sufficient to inform the garnishee that he is a party to an action. Failure to appear after such notice would appear to justify a default judgment under section 15-312 in a manner analogous to default judgments under Rule 55.

Both the District of Columbia Court of General Sessions and the United States District Court for the District of Columbia seem to recognize the harshness of this section as demonstrated by their opinions or reasons for granting relief to the defaulting garnishee in several cases concerning section 15-312. For example, in Pastor v. Republic Sav. & Loan Ass'n, the Municipal Court of Appeals (now the Court of General Sessions) held that the lower court had not abused its discretion in refusing to hold the Association in default when it failed to answer interrogatories because of a mistake and lack of understanding. Judge Hood, writing for a unanimous court, stated that the word "shall" as used in section 15-312 is not mandatory and that courts have inherent power to relieve from default. In Austin relief was granted to the garnishee on rather tenuous grounds. Although interrogatories were normally served as a matter of course and in Austin both the lower court and the marshal stated that the garnishee had been served with a copy of the interrogatories, the court of appeals held the default judgment invalid because the file record failed to state service of the interrogatories.

Owing to the vagueness of the forms necessary to institute a garnishment proceeding, it is understandable why in the Pastor case the garnishee failed to answer the interrogatories, feeling that no action was required.

38 312 F.2d at 341.
Cases in several states, as well as in the District of Columbia, show that garnishees have failed to answer interrogatories simply because they were mistaken as to their legal significance. In some instances even attorneys have failed to realize the legal significance of garnishment interrogatories. The "Attachment on Judgment" merely warns the named garnishee that any goods, chattels and credits of the defendant are seized and will be executed against unless the garnishee appears before the court and shows cause. This could reasonably be interpreted by the layman as having no effect upon him if he holds no goods of the defendant. Examining the wording of the "Interrogatories in Attachment," the layman reads:

You are required to answer the following interrogatories, under Penalties of Perjury within ten days after service hereof. And should you neglect or refuse to do so, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Since the second interrogatory concerns the goods, chattels or credits of the defendant, the layman could reasonably interpret this section containing the word "may" to mean that judgment will be entered against him only if he does in fact possess these goods, chattels or credits of the defendant or if he is indebted to the defendant. Since a garnishee is almost always an innocent disinterested third party, and since garnishment statutes are designed to protect creditors without injustice to garnishees, the garnishee should not be required to pay the debt of another unless he is legally liable. Yet, the language of these forms fails to clearly indicate that he might be so liable.

The public, also, seems to recognize the harshness of this provision as evidenced in an article which appeared in the Washington Post, and stated in part:

The special "quality of mercy" to which Portia referred can sometimes be made to trickle also through the technicalities of the law, the United States Court of Appeals proved yesterday.

41 Ray v. Bruce, supra note 40.
42 Id. at 698 (dissenting opinion). The same court recognized this fact sixteen years later in Pastor v. Republic Sav. & Loan Ass'n, 153 A.2d 813, 814 (Munic. Ct. App. D.C. 1959).
Relying heavily on a technicality, the Court yesterday reversed its own decision by which only three weeks ago it had struck Clarence Austin with a $7000 debt for damages a joyriding niece inflicted seven years ago on Otis Smith.

Technically, the court voted 2-1 to reverse a District Court decision in Smith's favor. The decision, by the same three judges who previously had voted to affirm the lower court's ruling, was by the same judicial score—but with Judge Henry W. Edgerton siding this time with Judge Wilbur K. Miller in favor of Austin.44

Despite these indications of dissatisfaction with the operation of section 15-312, the Judges of the Court of General Sessions and the United States District Court for the District of Columbia have failed to exercise their power to establish any rules of procedure which might alleviate the harshness of section 15-312.45

**DISTRICT OF COLUMBIA GARNISHMENT PROCEDURE COMPARED WITH THE PROCEDURE OF OTHER STATES**

Despite a general realization of the harshness of section 15-312 by the various courts of the District of Columbia,46 none of the safeguards incorporated by the various states in their garnishment proceedings to protect the innocent but unwary garnishee have been adopted.

Some states upon failure of the garnishee to answer may grant a conditional type of judgment47 which the garnishee may overturn by showing that he neither holds property of the defendant nor is indebted to him.48 A large number of states require that the plaintiff file an affidavit as a prerequisite to issuance of a writ of garnishment.49 Many of the states in this category require that the plaintiff state that he has reason to believe that the named garnishee holds property or is otherwise indebted to the defendant.50 Some jurisdictions, upon failure of the garnishee to

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45 D.C. Code Ann. § 15-320 (1961) which states: "The judges of the municipal court for the District of Columbia and of the United States District Court for the District of Columbia shall establish such rules of procedure for their respective courts as may be necessary to effectuate the purposes of this Act."
answer, can determine the amount of property held by the garnishee or indebtedness of the garnishee to the defendant by compelling attendance of the garnishee in court.\textsuperscript{51} In some instances, attendance may be enforced by contempt proceedings.\textsuperscript{52} Moreover, the final judgment against the garnishee is usually restricted to the amount of property held or actual indebtedness owed by the garnishee.\textsuperscript{53}

While some jurisdictions, like the District of Columbia, provide no protective safeguards for the unwary garnishee,\textsuperscript{54} the requirements of other states appear to have merit if one is interested in protecting the garnishee from the harsh consequences of a single oversight. The requirement of an affidavit on the part of the plaintiff at least assures the public that plaintiffs and their attorneys will not abuse the garnishment process or that if they do they will be open to a charge of perjury.\textsuperscript{55} Also, the courts can feel sure that a defaulting garnishee has in fact property of the defendant and is, therefore, not being dealt with in an overly severe manner. The conditional type judgment in effect is another notice showing the garnishee the error of his ways and giving him a second chance. Statutes which require proof that the garnishee holds property of or is indebted to the defendant by extrinsic evidence or by compelling the garnishee’s presence; \textit{i.e.}, through contempt proceedings, are perhaps the most effective safeguards. They insure that only indebted garnishees or those holding property of the defendant are actually held liable to the plaintiff.

\textbf{DISTRICT OF COLUMBIA PROCEDURE COMPARED WITH THE FEDERAL RULES}

Assuming section 15-312 to be constitutional, it fails to incorporate the procedural safeguards present in the Federal Rules of Civil Procedure. As has been seen, the ultimate sanction against a neutral unwilling garnishee for failure to answer interrogatories is a default judgment for the entire

\begin{itemize}
\end{itemize}
amount of the plaintiff's claim against the original defendant. This sanction differs radically from that which should logically be available under the Federal Rules.

Since Rule 69(a) provides that process in aid of execution shall be (1) in accordance with either the Federal Rules relating to the taking of depositions or (2) in a manner provided for by the practice and procedure of the state, both procedures will be examined.

Neither the appropriate sections of the District of Columbia Code nor the reported District of Columbia garnishment cases make it clear whether the service of the writ of garnishment and the interrogatories institutes a suit against the garnishee. At least one District of Columbia case indicates that garnishment is ancillary to the main cause of action and this contention is supported by the language of the garnishment forms which require the civil action number of the original action. There is some authority that the garnishment proceeding does not rise to the dignity of a suit until the plaintiff traverses the garnishee's answer to the interrogatories; therefore, the interrogatories could be looked upon as a preliminary matter. The garnishee cannot be impleaded as a third party defendant under Rule 14 since a judgment has already been granted in the original action and the form used in the District of Columbia garnishment proceeding cannot be construed as a summons and complaint by any stretch of the imagination. Under the Federal Rules the only sanction provided for the refusal of a non-party to make discovery is contempt of court. Although discovery and therefore the sanctions relating to discovery are generally considered in regard to obtaining a judgment, there is support and authority for the proposition that the sanctions of Rule 37 apply to discovery proceedings in aid of execution of judgment. Since it has been held that Rule 37 provides the exclusive sanctions for failure to cooperate, it would appear that under

63 Societe Internationale v. Rogers, 357 U.S. 197 (1958); Sibbach v. Wilson, 312 U.S. 1, 16 (1941).
federal procedure if the garnishee is to be treated as a non-party, he can only be held in contempt for failure to answer garnishment interrogatories. This result would provide the salutary safeguard that an ignorant or unwilling garnishee would be forced to appear in court. The court could then ascertain the garnishee's actual indebtedness to the defendant or the amount of the defendant's property held by the garnishee, if any, and render a just judgment without relying on technical presumptions of doubtful validity which operate to produce harsh and unnecessary forfeitures.

Conversely, what is the result contemplated by the Federal Rules if it is determined that the garnishee is a party either to a separate action or to the original action? That the garnishee should be considered as a party upon initial service of the notice of garnishment and interrogatories has ample support in other jurisdictions. Where this is the case, the Federal Rules contemplate the use of the Rule 37(d) sanction of default for failure of a party to attend or serve answers.

At first blush this interpretation with its resultant sanction under the Federal Rules would not seem to afford safeguards to the unwary garnishee. However, whether the garnishee is made a party to the original suit by impleader or made a party in a separate suit, the Federal Rules require a complaint in both instances. The minimal requirement for a complaint is that it should set forth a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. Most jurisdictions which hold that the garnishee is a party recognize this and require that the plaintiff's allegations state a cause of action in favor of the judgment debtor versus the garnishee. At least one state requires that the pleadings be sufficiently definite to enable a court to render a judgment which will be res judicata.

The requirement that the plaintiff assert a claim against the garnishee would tend to restrict the service of notices of garnishment to those persons whom the plaintiff, after some investigation, was reasonably sure

69 Cases cited note 64 supra.
71 Prater v. Dingus, 230 Ky. 82, 18 S.W.2d 883 (1929).
held property of the original defendant. Present District of Columbia procedure under section 15-312 does not incorporate this safeguard, and it is hard to conceive that the "Attachment on Judgment" and "Interrogatories in Attachment" could meet the requirement of Rule 8(a)(2) and (3).

The District of Columbia procedure leaves the door open to "fishing expeditions" with few effective sanctions available against the attorney who would abuse the garnishment procedure. Under the Federal Rules, the attorney's signature to the pleadings would mean that he believed there was good ground to support the allegations of the complaint, thus subjecting the attorney to disciplinary action for willful violations. 72

It is interesting to note that among seventeen states which have substantially adopted the Federal Rules, 73 only Arizona and New Mexico have a default provision similar to that of the District of Columbia. 74 But even these states, as well as Kentucky, require that the plaintiff file an affidavit averring at least that he has reason to believe that the named garnishee has goods of, or is indebted to, the defendant. 75 Six states provide that a defaulting garnishee may be compelled to appear and/or answer. 76 Two of these jurisdictions also provide for the institution of a separate civil action against a defaulting garnishee. 77 Three states require proof of the amount which the defaulting garnishee actually owed the defendant. 78

Rule 69(a) also provides that garnishment in aid of execution can be in accordance with the practice of the state in which the district court is held. Rule 69 includes the local procedural law of the District of Columbia, both statutory and non-statutory. 79 Regarding section 15-312

as a state statute\textsuperscript{80} for purposes of Rule 69(a)(2), if the plaintiff elects to follow state practice, it would appear that the district court can impose the sanction of "Default Judgment" against the garnishee for failure to answer.\textsuperscript{81}

Although Rule 69 provides for continuing conformity to state law, the rulemakers apparently desired to establish a limit upon the state procedures available for use in the district courts when they added the phrase "except that any statute of the United States governs to the extent that it is applicable."\textsuperscript{82} Because of this, federal courts have held that pursuant to Rule 4(f) a writ of execution may run anywhere within the territorial limits of the state, although the state writ of execution could not run throughout the state.\textsuperscript{83} Rule 53 has been held to govern over state practice regarding the appointment of a master to examine a judgment debtor and third parties.\textsuperscript{84} A statute which stated that no bond or security shall be required from the United States\textsuperscript{85} has been held to govern over a state statute requiring the payment of five dollars for each garnishment notice.\textsuperscript{86} The federal government has been required to follow federal statutes applicable to the collection of civil judgments; even though, theoretically, state "Proceedings Supplementary to Judgment" were available to the government under Rule 69(a).\textsuperscript{87}

After the effective date of the Federal Rules, September 16, 1938, all conflicting laws ceased to have further force.\textsuperscript{88} Therefore, it would appear that a federal law, including those passed by Congress to govern the District of Columbia,\textsuperscript{89} should be given no further force or effect if found to be in conflict with the Federal Rules.\textsuperscript{90} The question then arises: What type or degree of conflict must exist to require that the Federal Rules of Civil Procedure be given controlling effect over state or conflicting federal statute? As shown above, when there is obvious and

\textsuperscript{82} 7 Moore, Federal Practice ¶ 69.04(2), at 2413 (2d ed. 1955).
\textsuperscript{83} Edmonston v. Sisk, 156 F.2d 300, 302 (10th Cir. 1946).
\textsuperscript{84} Bair v. Bank of America Nat'l Trust & Sav. Ass'n, 112 F.2d 247 (9th Cir. 1940).
\textsuperscript{85} Act of Feb. 21, 1863, ch. 50, 12 Stat. 657, as amended, ch. 225, § 1, 15 Stat. 226 (1868), as amended.
\textsuperscript{87} United States v. Baird, 241 F.2d 170 (2d Cir. 1957).
\textsuperscript{89} E.g., D.C. Code Ann. § 15-312 (1961).
direct conflict between a specific Federal Rule or statute and a state statute the federal law will govern. However, when the conflict is not so immediately apparent, as between a federal law having general or broad application and a specific state statute, should the federal law still govern?

It would seem that certain procedural rules are so basic to a court’s operation that a state statute embodying contrary rules cannot be given effect without destroying the spirit and intent of the Federal Rules. Whenever a state procedure conflicts with the spirit and intent of the rules as outlined in Rule 1, the state statute should not be given effect. Apparently, from the language used in Rule 69, the lawmakers realized the difficulties inherent in determining when the Federal Rules should govern. In light of this, an effective test must be flexible and broad, finding its specific application through the sound discretion of the trial judge. Rule 1 points out that the objectives of the Federal Rules are to provide for the just, speedy and inexpensive determination of every action. The underlying philosophy of the Rules is directed toward bringing about the disposition of every case on the merits without regard to discrepancies or errors that do not actually affect substantive rights.

In Austin, the effect of section 15-312 is seen only too well. Failure to answer and appear cut off the defenses of the garnishee, prevented the court from looking into the merits of the action and resulted in a judgment imposing a harsh forfeiture without the necessity of alleging a claim upon which relief could be granted. The operation and effect of section 15-312 so offends the spirit and intended objectives of the Rules as to require that it be given no further force or effect. Chief Judge Bazelon’s dissenting opinion in Austin indicates an awareness of the degree of conflict between the Code section and the Rules requiring, at least, a reinter-pretation of this default provision.

CONCLUSION

Even if section 15-312 is found to be in such conflict with the Federal Rules that it be given no further effect in the district court, it should still be redrafted since the Federal Rules do not govern the Court of General Sessions. That court would therefore remain bound to follow section 15-312.

91 Edmonston v. Sisk, 156 F.2d 300 (10th Cir. 1946).
93 312 F.2d 337, 344-45 (D.C. Cir. 1962) (dissenting opinion).
It is proposed that section 15-312 be changed to provide that garnishees who fail to answer or appear be compelled to attend by contempt proceedings which would enable the courts to dispose of cases on the merits. Utilizing this procedure, garnishees would only be liable for the amount of property actually held, while uncooperative garnishees could be made to bear the costs necessitated by their inaction. This amendment would bring the District of Columbia's procedure into conformity with the majority of states which have adopted the Federal Rules.

Specifically, it is urged that Congress adopt a default provision for the District of Columbia similar to that in force in Alaska. The Alaska statute provides in pertinent part:

(f) Garnishee Proceedings . . .
(2) Failure to Appear—Default. When a garnishee fails to appear in compliance with the order, the court on motion may compel him to do so.
(3) Discovery. After entry of the order mentioned in subdivision (1), (Order for Appearance), plaintiff may utilize the rules of discovery under the supervision of the court with respect to all matters relating to property of the defendant believed to be in the possession of the garnishee. The consequences of the garnishee's failure or refusal to make discovery shall be governed by these rules. . . .
(5) Judgment Against Garnishee. If it shall be found that the garnishee, at the time of service of the writ of attachment and notice, had any property of defendant liable to attachment beyond the amount admitted in his statement, or in any amount if a statement is not furnished, judgment may be entered against the garnishee for the value of such property in money.

Such a statute would allow a plaintiff to utilize all the Federal Rules of discovery in the district courts as well as discovery provisions found in the District of Columbia Code when the cause is before the Court of General Sessions. Under these rules both courts can compel attendance of the garnishee and subsequently render judgment in the amount actually found to be in the garnishee's possession.

Should the courts and lawmakers of the District of Columbia feel that no valid reason exists for denying the utilization and operation of the default provision of the District of Columbia Code or for its amendment, a further suggestion is offered. While the conformity sections of Rule 69(a) rigidly govern the district court concerning the substantive and procedural requirements of the law of the District of Columbia, these sections do not preclude the application of the Federal Rules while employing existing

95 Compare Fed. R. Civ. P. 30(d), 37(c).
96 Alaska R. Civ. P. 89.
The garnishment law. Rule 84 permits the district court to issue its own form of garnishment writ. Providing it effectively incorporated the existing garnishment law, it would seem that the district court could amend its garnishment forms. Furthermore, the district court could utilize contempt proceedings prior to ordering a default judgment against the garnishee even though this is not provided for by section 15-312, since the court has contempt powers. While this does not affect the problem confronting the Court of General Sessions, it would at least alleviate the situation in the district court. However, the ultimate obligation to correct this problem, so prevalent in the District of Columbia, lies with the legislative branch.

If no change in the garnishment procedure is forthcoming, it will not be long before other judges' opinions reflect Judge Hood's feelings as stated in Costin v. Hollywood Credit Clothing Co.:

In conclusion we wish to say that we are fully aware that many businessmen feel, and perhaps each with some justification, that our garnishment law, and especially the use of such law by certain merchants, imposes upon them an undue and harsh burden.

Gordon R. Coons
Gerald J. Flintoft
Laurence E. Harris

COMMUNITY ANTENNA TELEVISION: SURVEY OF A REGULATORY PROBLEM

INTRODUCTION

Community antenna television is a master television receiving antenna system which receives signals transmitted by television broadcast stations and redistributes them, by wire or cable, to subscribing members of the public. A CATV system consists of a receiving antenna ordinarily located on a high elevation, wire lines or cables for distributing the signals received

99 Juneau Spruce Corp. v. International Longshoremen's Union, supra note 98, at 869.
100 See ibid.
101 Id. at 873.
104 Id. at 698.
by the antenna to the receiving sets of subscribers, necessary amplifying
equipment, and sometimes equipment to convert the signal from the
channel on which it is received to another channel on which it is to ap-
pear.\(^1\) The redistribution of signals of far distant stations is generally ac-
complished by use of microwave facilities\(^2\) which pick up the signals of
the broadcaster at a point relatively near its location and relay them to
the distant CATV’s antenna. CATV systems are business enterprises con-
ducted for profit. Revenue is produced by charging subscribers a monthly
fee for the privilege of connecting their set to the CATV cable and, some-
times, an initial installation fee. CATV is not “pay-TV,” which involves
the purchase of programs individually on a pay-as-you-see basis.

A community antenna television system is regarded as an “auxiliary
service”\(^3\) comparable to a TV translator,\(^4\) TV satellite station,\(^5\) or TV
repeater or “booster.”\(^6\) The basic distinction between CATV and other
auxiliary services is that the latter disseminate their signals through the

\(^1\) See In the Matter of Inquiry Into the Impact of Community Antenna Systems, TV
Translators, TV “Satellite” Stations, and TV “Repeaters” on the Orderly Development of

\(^2\) A microwave facility involves a narrow-beam, line-of-sight, point-to-point radio trans-
mission. A “point-to-point microwave radio service” is a “domestic public radio service
rendered . . . by fixed stations between points which lie within the United States or between
points in its possessions or to points in Canada or Mexico.” 47 C.F.R. § 21.1 (Supp. 1963).

\(^3\) 1959 Report ¶ 1.

\(^4\) A television broadcast translator station is:

[A] station in the broadcasting service operated for the purpose of retransmitting the
signals of a television broadcast station or another television broadcast translator station,
by means of direct frequency conversion and amplification of the incoming signals with-
out significantly altering any characteristic of the incoming signal other than its fre-
quency and amplitude, for the purpose of providing television reception to the general
public.


\(^5\) TV “satellite” stations operate in the same manner as regular TV broadcast stations,
but generally do not originate live programming. They are authorized by the FCC just as
regular stations and must meet many of the same standards. Satellite stations are usually
owned by licensees of regular stations in the same general area. In many instances, however,
“stations originally authorized as satellites have developed with time into operations serving
as local outlets for their communities . . . in that they have built studios and originate a
certain amount of live programming and local advertising.” 1959 Report ¶ 17.

\(^6\) A television broadcast booster station is:

[A] station in the broadcasting service operated for the sole purpose of retransmitting
the signals of a television broadcast station by amplifying and reradiating such signals
which have been received directly through space, without significantly altering any
characteristic of the incoming signal other than its amplitude.

air waves for free reception by the general viewing public, while CATV systems receive and distribute signals by cable on a subscription basis.

The CATV industry was born more than fourteen years ago in response to a need for television service in rural areas and small communities too far away from metropolitan areas to obtain satisfactory television reception. The CATV idea originated with small town television dealers desirous of providing television reception to anxious, potential receiver purchasers. As a result of the "freeze" on the construction of new television stations ordered by the Federal Communications Commission, the industry prospered during the years 1948-1952.

Today, CATV reaches about three and one-half million viewers. There are more than a thousand CATV systems serving in excess of one million homes, roughly creating over a fifty-one million dollar industry. The industry is small in terms of viewers, reaching only about two per cent of the total of TV homes, but large in number of systems as compared with TV broadcast stations. The average CATV system is estimated at 800 subscribers, but systems of 100 to 500 subscribers form the largest single grouping. The yearly gross revenue of the average system, based on a typical monthly charge to the subscriber of four dollars and fifty cents, would be about 43,000 dollars. An average system carries four to five TV signals, although some carry only one, and others as many as nine.

Regulatory authority over radio communications was conferred initially upon the Federal Radio Commission by the Radio Act of 1927 and later upon the FCC by the Federal Communications Act of 1934. The general purposes of the 1934 act were to regulate common carriers engaged in

8 At the time of the FCC's 1959 inquiry, there were only 509 commercial TV broadcast stations and 42 non-commercial educational stations. 1959 Report ¶ 7.
9 The statistics in this paragraph are taken from an article in Television, June 1962, at 49-50.
10 Ch. 169, 44 Stat. 1162.
12 The Communications Act established the FCC:
[F]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies
interstate or foreign communication by wire or radio, and to require approval by the FCC for any emission of radio waves within the United States by any person other than the federal government. In the case of *Allen B. Dumont Labs., Inc. v. Carroll,* it was held that the Communications Act applied to both television and radio, and further, that it preempted the entire field of radio and television communications to the exclusion of state action. The court said the "Communications Act of 1934 applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action." The FCC, however, has taken the position that, although Congress has the power to regulate CATV's, they are not within its own jurisdiction under the framework of the present law because CATV operations are inconsistent with the concepts of "common carriers of communications" and "broadcast stations."

Opposition to CATV has come primarily from television broadcasters alleging substantial adverse economic impact, particularly in the smaller TV station market areas. CATV systems normally do not carry local advertising (although in many instances they do receive and distribute the signal of the local stations, together with its local advertisements) and are not in competition for the local advertising dollar; however, since they can receive and distribute to their subscribers several signals simultaneously, their very presence often splits the local audience four or five

and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . . .


13 184 F.2d 153 (3d Cir. 1950).
14 Id. at 155.
16 A "common carrier" or "carrier" is any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.


17 "Broadcasting" is defined as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." FCA § 3(o), 48 Stat. 1066 (1934), 47 U.S.C. § 153(o) (1958). "Radio communication" is defined therein as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

18 1959 Report ¶¶ 1, 4.
ways, thereby making the local broadcasting station a less attractive advertising medium.\textsuperscript{19}

Other competitive complaints arose because CATV's received and distributed signals containing network shows which local outlets did not carry, and because CATV's provided network shows "live," while the local broadcaster often ran them on a delayed basis; thus, the local outlet may have lost potential viewers to the CATV system. In addition, broadcasters have raised complaints of a technical nature against CATV's to the effect that the presence of a CATV terminal at a subscriber's set makes off-air reception of the local station difficult, and that the CATV either does not carry the local station on the cable or, if it does, it degrades the signal. To remedy this, the broadcasters have urged that the FCC require CATV systems to carry the local station without degradation to picture quality.\textsuperscript{20}

The broadcasters claim that unless the FCC takes regulatory action many small-market television stations will be forced off the air and communities will lose the benefit of a local outlet. CATV, because of the impracticability of running its cables over long distances, generally does not serve the outlying rural areas of the communities in which it operates. Consequently, if the local broadcasting outlet is forced off the air, the outlying areas will be without TV service.\textsuperscript{21}

On the other hand, the National Community Television Association, Inc., spokesman of the CATV industry, claims there is no real impact problem, and that local TV broadcasters and CATV systems can co-exist. There are approximately forty communities in which a single local TV broadcaster and a CATV system are in competition, and in only three or four, NCTA estimates, is the situation a matter of controversy.\textsuperscript{22} As a result, NCTA takes the position that the FCC should not have jurisdiction over community antenna systems on the ground that they are merely signal reception services.\textsuperscript{23}

Caught somewhere in the middle of the controversy is the FCC, which has as its basic aims in regulating the television industry the "priorities" established in its \textit{Sixth Report on Television Allocations},\textsuperscript{24} which ended

\textsuperscript{19} 1959 Report ¶ 25.
\textsuperscript{20} 1959 Report ¶ 55.
\textsuperscript{21} E.g., Brief for Intervenor, p. 17, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963).
\textsuperscript{22} Television, June 1962, at 51.
\textsuperscript{23} See Brief for Appellant, p. 9, Cable Vision, Inc. v. The KLIX Corp., No. 18577, 9th Cir.
\textsuperscript{24} 1 P. & F. Radio Reg. 91:620 (1952).
the “freeze” on TV grants in 1952. The first three of these priorities are: (1) to provide at least one TV service to all parts of the United States; (2) to provide each community with at least one TV broadcast station; and (3) to provide a choice of at least two TV services to all parts of the United States. 25 CATV does provide a “TV service”; in some instances it provides the only such service, while in other situations it furnishes an alternative choice. Clearly, it has substantially contributed to the achievement of the first and third priorities. However, where a CATV system supplies the only TV service to a community, there arises a question of whether, because of its competitive force, it is acting as a deterrent to a potential TV broadcaster who otherwise might provide direct TV service. In such situations, the furtherance of the second and third priorities is foreclosed. In communities that are supplied a choice of two TV services, i.e., a CATV and a TV broadcaster, there lies the possibility of one being destroyed by the “impact” of the other. Here again, achievement of the second and third priorities may be impaired.

If the priorities are to be realized, some form of regulatory vehicle seems necessary to assure the co-existence of CATV and TV broadcasters within the same communities. The suggested possibilities are broadly threefold: (1) under the present statute the FCC could, if it desired, find authority to regulate CATV’s; (2) relief could be sought in the courts; and (3) additional legislation. Each of these possibilities will be examined in detail.

I

FCC Control Under the Present Statute

In 1959, the FCC thoroughly studied the effect of various auxiliary television operations on the television broadcasting industry. 26 The Commission had previously declined to license or regulate CATV pursuant to its jurisdiction over communications common carriers 27 or as a broadcasting facility. 28 As a result, the CATV industry was the only auxiliary service

25 The fourth and fifth priorities established by the Commission are, respectively, “to provide each community with at least two television broadcast stations,” and to provide that any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.

Ibid.

26 1959 Report.


28 Id. ¶ 10. The definition of “broadcasting” uses the term “radio communication,” as
not under FCC control, and it was examined with special care in light of criticism from some television broadcasters that CATV was interfering competitively with stations by causing loss of local advertising and occasionally through technical interference. It was claimed that CATV was disrupting the Commission’s carefully planned Table of Television Channel Allocations designed to provide nation-wide television service, yet serving only where it was convenient to the CATV operators. The consensus of these critics was that the FCC should regulate the CATV industry either under present provisions of the Communications Act, or should seek special legislation establishing FCC jurisdiction. The NCTA and other pro-CATV parties maintained “that generally there is no real impact problem, that a local station and a CATV can co-exist, and that the present stir is being made by a few broadcasters wishing to maintain their monopoly positions [in single station communities]...”

The 1959 report describes the general CATV economic impact and concludes that although there was undoubtedly an impact, “in what situations this impact becomes serious enough to threaten a station’s continued existence or serious degradation of the quality of its service...we cannot tell from the data before us.” The report discussed three basic legal issues involved in any action the Commission might take: (1) what basis for regulating and licensing CATV is available under the present laws?; (2) is it legally valid to control CATV by denying common carrier licenses to microwave systems serving a CATV where there would be an adverse economic impact on a local station?; and (3) is economic injury to a local station a valid public interest justification for denial of a license to any type of competing auxiliary facility?

Regulation possibilities under present rules were considered through “either common carrier,” broadcasting, plenary power, or property opposed to “wire-communication.” FCA § 3(o), 48 Stat. 1066 (1934), 47 U.S.C. § 153(o) (1958).

29 Sixth Report on Television Allocations, supra note 24. This Table of Allocations is amended from time to time to change the channel allocations in various cities.

30 1959 Report ¶ 22.

31 “The pro-CATV parties include the NCTA, four individual CATV operators, some 20 microwave common carrier licensees or permittees, and Jerrold Electronics Corporation, a major supplier of CATV system equipment.” 1959 Report ¶ 23 n.6.

32 Id. ¶ 23.

33 Id. ¶ 51.

34 Id. ¶ 57.

35 Id. ¶ 58(a). See definition of “common carrier” note 16 supra.

36 Id. ¶ 58(b). See definition of “broadcasting” note 17 supra.

37 Id. ¶ 58(c). “[T]he Commission shall make such distribution of licenses, frequencies,
right principles under sections 325(a) and 312(b) of the Communications Act.\(^{38}\) First, CATV was shown not to fall within the legislative intent of the definition of "common carrier," in that it did not provide the "means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted," and that the CATV operator had the "sole responsibility or prerogative" as to what was carried.\(^{39}\) Furthermore, if CATV did come under the definition of "wire communications" it was not subject to regulation under Title II of the Communications Act when operating on an intrastate basis.\(^{40}\) Next, the Commission found CATV was clearly not within the definitions of "broadcasting" or "broadcast station" or "instrumentality" engaged in broadcasting.\(^{41}\) The systems did not transmit radio signals through the air, but by wire. Further, the Commission stated "we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications."\(^{42}\) Finally, the Commission found no grounds for requiring CATV systems to obtain consent from originating stations to use any of that station's broadcast program material. CATV was not "rebroadcasting" within the meaning of section 325(a), and there were no grounds for issuance of cease-and-desist orders aimed at CATV systems under section 312(b).\(^{43}\) The Commission also found no way under the current rules to regulate CATV because of its adverse effect on broadcasting since even if this were a legally valid argument, it would be necessary to handle each case on an individual basis. Thus the problem would not be solved.\(^{44}\)
The broadcasters had urged that common carrier microwave licensees should be regulated so as not to allow them to carry signals for CATV systems which caused adverse economic effects on a local station. However, this contention forming the second legal issue was dismissed in the 1959 report on the grounds that the Commission was not in a position to censor materials being transmitted over microwave and that "public interest" only required that applicants show themselves legally, technically and financially qualified to operate common carrier facilities.\(^{45}\)

The fact that there might be only one customer was held to be insignificant at that time.\(^{46}\) It concluded that there was no valid authority to deny common carrier licenses solely because the CATV systems served might have an adverse economic impact on a local station.\(^{47}\) The 1959 report dismissed the argument that microwave operators should have permission from the originating broadcaster, since the existence of property rights in such transmission has not yet been determined.\(^{48}\)

On the final legal point, the Commission decided that it would consider the public interest aspects of economic impact on already existing stations or possible future stations under section 307(b) as ground for refusing an application for a translator license.\(^{49}\) This decision acknowledged *Carroll Broadcasting Co. v. FCC*,\(^{50}\) in which it was held that the Commission must afford a local station an opportunity to present proof of

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\(^{45}\) "There is no examination of the 'content' of the intelligence which is to flow over the communication circuit." 1959 Report ¶ 74. The Commission commented on its lack of ability to require common carriers to censor the material they carry, and stated that "the logical absurdity of such a position requires no elaboration." Id. ¶ 73.

\(^{46}\) Id. ¶ 76.

\(^{47}\) Id. ¶ 77. See also In re Applications of the Mountain States Tel. & Tel. Co., File Nos. 591-C1-P-61, 592-C1-P-61, 593-C1-MP-61, Memorandum Opinion and Order FCC 61-428, 21 P. & F. Radio Reg. 531 (1961), in which the Commission refused to consider an allegation that the facilities requested would be used to "pirate" television programs, since it knew of no such established property rights in this context; and the accompanying letter of January 1, 1961, to the complainant stating that "[A]ny adverse economic impact [resulting] . . . from the change by Community T. V. from its present service . . . is purely fortuitous. . . . Accordingly, a grant of the applications . . . would appear to serve the public interest, convenience or necessity." 21 P. & F. Radio Reg. at 540 (1961).

As will be seen, however, the Commission here too changed its position in a later proceeding involving a common carrier application. See discussion of the *Carter Mountain* case pp. 151-52 infra. As to dealing with business radio microwave licenses, see discussion of Part 11 Amendment pp. 153-56 infra.

\(^{48}\) 1959 Report ¶¶ 78-80.

\(^{49}\) Id. ¶¶ 82-83. See note 37 supra.

economic impact in awarding licenses for competing facilities, although proof of such economic injury "is certainly a heavy burden." However, there was no indication that such considerations would be applied to CATV systems, which were free from Commission regulation and licensing.52

SECTION 21.709 AMENDMENT

Commission misgivings over the effect of the 1959 report evidently arose immediately. By finding no jurisdiction, the Commission permitted the unregulated CATV industry to fill the gaps and holes in television coverage throughout the country wherever a profit could be found. This situation might well retard or frustrate achievement of the purposes of the Commission's plan for the establishment of nation-wide television service by means of its Table of Allocations.53 The Commission first showed its changing attitude toward CATV when it acquired indirect control over CATV by establishing conditions under which it could regulate licenses of microwave common carriers. Many of these microwave systems were parent (or subsidiary) corporations to the CATV systems they served. Only three months after issuing the 1959 report, the Commission amended section 21 of its Rules and Regulations as applied to common carrier microwave services.54 The new section (21.709) required renewal of license applications to indicate the percentage of use of the microwave facilities by

51 Id. at 350, 258 F.2d at 444.
52 This would require finding some jurisdiction over CATV which the Commission has consistently claimed it does not have.
53 Sixth Report on Television Allocations, supra note 24.
54 In the Matter of Amendment of Part 21 of the Commission's Rules to add a new Section 21.709—Domestic Public Radio Services (Other than Maritime Mobile), Order FCC 59-762, July 24, 1959, 47 C.F.R. § 21.709 (Supp. 1963). The amendment is as follows:

Renewal of Station Licenses

(a) Upon filing application for renewal of station license of a radio system in the Domestic Public Point-to-Point Microwave Radio Service, each such common carrier licensee who does not also operate a telephone or telegraph wireline system shall make a factual showing that, during the preceding license period, at least 50 percent of the total hours of service rendered over the radio system, and not less than 50 percent of the radio channels therein, have been used by subscribers not directly controlling or controlled by, or under direct or indirect common control with, the applicant.

(b) If the applicant is unable to meet the criteria set forth in paragraph (a) of this section, he shall make a factual showing of the extent of such service rendered, the specific nature, extent, and dates of any efforts the licensee has made to achieve use of the service by the public, and offer such further showing or explanation as he may deem appropriate.

(c) The showing made under paragraphs (a) and (b) of this section shall be made in duplicate and under oath and submitted with the appropriate renewal application.
customers other than a related CATV system.\textsuperscript{55} No rule-making proceedings were held on this order, since it was determined that the amendment was "procedural in nature, and, therefore, proposed rule-making is not required pursuant to the provisions of Section 4(a) of the Administrative Procedure Act . . . ."\textsuperscript{56} The amendment provided that unless a licensee could show a fifty per cent usage of his facilities by customers other than the related CATV system, hearings would be necessary to consider the application for renewal in light of whom he was serving and why. Considering the locations of most CATV systems which require microwave service for their operations, and the lack of public demand for microwave service in these areas, it is not surprising that licensees generally were not able to show enough unrelated customers to meet the requirement.

Several licensees of common carrier microwave systems were immediately faced with refusals to grant renewal applications of their licenses. The "procedural" rule began to have "substantive" effect. The meaning of "procedural" was explained in April 1963, when the Commission refused to reconsider an earlier decision denying license renewal to Columbia Basin Microwave Company.\textsuperscript{57} Accepting Columbia's contention that 21.709 was a procedural rule, the Commission stated:

However, where there is no public need for a common carrier facility, it cannot

\textsuperscript{55} To clarify later differences in wording regarding the words "directly controlling or controlled by, or under direct or indirect common control with," when applied to various applications, the Commission (by its Review Board) modified an issue framed in the above language to read "To determine whether applicant is a public service subscriber, i.e., a subscriber not directly controlling or controlled by, or under direct or indirect control with the applicant, or a subsidiary with whom the applicant is not directly or indirectly affiliated." \textit{In re} Applications of W. A. Henley, d/b as Kimble Communications, Docket No. 14730, Memorandum Opinion and Order FCC 63R-382, Aug. 8, 1963. In the instant discussion, the terms "related" or "unrelated" will carry with them the full intent of the wording of the 21.709 amendment.

\textsuperscript{56} In the Matter of Amendment of Part 21, supra note 54. Section 4(a) of the Administrative Procedure Act, which relates to rule making, provides:

\begin{enumerate}
\item (a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
\end{enumerate}

be disputed that the Commission has the authority—in fact, the duty—to deny the utilization of a frequency, reserved for service to the public, solely for the operation of a private business—particularly since other frequencies are allocated and available for the purpose of providing private non-common carrier microwave service.58

Evidently the Commission divorced the “procedure” of making a showing of customers from the “substantive” effect of failing to get a license renewed for lack of such showing. Although the Columbia ruling may be harsh, the Commission seemed justified in conditioning the continued use of frequencies allocated to common carrier service on a showing that the licensee is in fact a public carrier serving customers other than those in which it has a financial interest. The “procedural” rule incorporated in 21.709 is, then, in effect an advisory opinion as to how the Commission will determine whether or not the licensee has been operating as a public or private carrier.

A number of arguments were made by common carrier microwave operators to justify renewal of their licenses. Among them were lack of notice of the effect of the rule,59 need for time to amortize facilities60 and the hope of finding unrelated customers.61 In addition, some of the


59 In re Applications of Black Hills Video Corp., FCC Docket Nos. 14321-28, Memorandum Opinion and Order FCC 63-18, 28 Fed. Reg. 331 (1963), where the point arose as to when the licensees first received notice of the requirements of 21.709. However, it is submitted that it was at least “common knowledge” in the industry that the Commission might require a showing of bona fide common carrier status when licenses came up for renewal. Cf. In re Applications of Antennavision Serv. Co., FCC Docket Nos. 14336-40, Initial Decision of Hearing Examiner FCC 63D-93, ¶ 21 n.12, Aug. 6, 1963. The precise nature of this requirement was spelled out in the 21.709 amendment and subsequent interpretations of it. The issue does not seem significant unless it can be used as a basis for delay in revoking a license to allow for amortization of the costs of the installation. At least one applicant defaulted on the issue of notice. In re Applications of Antennavision Serv. Co., supra ¶ 24.


carriers took steps to bring themselves within the requirement of the rule by sale of the related microwave (or the CATV) system, or by sale and lease-back of the microwave facilities.68

In re Applications of Black Hills Video Corp.64 illustrated both the notice and amortization contentions. There, the application for renewal was sent to a hearing examiner when Black Hills was unable to show customers other than its related CATV system.65 In his Initial Decision, the examiner found that Black Hills had not met the requirements of 21.709(b).68 Black Hills had requested a delay, on the ground it had not had sufficient notice to meet the requirements, but claimed further that it should at least be allowed enough time to amortize the installation costs. The examiner found that Black Hills had received notice in April 1959 (at a time when its license was modified), and that since the issue of amortization had not been included in the proceedings, he was precluded from considering such matters in his Initial Decision.67 Black Hills appealed, and the Commission thereafter added issues and sent the case back to the examiner to permit Black Hills to show the cost of the system, the suitability of the equipment for conversion to Business Radio Service, when notice of the need for nonrelated customers was first received and whether time should be allowed for amortization of the costs.68 This approach seemed to mitigate the harshness of the Columbia rule.

Another means of avoiding section 21.709 was divestiture of the microwave by the CATV owner, as was done when the Superior Communications common carrier microwave license came up for renewal.69 Superior

64 FCC Docket Nos. 14321-28 [hereinafter cited as Docket Nos. 14321-28].
67 Ibid.
69 In re Applications of Superior Communications Co., FCC Docket Nos. 14331-33. See also In re Application of Western TV Relay, Inc., FCC Docket No. 14317; In re Application of Mesa Microwave, Inc., FCC Docket No. 14334. The Mesa application was first refused because Mesa was only able to show 25% unrelated customers under § 21.709(b). Memorandum Opinion and Order FCC 62-702, July 6, 1962. However, when Mesa was later
was granted a delay to give the common owner time to sell his interest in Superior. After various proceedings, the examiner found Superior was in the hands of a new owner, and thus a bona fide common carrier. He concluded that public interest would be served by granting the license renewal.\textsuperscript{70} This holding offers an "out" to CATV operators who are served by their own microwave system. However, finding customers for microwave systems and reaching a satisfactory agreement as to price and future charges for the microwave service is another problem.

A similar situation arises when a CATV owner sells his microwave system, then leases it back from the buyer. Whether such a transaction is a mere subterfuge to avoid 21.709, or whether there is a bona fide sale and lease-back depends, of course, on the facts in each case. Transfer of licenses is controlled very closely by the Commission under Section 310(b) of the Communications Act,\textsuperscript{71} and violations of this rule are a serious matter.\textsuperscript{72} In \textit{In re Applications of Antennavision Serv. Corp.},\textsuperscript{73} the common owner of CATV systems and the microwave facilities serving them attempted to meet the requirements of 21.709 by selling both the CATV systems and the microwave facilities, then leasing back the microwave facilities for which he had retained the license. By terms of the chattel mortgage covering the facilities, the buyer-lessee was required to keep them in repair; however, under the lease agreement the seller-lessee-applicant also assumed the obligation for repairs. The examiner found that the mere fact the applicant was leasing the facilities would not disqualify him. However, since he was leasing them, he was required to show that he had exclusive control over them, and that Antennavision had

\textsuperscript{70} In re Applications of Superior Communications Co., FCC Docket Nos. 14331-33, Initial Decision of Hearing Examiner FCC 63D-57, May 21, 1963.

\textsuperscript{71} That section provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

\textsuperscript{72} See, e.g., FCC Public Notice 1142, Feb. 6, 1963, "Applications for Microwave Transfers to Teleprompter Approved with Warning," in which the Commission emphasizes the importance of complying with its rules regarding transfer.

\textsuperscript{73} FCC Docket Nos. 14336-40.
not retained such control. The fact that certain employees charged with day-to-day operations of the facilities were employed by both the lessor and the lessee, and the fact that Antennavision was not getting a reasonable return on its investment because of low charges for the service provided, led the examiner to conclude that the public interest would not be served by granting the requested license renewals.\footnote{In re Applications of Antennavision Serv. Corp., FCC Docket Nos. 14336-40, Initial Decision of Hearing Examiner FCC 63D-93, Aug. 6, 1963.}

These cases illustrate some of the problems created by section 21.709. Its status as legally "procedural" or "substantive" remains unanswered, since none of the cases where an application for renewal of a common carrier microwave license has been denied are ripe for appeal to the courts.\footnote{One exception to this is In re Application of Dakota Microwave Co., FCC Docket No. 14315, Initial Decision of Hearing Examiner FCC 63D-3, 24 P. & F. Radio Reg. 1139 (1963). The revocation was final, but no appeal to the Commission was taken within the time allotted for such appeals.}

Thus far, however, the only renewals granted have been in cases where microwave systems and the CATV systems they serve were unrelated, or where the necessary unrelated customers have been found.\footnote{E.g., In re Applications of Superior Communications Co., FCC Docket Nos. 14331-33, Initial Decision of Hearing Examiner FCC 63D-57, May 21, 1963; In re Application of Mesa Microwave, Inc., FCC Docket No. 14334, Initial Decision of Hearing Examiner FCC 62D-102, 24 P. & F. Radio Reg. 1186 (1962); In re Application of Western TV Relay, Inc., FCC Docket No. 14317, Memorandum Opinion and Order FCC 62-472, 23 P. & F. Radio Reg. 571 (1962).}

**CARTER MOUNTAIN**

Historically, the Commission has refused to deny broadcast licenses on the mere allegation by an existing station that there is not enough business in the area to support two stations.\footnote{FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). However, in Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958), the Commission was cautioned to consider whether the public interest will be affected by the economic impact on an existing broadcast station.} The idea that the first station in a particular community should be protected from later competition from a new station has been alien to the free enterprise concept. This tradition was embraced in the 1959 report.\footnote{See generally §§ 69-83. Similarly, see WSTV v. Fortnightly, Order FCC 62-302, 23 P. & F. Radio Reg. 184 (1962).} However, hearings may be held on an application for a new license where the existing station claims there is insufficient revenue in the area and that competition would hurt the public interest by leading to the demise of one or both of the stations; but the burden of proof is on the existing station to show clearly how
the public interest will be hurt.\textsuperscript{79} In July 1962 the Commission, while denying requests for rule-making, expressed its concern with "the very real danger that operations of CATV systems may force the local television stations . . . off the air."\textsuperscript{80}

This concern manifested itself in \textit{In re Application of Carter Mountain Transmission Co.},\textsuperscript{81} when the Commission refused to grant a license for improved microwave facilities to a bona fide common carrier serving several CATV systems in Wyoming. In \textit{Carter Mountain}, the local station intervened and claimed it would be forced off the air if the amended licenses went into effect. Upon consideration of these allegations, the Commission ordered hearings to be held on the claim of economic injury before the amended license could become effective.\textsuperscript{82} At these hearings, the intervenor presented evidence which tended to show that any loss of revenue (caused by improved CATV service in the communities which it served) would force the station off the air. This, it was claimed, would "thwart the [television] allocation table of [sic] depriving northwestern Wyoming of local [television] transmission facilities . . . thereby defeating the Congressional mandates embodied in . . . the Communications Act."\textsuperscript{83} The examiner discussed Carter Mountain's standing as a common carrier, held that it was bona fide, and concluded that:

[W]hatever impact the operations of the CATV systems may have upon protestant's operation . . . are matters of no legal significance to the ultimate determination made that a grant of the subject application of Carter . . . will serve the public interest.\textsuperscript{84}

On appeal, the Commission reversed this decision, finding that the CATV system was responsible for loss of revenue to the station, that the station would probably go off the air if the CATV service were improved, that the public interest could be injured through loss of local service, and therefore that the application should be denied.\textsuperscript{85} An alternative was added, allowing a grant of the amended license if the applicant could obtain an agreement


\textsuperscript{81} FCC Docket No. 12931 [hereinafter cited as Docket No. 12931].

\textsuperscript{82} Docket No. 12931, Memorandum Opinion and Order FCC 60-564, May 20, 1960.

\textsuperscript{83} Docket No. 12931, Initial Decision of Hearing Examiner, ¶ 12 of the conclusion, FCC 61D-74, 32 F.C.C. 468, 22 P. & F. Radio Reg. 194] (1961), where the brief of the intervenor is quoted. (Brackets in original.)

\textsuperscript{84} Docket No. 12931, Initial Decision ¶ 13.

from its CATV customer that it would not duplicate the local station’s programs, and would carry those programs as broadcast if so requested by the local station. Without further study of the overall situation, the Commission held that “to the extent that this decision departs from our views in [the 1959 report] those views are modified.”\textsuperscript{86} The United States Court of Appeals for the District of Columbia Circuit upheld the decision \textsuperscript{87} and relied largely on the “expertise” the Commission used in overturning its prior holding. An adequate showing had been made to the court that the local station would be driven off the air; the court also denied Carter Mountain’s claim that the Commission was applying broadcast principles to a common carrier case, or was censoring the CATV system through control of the microwave without proper authority.

\textit{Carter Mountain} probably showed the confusion surrounding CATV as clearly as any other case. While denying the right to control CATV, the Commission clearly took such control by insisting that common carriers serving a CATV system be responsible for the end use of what they carry. Carter Mountain argued, \textit{inter alia}, that such a test could be extended to the point where any common carrier could be requested to censor what it carried in order to hold its license.\textsuperscript{88} Although this position is extreme, it tends to point out the difficulties created by a regulatory agency attempting to reach an equitable settlement in an individual case by ignoring its own precedents.

The Commission distinguished \textit{Carter Mountain} in \textit{In re Application of

\textsuperscript{86} Docket No. 12931, Decision FCC 62-177, supra note 85, ¶ 16; petition for reconsideration denied, Memorandum Opinion and Order FCC 62-549, 22 P. & F. Radio Reg. 194h (1962). The propriety of overturning a well-documented and carefully studied report, in which opposing views were presented, on the mere allegation of a particular local station that it would be driven off the air may well be doubted.

\textsuperscript{87} Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963).

\textsuperscript{88} Brief for Appellant, p. 26, Carter Mountain Transmission Corp. v. FCC, supra note 87. The court rejected this argument. However, in its 1959 report the Commission spoke of regulating material carried by common carriers because of its effect on competitors of the common carrier’s customer as a “logical absurdity.” 1959 Report ¶ 73. The Commission justified this change in approach “after further reflection and study.” Brief for Appellee pp. 14-26. For a different explanation of this change, see Brief of Amicus Curiae, NCTA.

Other arguments raised in Appellant’s Brief were that the Commission had used broadcasting standards in a common carrier case, so \textit{Carroll Broadcasting} did not apply; that the Commission was acting beyond the scope of its jurisdiction; that the Commission had not made findings as to why this was a legally valid exercise of its regulatory jurisdiction; and that the Commission had not shown that the local station would actually be forced off the air.
Mesa Microwave, Inc. 89 There, a local station objected to an application of Mesa to carry signals to a CATV system within the Grade B contour90 of the station. However, no economic damages were alleged, nor did the station claim it received any revenue from the city involved. The Commission granted the license to Mesa, saying "injury to the broadcaster is only a pertinent public interest factor where it may spell destruction or diminution of service to the public."91

PART 11 AMENDMENT

The Commission is currently considering expansion of this "end use" test to obtain indirect control over CATV. In December 1962 it announced rule making proceedings would be held on a proposed amendment of Part 11 of the Commission's Rules and Regulations, concerning Business Radio Service.92 Under this part of the rules, licenses are granted for microwave facilities in the 12,000 mc range. Unlike common carrier li-

90 See Commission's Rules and Regulations § 3.683, 47 C.F.R. § 3.683 (1958). This might be termed a secondary service area.

Authorization for stations to relay television signals to CATV systems.

Authorizations in the Business Radio Service to construct and operate point-to-point operational fixed stations to relay television signals to a community antenna television system (CATV) will contain one or more of the following conditions:

(a) If the CATV system operates in an area within the predicted Grade A contour of any television broadcast station in operation, the CATV system must not duplicate simultaneously or 30 days prior or subsequent thereto a program broadcast by such television broadcast station, provided the CATV operator has received at least 30 days advance notification from the broadcast station licensee of the date of such broadcast. Further, if requested by such television station, the CATV system must carry the signal of such station without any material degradation in quality.

. . . . .

(d) If the applicant is not the same person as the operator of the CATV system to be served, but he proposes to render an otherwise permissible radio-communications service to the CATV system operator, and if one or more of the conditions in the foregoing paragraphs of this section are imposed, a further condition will be imposed that if such conditions are not complied with by the CATV operator, the licensee must discontinue rendering service to the CATV system immediately and must not resume such service until the CATV system operator complies with such conditions.

Subsections (b) and (c) of the section are similar to (a), but deal with authorized stations and allocated television channels, rather than existing stations.
licenses for microwave systems, these licenses are issued to individual applicants to use the microwave as an adjunct to their business. Technically, these systems have heretofore been inferior to and more costly than common carrier microwave systems operating in the 6,000 mc range, since they require that the relay stations be located closer together to transmit TV signals clearly. Until recently there seemed to be no great demand for such licenses among CATV owners, but with the advent of section 21.709 and technological improvements in the 12,000 mc equipment, a number of applications were received. As a result, the Commission announced a "freeze" on applications of such licenses pending settlement of the new rule making.\(^93\) A few of these licenses have been granted where the applicant was willing to meet the stipulations in the new amendment, pending settlement of the rule making.\(^94\)

The Commission proposed addition of a new section to Part 11, which in effect would condition a grant to a microwave licensee on the end use of what it carries.\(^95\) The proposed rule requires that a CATV system not duplicate programs of a local station within that station's Grade A contour\(^96\) for thirty days before or after the local station broadcasts the program and that the CATV must carry the signal of the local station if

\(^{93}\) Notice of Proposed Rule Making, supra note 92, ¶ 7.

\(^{94}\) E.g., FCC Public Notice Report No. 1256, July 10, 1963 "Business Radio Service Grants for TV Relay to CATV System," in which the applicant agreed that:

[T]he CATV system must not duplicate simultaneously or 30 days prior or subsequent thereto a program broadcast by such television broadcast station [whose Grade A contour includes the community served by the CATV system], provided the CATV operator has received at least 30 days advance notification from the broadcast station licensee of the date of such broadcast.

Further, it agreed to carry the signal of the local station if so requested.

In what may be an even more significant move, the Commission attached the same condition to the grant of a translator license. In re Applications of Frontier Broadcasting Co., BPTT 825-28, BPTV 1847-48, Memorandum Opinion and Order FCC 63-760, Aug. 1, 1963. The Order stated that if "in any other proceeding [the Commission] should prescribe a different meaning for 'duplication' in situations such as this, then Frontier will be free to request a corresponding modification of the condition herein imposed." In re Applications of Frontier Broadcasting Co., supra, ¶ 23 n.6. The Commission obviously recognized the basically untenable limitation imposed, and probably hoped to use requirements such as this to force a settlement of the issue of protection of local stations from economic injury because of the presence of translators, CATV, boosters, etc. As to the effect of such limitations, see Appendix III to the Comments in Opposition to Proposed Rule Making by the National Community Television Ass'n (NCTA) (concerning the amendment of Subpart L, Part 11), FCC Docket No. 14895.

\(^{95}\) See note 92 supra.

\(^{96}\) Commission's Rules and Regulations § 3.683, 47 C.F.R. § 3.683 (1958). This may be thought of as the primary service area of a television station.
so requested. The licensee is required to discontinue microwave service immediately if these conditions are violated. The NCTA has attacked this proposed rule on numerous grounds, claiming that Congress has refused to give the Commission jurisdiction over CATV and that this proposal is a clear violation of congressional intent. Further, it is claimed that no economic impact has been proved, and that any proposal should meet only the barest needs for protection of the local station; i.e., prohibition of simultaneous duplication of a local station's programs. The primary objection, however, is that a non-duplication provision will permit the local station to select the top programs from two or three networks and, in effect, create a sixty-day hiatus in the CATV system's ability to receive and distribute these popular programs. As a signal-receiving-distributing service, CATV operates on a "live" basis, and has no facilities to hold shows for delayed broadcast. Therefore, any requirement entailing delay would mean that a particular program is lost as far as the CATV viewers are concerned.

This does seem to be a heavy burden on the CATV systems, for local stations could pre-empt popular programs for use, even though they did not plan to use them during "prime" broadcast hours. It could be argued that the most a rule of this nature should do is require that the CATV refrain from showing a particular program in advance of the showing by the local station. Even this would permit a local station to plan its scheduling to prevent the CATV from showing many "live" programs by scheduling delayed showings of the same programs. Perhaps a solution to the "end-use" test would be to give the local station only first choice on "live" broadcasts. That is, forbid the CATV from using its microwave

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97 It should be noted that the Commission has twice refused to take almost the same steps when so requested by local broadcasters: In the Matter of Petition of Television Montana and Capital City Television, Inc. for Amendment of Part 21 of the Commission's Rules relating to applications for microwave frequencies in the Domestic Public Radio Service (other than Maritime Mobile), Memorandum Opinion and Order RM-173, FCC 60-890, 20 P. & F. Radio Reg. 1533 (1960), where the Commission held that it was not yet ready to "establish a position different from that" of the 1959 report, but that if such modification of the rules were required the Commission would take steps to initiate rule making on its own; and In the Matter of Distribution of Television Programs by Community Antenna Television Systems, Memorandum Opinion and Order RM-300, FCC 62-871, 23 P. & F. Radio Reg. 1624 (1962), in which the Commission refused to require television broadcasters to prevent a CATV system from transmitting their programs in areas where a local station was broadcasting the same programs, in view of bills pending before Congress at that time, and because it would "impose a burdensome obligation on television licensees."

98 Comments in Opposition to Proposed Rule Making by the National Community Television Ass'n (NCTA), FCC Docket No. 14895 (Dec. 14, 1962).
system to provide its customers with a program which they could receive at the same time from the local station with local advertising; or to require the CATV to carry such programs from the local station over its cables.

As yet, the Commission has found no direct control over CATV. If and when it obtains such control, and what type of control it may be, are questions which both the Commission and the NCTA recognize as requiring answers. Indirect control, through regulation of microwave, is surely not the solution, since it is partial control at best, and at worst inhibits multiple service to the people who need it most—those living so far from major cities that microwave is needed to bring in any TV signals. On the other hand, those people should not be denied the right to a local station as a medium of self-expression, nor should they suffer the loss of local programs for non-CATV subscribers. The best solution would be one which brings CATV under some type of direct control of the FCC but without cutting the heart out of its reception-distribution operations. Until such direct control is established a solution to the CATV problem will inevitably be sought elsewhere.

II

JUDICIAL CONTROL

Since broadcasters have not obtained FCC protection against CATV, they have turned increasingly to the courts. Generally, they have re-

99 A more indirect means of control over CATV has been the Commission's refusal to protect established CATV systems from interference by translators. See In re Applications of Laramie Community TV Co., Docket Nos. 14552-54, and Albany Electronics, Inc., Docket Nos. 14555-56, Initial Decision of Hearing Examiner FCC 63D-35, March 20, 1963, and Memorandum Opinion and Order of Hearing Examiner FCC 63M-299, 25 P. & F. Radio Reg. 131 (1963), where the examiner awarded mutually exclusive translator licenses to Albany, rather than to Laramie, the operator of the local CATV systems, upon finding bad faith on the part of Laramie in making its application for translator licenses; In re Applications of San-Juan Non-Profit T-V Ass'n, Docket Nos. 14188-90, Decision FCC 62-1154, 23 P. & F. Radio Reg. 365 (1962), which affirmed the examiner's Initial Decision, FCC 62D-18, 23 P. & F. Radio Reg. 368 (1962), granting translator licenses over the objections of the local CATV system operator that the applications did not meet certain technical requirements; In re Applications of Claremont Television, Inc., File Nos. BPTTV 1269-72, Memorandum Opinion and Order FCC 63-42, 24 P. & F. Radio Reg. 805 (1963), where the Commission failed to find that the requested locations of the new translators would interfere with the existing CATV antenna, although it indicated the CATV operator might seek later redress if actual interference developed in the future. Cf. Jackson v. Harward, 9 Utah 2d 136, 339 P.2d 1026 (1959), where a CATV owner was found to have no property right in what he transmits which would protect him from the installation of a "booster" station.
quested injunctive relief based on theories of copyright infringement or unfair competition.\textsuperscript{100} However, permeating these two distinct areas of the law is the basic question: If the Federal Communications Act pre-empts the field of radio and television, does judicial relief constitute unwarranted interference? Each of these matters will be examined in turn.

\textbf{COPYRIGHT}

The Federal Copyright Act\textsuperscript{101} protects television scripts under sections 1(a) through 1(d) by giving to the copyright holder the "exclusive right" to publish, translate, exhibit, perform, represent, produce, or reproduce the copyrighted material in any manner whatsoever.\textsuperscript{102} Where television scripts or other program materials have been copyrighted under these provisions, protection of such material seems limited to action for copyright infringement.\textsuperscript{103} Accordingly, a protected party under the Federal Copyright Act is precluded from seeking an injunction regarding the same material on any theory of unfair competition. Further, an action for infringement under the act can be brought only by the copyright holder.\textsuperscript{104}

However, it is in the area of common law copyright that a potential for broader protection of television programs is found. In \textit{Ketcham v. New York World's Fair, Inc.},\textsuperscript{105} the classic summation of a common law copyright was handed down when the court said that "an individual has a property right in his original, unpublished, intellectual productions."\textsuperscript{106} This three-pronged definition of a common law copyright has been adhered to consistently by the courts. In \textit{Ketchum}, the defensible property right was held to exist in a color scheme designed for the World's Fair. Significantly, for present purposes, a similar right was held to exist in a

\textsuperscript{100} The suggestion has been offered that, given a restrictive announcement, an equitable servitude might be claimed as a basis for enjoining a CATV. Solinger, Unauthorized Uses of Television Broadcasts, 48 Colum. L. Rev. 848, 869 (1948); Comment, 20 Albany L. Rev. 69, 70 (1956). The point has not arisen in CATV litigation.


\textsuperscript{102} 37 C.F.R. § 202.6 (1960).


\textsuperscript{105} 34 F. Supp. 657 (E.D.N.Y. 1940), aff'd per curiam, 119 F.2d 422 (2d Cir. 1941).

\textsuperscript{106} Id. at 658.
combination of ideas evolved into a radio show.\textsuperscript{107} Thus, there can be no doubt that there is a basis for finding a common law copyright in a television program if such program is deemed to be an original, unpublished, intellectual production.\textsuperscript{108}

Application of the foregoing principles of copyright law to the CATV problem immediately raises two questions: (1) Does the activity of a CATV operator amount to a "reproduction" sufficient to constitute an infringement of copyright, either statutory or common law?; (2) If common law copyright is being argued, does the original broadcast amount to "publication" sufficient to destroy such copyright before the program ever reaches a CATV?

With respect to "reproduction," the cornerstone case remains \textit{Buck v. Jewell-LaSalle Realty Co.}\textsuperscript{108} In that case, a hotel maintained a master radio receiving set which was wired to all rooms. Paying guests were thus able to hear radio programs over loudspeakers in public rooms and through headphones in private rooms. Action was brought by the holder of a statutory copyright on a popular song which had been played on the air and disseminated in the above manner by the hotel. The Supreme Court held that the copyright in this instance applied not only to the original rendition on the air but also to reception for commercial purposes. The hotel's action of receiving radio broadcasts and translating them into audible sound was said to be "not a mere audition of the original program" but "essentially a reproduction."\textsuperscript{110} This view has been followed in subsequent decisions\textsuperscript{111} and undoubtedly is still the law. When applied to television, it has led to the conclusion that the owner of a receiving set, by showing a program in a tavern, hotel, restaurant, private auditorium or theater, has infringed on copyright to the same degree as if he had reproduced the material on his own stage with a live cast.\textsuperscript{112} However, broadcasters have not sought to enforce this point by injunction since as a practical matter, hotels, taverns and restaurants have stimulated interest in televi-


\textsuperscript{108} See Warner, Protection of the Content of Radio and Television Programs by Common Law Copyright, 3 Vand. L. Rev. 209 (1949).

\textsuperscript{109} 283 U.S. 191 (1931).

\textsuperscript{110} Id. at 200.


\textsuperscript{112} Solinger, supra note 100, at 855.
sion and have afforded wider dissemination for broadcasters' advertising.\textsuperscript{113}

CATV operators have argued that the hotel’s activity in the \textit{Buck} case can be sharply distinguished from their own. They have pointed out that the hotel owned and controlled the receiving equipment and determined which programs its guests were to hear. A CATV system, on the other hand, it is argued, neither owns nor controls the receiving sets; it is, rather, a reception service only—one which does not select the programs to be seen and hence cannot be held to be “reproducing” anything.\textsuperscript{114} A CATV, it is urged, “merely furnishes an attachment to a television receiving set which enables a set disadvantageously located to operate like an ordinary set.”\textsuperscript{115}

This argument has some merit and finds support by analogy to the so-called “player piano” or “juke-box” amendment to the Federal Copyright Act.\textsuperscript{116} This amendment provides that property rights of an orchestra in phonograph recordings are not a subject of protection by statutory copyright. Accordingly, a recording company is not held to have “reproduced” an orchestral rendition when its recording of that rendition is played on a juke-box.\textsuperscript{117}

Nevertheless, the attempt to distinguish the activity of a CATV from that of the hotel in the \textit{Buck} case is not entirely persuasive. The infringement in \textit{Buck} was held to flow from the reception of radio broadcasts and the translation of them for commercial purposes into audible sound. To restrict this rule to situations where the defendant owns and controls the receiving sets and selects the programs would be to belabor too fine a point—and would perhaps entail reading too much into the opinion in \textit{Buck}.\textsuperscript{118}

\textsuperscript{113} See Warner, supra note 108, at 233 n.166.
\textsuperscript{114} Brief for Appellant, p. 21, Cable Vision, Inc. v. The KLIX Corp., No. 18577, 9th Cir.; Reply Memorandum of Defendant in Opposition to Plaintiff’s Motion for Preliminary Injunction, p. 47, WSTV, Inc. v. Fortnightly Corp., Civil No. 669-F, N.D. W. Va.; Answer for Defendant, pp. 3, 8; United Artists Associated, Inc. v. The NWL Corp., Civil No. 60-2583, S.D.N.Y.
The argument of the CATV industry, of course, is limited by the fact that the Buck decision is still the law. But that decision may well have outlived its usefulness. It was, after all, handed down in the very early days of radio—and three years before enactment of the Federal Communications Act. It certainly could be argued that Buck is at variance with one of the express purposes of the act; i.e., to make radio and television broadcasts available to the greatest number of people in all parts of the country.119

Another requirement for recovery via common law copyright is that the material in question remain unpublished up to the time of the alleged infringement.120 And "publication" raises another question in the current CATV dispute, namely, whether or not performance over the air constitutes a general publication sufficient to place the material in the public domain.

The generally accepted rule in this area was first set forth in Uproar Co. v. NBC.121 There, the court held that a radio performance did not constitute a general publication. Since the Supreme Court's decision in Erie R.R. v. Tompkins,122 however, the effect of the Uproar Co. case no longer bound state courts. While many state courts followed the lead of the Uproar Co. decision,123 there have been exceptions. For example, in 1949, a California court held that the rendition of a "musical laugh" in a radio broadcast constituted a general publication;124 and more recently, a Montana court, in a CATV case, construed a state copyright statute to mean that an original broadcast destroyed all property rights in the material broadcast.125

A CATV, then, can be said to be infringing on common law copyrights if (1) it is held that the CATV "reproduces" broadcasts within the rule of the Buck case, and (2) it is held that a broadcast does not constitute a general publication and hence does not destroy a common law copyright.

122 304 U.S. 64 (1938).
UNFAIR COMPETITION

The doctrine of unfair competition has gone through three distinct phases. In its inception, it covered any imitation or appropriation of a property right of another in a trademark.\textsuperscript{126} It was later expanded to include cases of "palming off"; \textit{i.e.}, instances where a seller of goods sought to delude the consuming public into believing that the goods in question were those of a competitor.\textsuperscript{127} Finally, in \textit{International News Serv. v. Associated Press},\textsuperscript{128} the Supreme Court enlarged the concept still further. International News Service had been taking news items off the boards of Associated Press and flashing them westward for prior publication there under its byline. The Court held that International New Service had thus been attempting to reap where it had not sown and such an attempt constituted a "misappropriation" of a quasi-property right of another.\textsuperscript{129} By so holding, the Court effectively introduced into the law of unfair competition the concept of unjust enrichment.\textsuperscript{130}

Under \textit{International News Serv.}, unfair competition has three elements: (1) a quasi-property right; (2) competition; and (3) damage. Each must be shown in order to obtain relief.\textsuperscript{131} Of the three, the idea of quasi-property right has been the most controversial. In \textit{International News Serv.}, the Court pointed out that Associated Press had invested a great amount of time and money in gathering news, thereby acquiring something akin to a property interest.\textsuperscript{132} Justices Holmes and McKenna, however, disagreed with this view and concurred solely on the more limited ground of "palming off."\textsuperscript{133} And Mr. Justice Brandeis, in a famous dissent, strongly objected to judicial creation of new property rights in areas affecting the public interest.\textsuperscript{134}

The concept of quasi-property right has been the subject of much argument in unfair competition litigation in the field of radio and television. The investment of time and money in gathering news was said

\textsuperscript{126} See Warner, Radio and Television Rights 890 (1953); Chafee, Unfair Competition, 53 Harv. L. Rev. 1289, 1291-93 (1940).

\textsuperscript{127} Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901).

\textsuperscript{128} 248 U.S. 215 (1918).

\textsuperscript{129} Id. at 239-40.


\textsuperscript{131} See Solinger, supra note 100, at 859-65.

\textsuperscript{132} 248 U.S. at 240.

\textsuperscript{133} Id. at 246-48.

\textsuperscript{134} Id. at 248-67 (dissenting opinion).
to have created such a right in the *International News Serv.* case.\textsuperscript{135} In radio and television, on the other hand, the quasi-property right was found in situations where stations had contracted to be the exclusive agencies broadcasting a particular event. Thus, in *Mutual Broadcasting Sys., Inc. v. Muzak Corp.*,\textsuperscript{138} plaintiff contracted with organized baseball for the exclusive right to broadcast the 1941 World Series. Defendant received plaintiff's broadcasts on an antenna and distributed them in their entirety through leased telephone lines to paying subscribers. Plaintiff was held to have acquired a quasi-property right by spending large sums of money to acquire exclusive broadcast rights. \textsuperscript{137}

There remains the question of whether a quasi-property right exists in a radio or television broadcast absent an exclusive arrangement. This question has been answered in the affirmative,\textsuperscript{138} but this was prior to the current CATV controversy.

Two recent cases in Idaho focused on the problem of applying the foregoing principles to CATV. In *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*,\textsuperscript{139} three originating stations in Salt Lake City sought to enjoin reception of their signals and transmission of them by microwave to a CATV. The signals had been intended for a local Twin Falls, Idaho, station under contracts for non-exclusive re-broadcast rights. Plaintiffs argued that they had expended considerable time, money and effort in producing these signals and that unauthorized reception and transmission of them for profit would constitute a misappropriation of a quasi-property right.\textsuperscript{140} The court held that there was no quasi-property right involved because the rebroadcast contracts with

\textsuperscript{135} Id. at 238-40.

\textsuperscript{136} 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

\textsuperscript{137} Id. at 490, 30 N.Y.S.2d at 420. There is also ample precedent to support the proposition that the producers of the events to be broadcast under an exclusive contract can also enjoin an unauthorized broadcast of that event. The theory behind such decisions has usually been that the station with exclusive broadcast rights has acquired a quasi-property right which is derivative only—and that the producer of the event retains a property interest in the right to publicize that event on an exclusive basis if he wishes. E.g., Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938); National Exhibition Co. v. Teleflash, Inc., 24 F. Supp. 488 (S.D.N.Y. 1936); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950); Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc., 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct. 1937).

\textsuperscript{138} Waring v. Dunlea, 26 F. Supp. 338 (E.D.N.C. 1939); Warner, op. cit. supra note 126, at 910 n.1.

\textsuperscript{139} 196 F. Supp. 315 (D. Idaho 1961).

\textsuperscript{140} Id. at 321.
the Twin Falls station granted no exclusive rights.\textsuperscript{141} It further held that the parties were not in competition under the rule of the \textit{International News Serv}. case since they received their incomes in different ways.\textsuperscript{142} And it also stressed that defendants planned to give plaintiffs full credit for all programs transmitted and distributed;\textsuperscript{143} thus, such activity was not unfair.

Shortly thereafter, \textit{Cable Vision, Inc., v. KUTV, Inc., The KLIX Corp.}\textsuperscript{144} was decided by the same judge. In this case, however, the local television station in Twin Falls was a party to the action and alleged unfair competition and tortious interference with contractual relations. The station, KLIX-TV, relied on a contractual right of "first call" on network programs in the Twin Falls area and argued that such a right constituted exclusivity sufficient to create a defensible quasi-property interest.\textsuperscript{145} It also pointed out that the contracts permitted insertion of local advertising during network programs but that the value of such insertions was considerably diminished because CATV subscribers could see the same programs as received directly from Salt Lake City with different advertising.\textsuperscript{146} The court held that the contracts were exclusive, thus giving a defensible quasi-property right. An injunction was issued on the grounds of tortious interference with exclusive contractual relations,\textsuperscript{147} and unfair competition against a station dependent on local advertising.\textsuperscript{148}

These cases engendered critical comment.\textsuperscript{149} In comparing them, reference should again be made to the essential elements of unfair competition under the \textit{International News Serv.} doctrine. The first of these elements is the need for a quasi-property right.\textsuperscript{150} In \textit{Intermountain}, plain-

\textsuperscript{141} Id. at 323.
\textsuperscript{142} Id. at 325-26.
\textsuperscript{143} Id. at 326.
\textsuperscript{144} 211 F. Supp. 47 (D. Idaho 1962).
\textsuperscript{145} Id. at 50-51.
\textsuperscript{146} Id. at 52.
\textsuperscript{147} Id. at 58. The doctrine of tortious interference with contractual relations was enunciated in Lumley \textit{v. Gye}, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853). This doctrine requires that the party accused of such interference induce a party to a contract to break such contract to the detriment of the other contracting party. See generally Prosser, \textit{Torts} 106 (2d ed. 1955); Restatement, \textit{Torts} \S\S 766-67. Application of the doctrine to the CATV's activity in this case therefore seems to have been erroneous.
\textsuperscript{148} 211 F. Supp. at 60-61. Appeal of the decision is pending, \textit{Cable Vision, Inc. v. The KLIX Corp.}, No. 18577, 9th Cir.
\textsuperscript{150} See Solinger, supra note 100, at 865-67.
tiffs sought to establish such a right on the basis of their investments in original television productions, but the absence of an exclusive arrangement with the local station persuaded the court to reject this contention.151 In Cable Vision, however, the local station claimed exclusivity by virtue of the "first call" contracts. The court agreed with this claim152 despite the following considerations: (1) a right of "first call" falls far short of being an exclusive right; (2) the contracts conformed with FCC regulations which prohibit exclusivity and permit "first call" only as against another station in the same community (with no mention of CATV);153 (3) KLIX-TV did not have exclusive rights in Twin Falls vis-à-vis out-of-town network stations whose signals could be received locally through use of a proper antenna; and (4) the court itself earlier said that if KLIX-TV could not assert exclusivity against another station or network, it could not assert it against a CATV.154 Based on these factors, the inescapable conclusion seems to be that KLIX-TV had no defensible quasi-property interest within the rule of International News Serv. There are grounds for reversing the decision on this point.155

The second element of the International News Serv. doctrine is the need for direct competition between the parties.156 In Intermountain, this clearly was not present. The CATV operation in that case provided wider dissemination of the programming and advertising of the local Salt Lake City stations. This would seem to be a supplemental service rather than competition. In Cable Vision, however, the parties clearly were in more of a competitive relationship. KLIX-TV in effect complained that it was hit in the pocketbook—that it was threatened with loss of advertising revenue due to Cable Vision's activities. CATV groups, on the other hand, have repeatedly argued that under International News Serv. the parties must receive their income in the same way for competition to exist between them and that this requirement does not fit the CATV situation since the parties do not compete for the advertising dollar.157 This seems

154 211 F. Supp. at 53.
155 See Brief for Appellant, pp. 25-30, Cable Vision, Inc. v. The KLIX Corp., No. 18577, 9th Cir.
156 See Solinger, Unauthorized Uses of Television Broadcasts, 48 Colum. L. Rev. 848, 861 (1948).
157 Brief for Appellant, pp. 32-33, Cable Vision, Inc. v. The KLIX Corp., No. 18577, 9th Cir.; Memorandum of Defendant in Support of Motion to Dismiss Complaint or for Judgment on Pleadings, pp. 32-33, WSTV, Inc. v. Fortnightly Corp., Civil No. 669-F, N.D.
to be a reasonable interpretation of *International News Serv.*, but the situation in a case such as *Cable Vision* probably calls for a different approach. In *Mutual Broadcasting Sys., Inc. v. Muzak Corp.*, referred to earlier, defendant's conduct in disseminating plaintiff's broadcast over leased telephone lines closely resembled usual CATV operations. The dissemination included all of plaintiff's advertising messages, but the court still granted an injunction. In *Cable Vision*, the redistribution was not of KLIX-TV's broadcasts; it was a redistribution of programming for which KLIX-TV had contracted, but without the local advertising necessary to sustain that station. In cases where a local station's advertising revenue is being threatened, the better view would seem to be that CATV operations amount to direct competition. Such a view would certainly accord with the FCC's aim of providing the widest possible dissemination of free television to the public. Thus, the *Cable Vision* decision, which was incorrectly reasoned on the question of exclusivity, seems to be sound law on the question of competition.

The foregoing discussion dealt with alleged unfair competition by a CATV under the rule of *International News Serv*. Since *Erie R.R. v. Tompkins*, however, that rule is no longer binding on federal courts and state law must be applied. Some decisions restricted the rule of *International News Serv.* to the specific facts presented in that case;
others extended the rule to cover similar factual situations;\textsuperscript{166} and a few refused to recognize it as a basis for relief.\textsuperscript{167}

In \textit{Cable Vision}, the court adopted the rule of \textit{International News Serv.} as the law of Idaho and applied it to the facts presented,\textsuperscript{168} even though the courts of Idaho had never taken a definitive position on that rule.\textsuperscript{169} In a West Virginia CATV case,\textsuperscript{170} on the other hand, plaintiff broadcaster faced a situation in which state precedent required a showing of "palm-ing off" before unfair competition could be found.\textsuperscript{171} It is difficult to see how a CATV can be attacked on this ground, unless it departs from normal CATV practice and attempts to deceive viewers into thinking that the programs being distributed are its own.

There are, then, three major problems in applying the doctrine of unfair competition to CATV. First, in order to establish the required quasi-property right, an exclusive right to broadcast certain programs in a defined area must be shown. The FCC, however, has expressly prohibited such exclusivity and has limited the possible contractual rights of a local station to "first call" only.\textsuperscript{172} Second, to establish the required element of competition, a local station must apparently show an immediate threat to its advertising revenue. And third, in jurisdictions which do not follow the rule of \textit{International News Serv.}, unfair competition requires either an imitation or appropriation of a trademark, or a conscious effort at "palm-ing off." There seem to be no grounds for accusing the usual CATV operation of either of those infractions. In view of these considerations, it does not seem that court injunctions for unfair competition can provide a sound and uniform solution to the CATV problem.


\textsuperscript{168} 211 F. Supp. at 56.


\textsuperscript{170} WSTV, Inc. v. Fortnightly Corp., Civil No. 669-F, N.D. W. Va.


\textsuperscript{172} 47 C.F.R. § 3.132 (1958).
STATUTORY PRE-EMPTION?

The *Cable Vision* court noted that under the Federal Communications Act, remedies at common law or under another statute were not altered or abridged. On this basis, it reasoned that because CATV's were not subject to FCC control, their conduct should be governed by the common law—including any conduct which affects broadcasting stations. Implicit in this line of reasoning are two assumptions: (1) because Congress has not delegated to the FCC power to protect broadcasters from CATV's, it has not acted on the subject; and (2) courts are therefore free to step in. These are highly questionable assumptions.

It has been argued that even if Congress has not acted in this field, courts are still not free to step in. Congressional inaction on subjects concurrently of a local and national nature is said to be consent to state regulation. But, the argument runs, similar inaction on subjects solely of a national nature is in effect a declaration that those subjects should be free from regulation. There can no longer be doubt that radio and television are subjects of a "national nature." Thus, if this argument is accepted, the conclusion must be that CATV's are unregulated and must remain so until Congress says otherwise.

Better reasoning would seem to start with reference to the Federal Communications Act:

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license.

This language makes two fundamental points. First, federal control over radio (and hence television) transmission is absolute, and licensed broadcasters are mere users of federal facilities. And second, licensed broadcasters have no broadcasting rights beyond those spelled out in their licenses.

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174 211 F. Supp. at 56.


178 See Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153 (3d Cir. 1950).
In view of this language, the better argument would seem to be that Congress has acted in the field of CATV but it has not seen fit to delegate appropriate regulatory authority to the FCC. If the channels for television transmission are in fact federal facilities, then an injury to a licensed transmission over those facilities is an injury to the United States if the statute so recognizes it.\textsuperscript{179} There is no right in the broadcaster to protect such transmission. Specifically, the broadcaster has no property right quasi or otherwise.\textsuperscript{180} This removes the cornerstone of any argument based on copyright or unfair competition.

Courts have recognized that the entire field of television has been preempted by the Federal Communications Act.\textsuperscript{181} It is also firmly established that the doctrine of \textit{Erie R.R. v. Tompkins}\textsuperscript{182} does not apply in the face of a pre-emptive enactment of Congress.\textsuperscript{183} The pre-emptive enactment here, of course, relates only to communications as such. Activities in the ordinary course of daily business (buying and selling, hiring and discharging personnel, conforming with local health and safety laws, etc.) are still subject to state law.\textsuperscript{184}

Inescapably, one returns to the policy arguments embodied in Mr. Justice Brandeis' dissent in \textit{International News Serv.}\textsuperscript{185} It was there argued that courts should not create new property rights in areas broadly affecting the public interest. Wrongs in such areas, it has been pointed out, often will arise again and again; and if courts attempt regulation,


\textsuperscript{180} "... and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." FCA § 301, 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1958). See FCC v. Sanders Bros. Radio Station, supra note 179, at 475 (1940). For cases holding that a CATV operator has no property right in the signal he receives, see Intermountain Electronics, Inc. v. Tintic School Dist., 14 Utah 2d 86, 377 P.2d 783 (1963), and Jackson v. Harward, 9 Utah 2d 136, 339 P.2d 1026 (1959).

\textsuperscript{181} Farmers Union v. WDAY, 360 U.S. 525 (1959) ; Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153 (3d Cir. 1950).

\textsuperscript{182} 304 U.S. 64 (1938).


they "will be beginning a permanent job of business management."\textsuperscript{186} Moreover, under the \textit{Erie} doctrine, uniformity will not be attained in areas where uniformity is absolutely essential.

For the foregoing reasons, a further congressional enactment appears to offer the best hope for a just solution of the CATV problem.

III

\textbf{PAST LEGISLATIVE PROPOSALS}

Concern about the steps being taken by the FCC to assure the proper development of a nationwide competitive television system led the Communications Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, to hold hearings in 1958.\textsuperscript{187} Following the hearings, specific findings and recommendations were made and forwarded to the FCC for its consideration and comment. Thereafter, the FCC commenced an inquiry \textsuperscript{188} into the impact of certain auxiliary services upon the orderly development of television broadcasting, and on April 22, 1959, the Chairman of the FCC informed the committee:

[A]fter carefully weighing all the conflicting proposals urged on the Commission, it has been decided to recommend the adoption of legislation which would require CATV systems to obtain the consent of the originating station for the redistribution to CATV subscribers of programs broadcast by such originating stations; and in addition requiring CATV stations to carry the programs of television stations assigned to communities in which the CATV serves subscribers.\textsuperscript{189}

Several bills\textsuperscript{190} were introduced in 1959 which incorporated the FCC's proposals and also expressly provided for the placing of CATV systems under the jurisdiction of the Commission. Following hearings on these proposals, the committee recommended an original bill, S. 2653,\textsuperscript{191} to amend the Communications Act of 1934 to establish jurisdiction in the

\textsuperscript{186} Chafee, Unfair Competition, 53 Harv. L. Rev. 1289, 1316-17 (1940).
\textsuperscript{187} Hearings on S. 2653 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 837 (1959).
\textsuperscript{188} See generally 1959 Report.
\textsuperscript{190} The FCC proposals were introduced in the U.S. Senate by Senator Warren G. Magnuson, Chairman of \ldots \text{[the]} committee, and made part of S. 1801. Shortly thereafter, Senator Frank Moss and Senator James Murray cosponsored a bill, S. 1886, which incorporated the FCC's proposals and a plan for placing the CATV's under the jurisdiction of the Federal Communications Commission. Senator A. S. Mike Monroney also introduced a bill, S. 2303, which amended the Communications Act so as to establish jurisdiction in the Commission over community antenna systems.
\textsuperscript{191} 86th Cong., 1st Sess. (1959).
FCC over CATV systems. The bill proposed that the act include a definition of community antenna television,\(^{192}\) and that the definition of "common carrier" be amended to exclude specifically CATV operations.\(^{193}\) The purpose of excluding CATV systems from the definition of "common carrier" was obviously to preclude them from obtaining common-carrier microwave licenses for the sole purpose of transmitting signals via microwave facilities to their community antennae.

In substance the bill would have prohibited the operation of a CATV system without a license similar to that required for the operation of radio transmission apparatus. Generally, the provisions of the act relating to radio broadcast communications (and, therefore, to television broadcasting\(^{194}\)) were made applicable to CATV systems.\(^{195}\) However, the bill did not apply section 325(a),\(^{196}\) which would require a CATV system to obtain the consent of the originating television station before it could

\(^{192}\) A community antenna television system was defined as any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located, and which are not in the first instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations.

Senate Report 1.

\(^{193}\) It was proposed that Section 3(h) of the Communications Act of 1934 be amended to read:

(h) "common carrier" or "carrier" means any person engaged as a common common [sic] carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier.

Senate Report 1. (Emphasis added.)

\(^{194}\) See Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153 (3d Cir. 1950).

\(^{195}\) The following sections of the Communications Act were, in the committee's proposed bill, expressly made applicable to CATV systems: 303, 304, 307, 308, 310-13, 315 and 316, relating to stations, radio stations, broadcasting stations, licenses thereof, licensees thereof, and station operators; 317, relating to matters broadcast by any radio station; 326, relating to radiocommunications; 319, relating to construction permits (but subject to waiver by the Commission); and 309, relating to the issuance of licenses, modifications, and renewals thereof. Senate Report 2.

\(^{196}\) Section 325(a) of the Communications Act states in part: "... [no] broadcasting station [shall] rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." 48 Stat. 1091 (1934), 47 U.S.C. § 325(a) (1958).
redistribute the originating station’s signals. The committee apparently adopted the FCC’s views in this respect, that section 325(a) in its present form has reference to “reproduction by radio” and not “reproduction or distribution by wire” as in the case of CATV systems.\footnote{197}

The bill provided for the “grandfathering in” of CATV systems then in operation, but where there was a lone TV broadcasting station in the same community it reserved in the Commission (following a public evidentiary hearing, if requested by either party) the power to apply such conditions on the CATV system’s operation as would “significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast service.”\footnote{198} That provision of the bill would have placed on the broadcaster the burden of establishing that the imposition of such proposed conditions would significantly facilitate its continued operation, and the FCC’s action was to be based upon its determination as to whether the public interest, convenience or necessity would be served. It should be noted that this portion of the bill covering the licensing of existing CATV systems would have permitted only the imposition of operating conditions, not the denial of a license.

The bill also would have applied a public interest standard for the licensing of new CATV systems and for renewing or modifying licenses of existing systems, with due regard to the desirability of facilitating the continued operation of single local TV broadcast stations. This portion of the bill expressly incorporated the protest procedure of section 309 of the act,\footnote{199} and would, in effect, have permitted the FCC to refuse to allow the construction of a new CATV system or the expanded service of an existing system if it determined that the public interest would not be served thereby. Consequently, the FCC would have had authority to deny licenses for new CATV’s, while it could only impose operating conditions upon existing ones.

\footnote{197} 1959 Report § 65.\footnote{198} Subsections “(c)” and “(d)” of the proposed amendment to title III of the Communications Act as contained in S. 2653. Senate Report 13.\footnote{199} Under the FCC’s licensing authority at the time S. 2653 was introduced, if, upon examination of an application for a license, the Commission was unable to find that the public interest, convenience or necessity would be served by the granting of such license, it was required to notify all interested parties of the source and nature of all objections made to the application, and grant the applicant an opportunity to reply. If, after considering such reply, the Commission was still unable to find that the public interest, etc., would be served through grant of the application, a hearing was to be held on the application. That procedure, however, has since been changed. FCA § 309, 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309 (Supp. IV, 1963).
Where a TV broadcast station was assigned to a community in which a CATV system operated, the bill would have permitted the licensee of the broadcast station to require the CATV to carry the programs of such local broadcast station if the FCC should find this to be in the public interest. The bill also authorized the FCC to promulgate rules and regulations to assure that reception of such local programs, as redistributed by the CATV system, would be of reasonably comparable technical quality as other programs redistributed by the CATV system.

Finally, the proposed bill would have authorized the FCC to adopt appropriate rules and regulations designed to avoid the duplication of programs by a CATV system which were to be broadcast, or were scheduled to be broadcast, by a local TV broadcast station. Here again, due regard was to be given for facilitating the continued operation of television stations which were providing the only available locally originating TV broadcast program service.200

Thus, the committee rejected the FCC’s suggestion that CATV systems be required to obtain consent from the station originating the signal which the CATV intended to redistribute, but it accepted the FCC’s suggestion with respect to requiring CATV’s to carry the programs of local TV broadcasters.

The committee’s bill, S. 2653, was defeated on the Senate floor; it went back to the committee and eventually died.

In 1961, the FCC had its own proposed legislation introduced into Congress.201 These bills also excluded CATV systems from the definition of “common carrier,” and defined CATV substantially as did S. 2653.202 They did not provide for the licensing of CATV systems, but simply provided for an amendment to the act granting the Commission discretionary jurisdiction, under guidance of a “public interest” standard, to issue rules and regulations with respect to CATV systems in situations where an area is served by both a CATV system and a local TV broadcast station.208

200 In summary, the committee’s proposed bill set forth three significant criteria designed to enhance an orderly development of a nationwide competitive TV system: (1) in granting licenses to CATV’s the FCC was required to give “due regard to facilitating the continued operation” of a TV station providing the only locally originated TV service; (2) the FCC was empowered to adopt rules to avoid “duplication of programs” by CATV’s; and (3) the FCC was to decide whether CATV’s were to carry the local station’s programs if so requested. Senate Report 11.
202 See definition of community antenna television, note 192 supra.
203 The bills would have empowered the Commission
... to issue such orders, rules, and regulations and prescribe such restrictions and
Although the Commission had been in accord with the general objectives of the committee's earlier bill, it felt that it was unnecessarily comprehensive in scope, would reach into situations which did not affect local television stations and would unnecessarily add to its already large licensing functions. The Commission had previously expressed its position to the committee that

broad regulation of CATV's under the standards described in the Communications Act of 1934, as amended, would not be desirable; that, in the Commission's view, it could not be expected, realistically, to solve the underlying problem; and that such broad regulation would require substantial increases in staff and appropriations to handle the licensing and regulation of the . . . existing CATV's which already exceed in number all the regular television broadcast stations.204

The FCC's proposal was designed to vest in it authority to act only in those situations where local TV broadcasters were operating under competitive disadvantage with CATV systems, without the Commission being encumbered by the administration of a mandatory licensing scheme. Under the bills, the FCC's jurisdiction was geared toward making reasonable adjustments in the competitive situation. It would have had authority to issue orders, rules and regulations and

 prescribe such restrictions and conditions and . . . to hold such hearings as, in its discretion, may be deemed appropriate . . . as may be necessary or desirable to the maintenance of broadcast stations providing locally originated television program service in the area . . . with due regard to the public interest in the provision of multiple television program services . . . 205

By the language of the bills, the imposition of restrictions and conditions upon CATV systems could have been discretionary with the FCC when considered "desirable," without any showing of necessity or urgency by the local broadcaster. Hearings on the issues in cases of controversy would also have been discretionary with the FCC. The bills were aimed primarily toward protecting the TV broadcast industry, and secondarily toward pro-

204 Senate Report 15.

205 S. 1044, supra note 203, at 3. (Emphasis added.)
moting multiple TV services; thus, they were apparently in accord with the FCC's second and third "priorities."

No action was taken on the FCC proposal, and no other bills on the subject have subsequently been introduced.

It would seem that because no frequency allocations are involved in CATV operations and because the number of actual controversies between broadcasters and CATV systems are so relatively few in number, there is little need for a mandatory licensing requirement as was proposed by the committee. On the other hand, the FCC's proposal would appear to have been too broad in scope, too discretionary and without necessary standards or a requirement for an evidentiary showing of injury in cases of controversy. It seems, then, if CATV's and TV broadcasters are to function harmoniously within the same communities wherever that situation exists, and with a minimum of regulatory burden on the FCC, a fresh legislative approach is necessary.

Conclusion

It is apparent from the foregoing discussion that the CATV industry needs regulation to avoid clashes with established and future television stations. CATV operators have been slow to realize, however, that the correct kind of regulation would also serve their long-run interests. There are indications, in the FCC and to a lesser degree in the courts and in Congress, that the CATV industry will not always enjoy the current regulatory vacuum. It is only a matter of time before further means of limiting the present freedom are found. Left on their own, without the cooperation of the CATV operators, the FCC, or perhaps the courts, will undoubtedly find some means of bringing CATV to heel.

Regulation through the courts offers little hope for a workable solution to the CATV problem. Conflicting opinions, magnified by the *Erie* doctrine, could well lead to disruption of television service through a lack of clear regulatory authority. In the end, the public would suffer, either from loss of CATV service or through undue interference with a local station by CATV.

An alternative would be for the FCC to re-examine its position and find a means of control within its present statutory mandate. This would require a very liberal construction of that mandate, however; and it could also be dangerous to the CATV industry, since once such re-interpretation has begun it is hard to say where it might end. Ex parte proposals are not likely to be favorable to CATV operators. An example is the
suggested ban on duplication under Part 11. Such a ban would give the local station a dominant role in selecting what the CATV system could carry. Further, it would go beyond the minimum regulation needed to protect a local station from substantial loss of advertising revenue.

Within this context, then, one solution would appear to lie in rule-making procedures initiated by the FCC aimed at regulation of the CATV industry by the Commission, but written with the participation of that industry. It is in the best interests of CATV operators to offer reasonably acceptable suggestions with regard to means of regulation.

Another alternative would be additional congressional enactment, modifying the Federal Communications Act. Such a modification could well provide the most desirable solution to the CATV problem. It could, in the first place, avoid the necessity of resting FCC authority over CATV on a liberal (and questionable) construction of the existing act. Secondly, it could provide the first clear set of detailed guidelines for governing CATV activity.

A properly drafted enactment would avoid giving the FCC blanket control over CATV. The FCC should be empowered to intervene only when a local station has met the burden of proof in showing that irreparable harm will be done to the public interest unless a CATV system is limited in its operation. Irreparable harm to the public interest might be shown if a CATV caused such substantial losses in advertising revenue that an imminent threat to a local station’s continued existence was created. Or possibly irreparable harm might be shown if a CATV caused undue interference with reception of the signal of a local station. In any event, where irreparable harm to the public interest is found, the Commission should be empowered to issue cease-and-desist orders, enforceable, if necessary, through court action.

Any congressional enactment should state specifically that the “end-use” test, as applied in Carter Mountain, is not a valid means of determining whether or not an applicant should receive a common carrier microwave license. There is no more reason to hold a common carrier employing microwave responsible for the end-use of what it carries than there is to hold American Telephone and Telegraph Company or Western Union (also common carriers) responsible for the use made of information they carry.

Finally, any legislation on CATV should be made pre-emptive. A carefully drafted bill ought to indicate this clearly, in order to end the present confusion. Unless such pre-emption is established, there is a danger that
friction will develop between the FCC and the state utility commissions over authority to control CATV.206

Considering the fate of recent legislative proposals, it is questionable whether enough interest can be generated in Congress in the near future to pass a bill which would be satisfactory to all interested parties. Nevertheless, legislation on CATV stands as the most promising of the solutions discussed here. CATV operators would do well to consider the dangers inherent in allowing the present regulatory vacuum to be filled without their consultation and advice.

John C. Palmer, Jr.
James R. Smith
Edwin L. Wade

206 A serious attempt to control CATV systems was made by the Public Utility Commission of Wyoming. In the Matter of Cokeville Radio & Elec. Co., Wyoming Public Serv. Comm'n decision of Nov. 19, 1954, 11 P. & F. Radio Reg. 2041. The Wyoming Commission decided it had jurisdiction and that the federal government had not pre-empted the field. The issue was raised again in In the Matter of Community TV Sys. of Wyoming, Wyoming Public Serv. Comm'n decision of May 28, 1956, 17 P. & F. Radio Reg. 2131, which affirmed the prior holding since CATV systems were not engaged in "broadcasting." In overturning this decision, the court found that CATV was not a public utility, and that CATV systems were engaged in interstate commerce. 17 P. & F. Radio Reg. 2135 (Dist. Ct. Wyo. 1958). Accord, Television Transmission, Inc. v. Public Util. Comm'n, 47 Cal. 2d 82, 301 P.2d 862 (1956), where the court held CATV systems were not "telephone Corporations" or within any other class of regulated public utility. But cf. a letter of Feb. 23, 1962, from the FCC to the City Manager of Salinas, California, FCC Public Notice 16695, 23 P. & F. Radio Reg. 2159 (1962), which indicated that the city should, in considering whether or not to grant a CATV franchise, weigh the benefits of multiple service from the CATV against the possibility of having a local station.
RECENT DECISIONS


The defendant, Adele Guido, was for seven years the wife of the deceased. She resided in New Jersey until shortly before the occurrence of the homicidal incident here in question. The deceased had spent his last year in Florida living with another woman and only occasionally visited his family in New Jersey. In his relationship with the defendant he was emotionally childish, a condition which not only precipitated the frequent use of abusive threats and violence but also placed the defendant in great fear of her own and the children’s safety and well-being. Arriving in New Jersey on one of his infrequent visits, Guido found the defendant had moved to New York City where she was actively engaged in seeking a divorce. Thereupon, he went to the defendant’s place of employment, where only after he had attempted to choke her, and had brandished before her a pocket knife, did the defendant acquiesce in returning with him to New Jersey. Subsequently, he urged her to return to Florida with him and when she resisted, he threatened to do violence to their youngest child. Sometime thereafter, Guido fell asleep and the defendant removed a weapon from her husband’s travelling bag intending to take her own life. Deciding suicide would be no answer, she proposed to return the weapon when her eyes fell upon Guido; she raised the weapon and fired until it was empty.

The defendant was charged with murder in the second degree and was convicted. On appeal, The Supreme Court of New Jersey reversed. Held, an accused may be guilty of manslaughter where adequate provocation may exist notwithstanding the absence of an immediate and specific provocative act, when the accused has experienced prior incidents of ill treatment susceptible of producing a reasonable homicidal response and at the time of the slaying entertains a reasonable belief that such misconduct will likely continue.¹

The pivotal issue as here decided presents a novel and expanded conception of legal provocation sufficient to reduce the killing of another from murder to manslaughter. The theory of adequate provocation is the legal measure which gauges homicidal conduct to appraise its culpability, and thereby prescribe to it the appropriate legal sanctions. Because of the ultimate significance of this factor, it must be placed in its proper perspective as it relates to the law of homicide.

The slaying of another may be broadly categorized as lawful, i.e., justifiable

or excusable, or as criminal, i.e., killings not legally justifiable or excusable, and hence subject to the criminal sanctions enacted by society in its interest in self-preservation. Although the common law at the outset viewed all culpable homicide as murder, early statutes and cases developed four general classifications or degrees for such misconduct: first degree, second degree, voluntary manslaughter and involuntary manslaughter. Generally, murder in the first degree is distinguished from second degree murder by the presence of premeditation or deliberation\(^2\) while manslaughter is distinguished from murder by the absence of malice aforethought, which may be negated by an act of passion founded upon adequate provocation.\(^3\) Most jurisdictions presently have statutes so defining these crimes though in principle the distinguishing characteristics remain similar to those of the older case law.

The facts in \textit{Guido} clearly establish a voluntary act of homicide with a deadly weapon. The spontaneity of the act, as well as other factors present, precluded premeditated murder and left before the court the issue of whether the killing was statutory second degree murder\(^4\) or the common law offense of voluntary manslaughter. The New Jersey statutes, while declaring all murder without premeditation or other specific misconduct to be in the second degree,\(^5\) fail to define the manslaughter offenses. Thus, resort to the common law is required.

In the sixteenth century the distinction between murder and manslaughter rested solely upon the suddenness of the act itself. However, by the seventeenth century the courts were refining this distinction by finding the offense to be manslaughter only where the sudden act of brutal ferocity was the result of the accused's inability to control his natural anger which had been excited by a serious cause.\(^6\) In this refinement is the formation of the present characteristic elements of voluntary manslaughter: passion, adequate provocation and the absence of a cooling-off period. Voluntary manslaughter, then, may be defined as the taking of the life of another while under the dominion of one's passion, excited by a reasonable and adequate provocation, and before a sufficient period of time has expired for the reasonable man to have regained control of his emotions.\(^7\) Inherent in both this definition and the crime's essential components is the recognition of the frailty of man. It concedes that the reasonable man may react violently to a sufficient wrong and therefore, at least in those in-

\(^5\) Ibid.
stances, the law concludes a lesser punishment is justified. Manslaughter, then, becomes a compromise in the law encompassing, among other things, conduct which is proscribed, but which is not so far beyond the scope of permissible normal reaction that its consequences should not be mitigated. Because the underlying emphasis is on a code of conduct in the interest of society in general and not necessarily on the subjective well-being of the individual accused, the facts as they relate to the essential elements of manslaughter have traditionally been tested by an objective standard.

A closer examination of these prerequisites will be helpful in appreciating the novel and extended view announced by the instant court. The passion required to mitigate a killing may be one of anger, sudden resentment, or terror; but in any case it must be one which a reasonable man would entertain under the circumstances. Further, it must have incited the fatal act and have been the result of a state of mind influenced by something external to itself which created an extremely sensitive or excited condition. The presence of this reasonable passion serves to negate malice and the control of one's actions, and signifies that the source of the conduct was not a malignant heart which warrants severe punishment, but only a natural response which even the most virtuous might make.

Additionally, for the passion to be reasonable, it must be the response to an adequate provocation. Furthermore, the provocation must be of such a character, and so close to the act itself, that the accused could not be considered the master of his own understanding. Hence, for the fatal act to be considered manslaughter it must have been directly caused by a passion which arose from an adequate provocation. Unless the provocative act is deemed legally sufficient, the presence of passion proves immaterial.

Provocation is defined as any improper conduct toward the accused which causes him to submit to the dominion of sudden passion and removes his ability to deliberate, or to choose rightly, or to understand the nature, quality or consequences of his act. It may be separated into three basic factors: the provocative act itself; the loss of self-control, both actual and reasonable; and, a retaliation proportionate to the provocation. The significance of the instant decision centers principally upon the first of these elements, namely, the act of provocation itself. Conceding that the defendant did in fact lose her self-control, only if adequate provocation existed could this passion and her retaliation be sustained as reasonable.

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9 1 Warren, Homicide § 90, at 435 (perm. ed. 1938).
10 Ibid.
13 State v. Barrington, 198 Mo. 23, 102, 95 S.W. 235, 260-61 (1906).
Looking to the provocative act, it is essential that it be performed by the victim, and that it be so closely related to the defendant's passionate act that a reasonable man would have similarly reacted under the same circumstances. To attempt to classify specific provocative acts as adequate or inadequate requires an evaluation of the facts of the particular case. However, certain conduct may be summarily classified as sufficient, namely, violent physical attack upon the defendant or the sight of defendant's spouse in an adulterous act. Conversely, mere words have generally been held not to create legal provocation, nor have reactions after an adequate cooling-off period. It may be concluded then that the law requires the provocative act to originate from the victim, to be of some consequence in itself or as it relates to the past conduct of the parties, and that it be immediately evocative of the passion and consequent retaliation.

The provocative conduct in Guido, prima facie, does not come within the bounds of this stated conclusion; nonetheless, it was held to be adequate. The facts indicate the attacks of Guido upon his wife were sufficient provocation had she reacted at the time they were inflicted; but she did not. Hence, under established principles, after a sufficient period for a reasonable man's blood to have cooled, or upon the finding of evidence that her blood had in fact cooled, i.e., deliberation or intervening actions, such past acts individually could no longer be viewed as legal provocation. Clearly, the defendant's decision that suicide was no answer would be evidence of deliberation and an indication that her blood had cooled. Therefore, at the time she made this decision all prior provocation, if otherwise present, would be deemed to have been dissipated. Yet, almost instantly thereafter she killed the sleeping victim. To sustain a finding of provocation under the conventional standards it would be necessary to find some intervening act by the victim which of itself, or combined with past acts, could be considered sufficiently provocative to cause a reasonable man to react as the defendant acted. But there is no act here by the victim unless his mere presence could be considered to have had such an impact upon the defendant's mind that it could be viewed by the court as the provocative act. This would appear to be without precedent, though conceivably it could be analogized to a first encounterment test applied elsewhere.

The Guido court, however, did not address itself to this problem of an

16 See State v. Finn, 243 S.W.2d 67, 70 (Mo. 1951); 40 C.J.S. Homicide § 48 (1944).
17 Sheppard v. State, 243 Ala. 498, 500, 10 So. 2d 822, 824 (1942).
immediate provocative triggering act by the victim and apparently did not consider it to be a necessary prerequisite. The court stated: "It seems to us that a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation." Hence, the court substituted for the immediate provocative act a recognition of the fact that a history of past misconduct, when coupled with an expected continuance thereof, may cumulatively cause a similar loss of self-control. The court then concluded that if the killing is proximately caused by such an emotional explosion before a sufficient cooling period expires, it may be viewed as adequate provocation.

This new criterion raises at least two distinct difficulties. First, it requires an appraisal of the defendant's act from a more subjective viewpoint; second, it requires the jury to face extensive problems foreign to the instantaneous provocative act theory. Analyzing this court's two part criterion, the objective evaluation of past acts is neither novel nor foreign to the question of the adequacy of the provocation, or to jury consideration. Earlier cases have held that a slightly provocative act when viewed in light of the victim's past treatment of the defendant might sustain a finding of provocation. However, to combine this factor of past acts with that of a reasonable belief in their continuance does create a new approach. This belief must initially be viewed subjectively, and only thereafter reconsidered objectively to determine its reasonableness. Apparently, the court intended that the reasonableness of the belief be proved under the facts as they appeared to the defendant. If this is so, the result would often be a relaxation of the objective standard to compensate for the infirmities of the subject. Inherent collateral problems arise respecting the degree of certainty with which this belief must be held, and the standards by which the jury is to test the subjective factors relative to both the extent of the reactions caused by the past acts upon the subject and the actual and reasonable belief of similar future acts. At what point may it be said that the defendant was justified in emotionally exploding after contemplating such past conduct while looking toward the future? Where is the line to be drawn between this passionate release and the total defense of temporary insanity? How is one to distinguish between reawakened passion and premeditated revenge? An even more difficult problem is created by the court's insistence that the act be proximately caused by the passion and that the act be executed before an unreasonable time has expired. How is the jury to determine the point at which the defendant fell sway to his emotion without some act exterior to himself to trigger and hence mark the instance of the passion?

Despite these obvious and unanswered problems the Guido court appears to

22 Ibid.
have intentionally broadened the scope of manslaughter. Its decision cannot be viewed as an attempt to mitigate a particular wrong because of peculiar facts or a particularly deserving defendant inasmuch as the court stated in its opinion that the punishment for second degree murder could, under the New Jersey statutes, be less than that for manslaughter. Rather, this holding is a real attempt by the court to find the circumstances at hand productive of adequate provocation and hence capable of reducing the crime to manslaughter. The result seems to give the jury a wider scope of inquiry whenever the facts indicate the victim may have previously offended the defendant, and to make extremely difficult any consideration of the adequacy of the cooling-off period.

It is submitted that despite the unanswered questions raised by the Guido holding, it is both an enlightened decision and in accord with a trend to give the individual accused more subjective attention. Under this finding, the accused in a homicide case is given a greater opportunity to prove the existence of exculpating circumstances. Further, the law is not arbitrarily bound to find an immediate act to permit mitigation but may look for the actual presence of culpability. Because of the New Jersey statutory scheme this holding was without practical effect as it related to the mitigation of the accused’s sentence. But where the statutory punishment is strictly limited by the offense found, this new definition of adequate provocation could have a profound practical effect. It seems preferable nonetheless to have an established standard, however broad, which inherently recognizes mitigating factors and considerations, rather than a standard which would require a court to resort to artifice to reach the just result. The Guido decision appears to concur in such a conclusion and contributes significantly in establishing a more refined standard for determining criminal conduct.

EDWARD ANDREW GAMBLE


Respondent Fleuti, a Swiss national, was admitted to the United States as a permanent resident in October 1952. In August 1956 Fleuti crossed the border into Mexico where he spent a few hours. Upon his return, the Immigration and Naturalization Service sought to deport him on the ground that he had previously been “convicted of a crime involving moral turpitude,”1 but the

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1 Immigration and Nationality Act § 212(a)(9), 66 Stat. 182 (1952), as amended, 8 U.S.C. § 1182(a) (Supp. IV, 1963): “Except as otherwise provided in this Act, the

25 Ibid.
deportation order was determined to be invalid because the crime was not of the magnitude encompassed within the statute. A second deportation order was issued, this time on the ground that Fleuti, as a homosexual, was excludable as an alien "afflicted with a psychopathic personality." The Board of Immigration Appeals dismissed Fleuti's appeal, and he brought action for review. The trial court rejected Fleuti's contention that Section 212(a)(4) of the Immigration and Nationality Act was "unconstitutional as being vague and ambiguous" and granted the government's motion for summary judgment. On appeal the deportation order was set aside and its enforcement enjoined, the United States Court of Appeals for the Ninth Circuit holding that section 212(a)(4) was "unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term 'psychopathic personality.'" The Supreme Court granted the government's petition for certiorari—not to consider the constitutionality of section 212(a)(4) as urged by the government—but, rather, to consider the statutory interpretation of the term "entry" as used in the act and as applied to Fleuti's return from Mexico in 1956. The application of the term "entry" was necessarily restricted to Fleuti's 1956 re-entry from Mexico because his initial entry into the United States was prior to the effective date of the act. Held, the return of a resident alien from a brief, temporary visit across the border is not an "entry" under the Immigration and Nationality Act as to make him excludable as a "psychopathic personality."

The definition of the term "entry" in its application to resident aliens evolved judicially and took statutory form for the first time in the 1952 act. The early cases employed a strict definition of the term "entry," often with a harsh result for aliens. Thus, in Lewis v. Frick the Supreme Court held that an alien who crossed the river into Canada and who returned the same day had "re-entered" the United States. The Court affirmed the strict definition nine years later in United States ex rel. Volpe v. Smith, when it held that an alien who had resided in the United States for twenty-four years became subject to following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (9) Aliens who have been convicted of a crime involving moral turpitude . . . ."

2 Immigration and Nationality Act § 212(a)(4), 66 Stat. 182 (1952), 8 U.S.C. § 1182(a)(4) (1958): "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (4) Aliens afflicted with psychopathic personality . . . ."

3 Ibid.
7 233 U.S. 291 (1914).
8 289 U.S. 422 (1933).
deportation when he made a brief trip to Cuba. The Court laid down in Volpe what subsequently became the firm definition of an "entry" in deportation cases: "The word 'entry' includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."

Many courts applied this strict rule with obvious reluctance. Specifically, the Sixth Circuit held that an alien had re-entered after a few hours in Canada, the court stating: "[T]he case is a hard one for appellant. . . . The decision of the Supreme Court . . . is, however, conclusive." In a concurring opinion, Judge Simons unhappily noted that:

Ever since it was first held that a departure, however brief and temporary, and without regard to intention to relinquish domicile, makes a subsequent return a new entry, courts in border districts have found it difficult to remain silent when the result in human misery of a literal reading of the act has been realized.

Five years later the same court said:

Once more we are impelled to direct attention to the toll in human anguish which so often follows that literal reading of the Immigration Act by which every departure from the United States, however brief and temporary, and pursuant to no intention to relinquish domicile, constitutes subsequent return a new entry, subjecting the unsuspecting to exclusion or deportation. But the law is clear, and however cruel the result, we have no recourse but protest and recommendation.

Subsequently, in Di Pasquale v. Karnuth, decided in 1947, the Second Circuit refused to hold that an alien who had taken an overnight sleeper from Buffalo to Detroit on a route lying through Canada had re-entered the United States. Judge Learned Hand felt that, in the absence of a showing that the alien knew he would be entering Canada, it would be too harsh to impute to him the intent of the railroad. The court refused to impose on the alien the duty to inquire into the route of a railroad, because it "would in practice become a trap" and because the alien's continued residence "should not be subject to meaningless and irrational hazards." That same year, in Del Guercio v. Delgadillo, the Ninth Circuit, following the strict Volpe rule, affirmed an order to deport an alien member of a merchant ship who had been taken to Cuba

9 Id. at 425.
10 Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937); Jackson v. Zurbrick, 59 F.2d 937 (6th Cir. 1932); Ex parte Piazzola, 18 F.2d 114 (W.D.N.Y. 1926); Guimond v. Howes, 9 F.2d 412 (S.D. Me. 1925); United States ex rel. Ueberall v. Williams, 187 Fed. 470 (S.D.N.Y. 1911).
11 Jackson v. Zurbrick, 59 F.2d 937 (6th Cir. 1932).
12 Id. at 938.
13 Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937).
14 158 F.2d 878 (2d Cir. 1947).
15 Id. at 879.
to recuperate after his ship was torpedoed in the Carribean. To resolve the conflict between the two cases, the Supreme Court granted certiorari in the Delgadillo case and reversed the Ninth Circuit. Expressly approving the Di Pasquale decision, the Court said that Delgadillo's trip to Cuba had resulted from "the exigencies of war, not his voluntary act," and that "respect for the law does not thrive on captious interpretations." Thus, resident aliens received an increased protection. They were no longer subject to deportation where re-entry was either unintentional (under the Di Pasquale holding) or involuntary (under the Delgadillo holding). Following the exceptions thus created to the strict Volpe rule, the Ninth Circuit subsequently held that an alien returning from a job in Alaska had not "entered" the United States after his ship made an unscheduled stop in Canada; nor had an alien member of the United States Maritime Service "entered" when, sailing under naval orders, he stopped at many foreign ports.

In enacting the 1952 "omnibus" revision of the immigration laws, Congress considered both the Volpe definition of "entry" and subsequent developments in the case law. For the first time a definition of "entry" was included in the statute. The statutory definition of "entry" then remained without judicial interpretation until the instant case. Mr. Justice Goldberg, writing for the Court, noted that "it was in light of all of [the previous] developments in the case law that § 101(a)(13) was included in the immigration laws with the 1952 revision." Noting that the committee reports had referred specifically to the Di Pasquale and Delgadillo cases, the Court stated: "The most basic guide to congressional intent as to the reach of the exceptions [to Volpe] is the eloquent language of Di Pasquale and Delgadillo themselves . . . ." The Court concluded that Congress had not intended its approval of these cases to limit the effect of liberalization of the Volpe rule to identical fact situations. According to the Court, Congress must have intended that future judicial interpretation of the

18 Yukio Chai v. Bonham, 165 F.2d 207 (9th Cir. 1947).
19 Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948).
   The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . .
22 374 U.S. at 457.
23 Id. at 458.
word "entry" should not place an alien "at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards'" alluded to by Judge Hand in *Di Pasquale*.

Referring approvingly to *Delgadillo*, the Court said:

It would be as "fortuitous and capricious," and as "irrational to square with the statutory scheme" ... to hold that an alien may necessarily be deported because he falls into one of the classes enumerated in § 212(a) when he returns from "a couple hours" visit to Mexico as it would have been to uphold the order of deportation in *Delgadillo*.

So, using the words of the statute itself, the Court concluded that "if [the] trip is innocent, casual, and brief, it is consistent with all the discernible signs of congressional purpose to hold that the 'departure . . . was not intended'."

Thus, the Court reached the conclusion that it was the intent of Congress in defining "entry" in the 1952 act not only to ameliorate the harsh results of the Volpe rule by including the exceptions of *Di Pasquale* and *Delgadillo*, but that it was also the intent of Congress to permit further liberalization wherever the results would be "capricious," "irrational," or would subject the alien to "meaningless and irrational hazards." In further support of this conclusion, the Court said: "The idea that the exceptions to § 101(a)(13) should be read nonrestrictively is given additional credence by the way in which the immigration laws define what constitutes 'continuous residence' for an alien wishing to be naturalized." The Court inferred from the fact that Congress had provided that specified periods of time outside of the country would be considered "residence" for naturalization purposes, that Congress must also have intended a liberal construction of the term "entry."

Having, in effect, created a third exception to the Volpe rule—brevity of the visit—the Court provided yardsticks which could be used to determine when a return from a brief visit abroad is an "entry" and when it is not. The factors suggested by the Court are: (1) the length of time the alien is absent; (2) whether his trip is to accomplish some object which is contrary to the policy of our immigration laws; and (3) whether travel documents are necessary.

There can be little question but that the law as it existed prior to the 1952 act was both inconsistent and sometimes harsh. Even under the liberalizing rules of *Di Pasquale* and *Delgadillo* it was still possible that an alien could be deported after a re-entry for an offense which would not be ground for his deportation had he remained in the United States. It was perhaps this very

24 Id. at 460.
25 Ibid.
26 Note 21 supra.
27 374 U.S. at 461.
28 Id. at 459.
30 374 U.S. at 463.
31 For example, a comparison of the grounds for deportation, § 241(a), 66 Stat. 204
harshness and inconsistency which enabled the Court to find evidence of an intent on the part of Congress either to create symmetry between the grounds for exclusion and those for deportation, or to add "brevity of the visit" as a third exception to the Volpe rule.

However, it would seem to be more probable that Congress intended to limit the liberalizing exceptions to those laid down in Di Pasquale and Delgadillo; and in neither of these cases was the length of the visit outside the United States a factor.

The Court in Fleuti notes almost regretfully that

the only liberalizing decisions to which the [committee] Reports referred specifically were Di Pasquale and Delgadillo, and ... there is no indication one way or the other in the legislative history of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time.\(^{32}\)

However, it would be incorrect to infer from this statement that there were other liberalizing decisions by the appellate courts which had been either neglected or ignored by Congress. The cases decided during the period between the Di Pasquale and Delgadillo cases and the enactment of the 1952 legislation provide little ground for imputing to Congress an intent to include additional exceptions to the Volpe rule in the 1952 act. Of the cases decided during this period most did not turn on the question of a re-entry\(^{33}\) and in those where re-entry was an issue, the decisions were generally within the Di Pasquale and Delgadillo rules. Thus, in Yukio Chai v. Bonham\(^{34}\) a resident alien was asleep below deck when his ship made an unscheduled three-hour stop in Vancouver en route from Alaska to Seattle. The court there said: "The facts on which appellant was ordered deported present an even flimsier case of 'entry' than

\(^{(1952), \text{ as amended, 8 U.S.C. \S\ 1251(a) (1958), as amended, 8 U.S.C. \S\ 1251(a)(11) (Supp. IV, 1963), with the grounds for exclusion, \S\ 212(a), 66 Stat. 182 (1952), 8 U.S.C. \S\ 1182(a) (1958), as amended, 8 U.S.C. \S\S\ 1182(a)(6), (9), (23) (Supp. IV, 1963), reveals that an alien may be excluded but not deported for the following grounds, inter alia: Epilepsy, tuberculosis, a physical defect affecting the alien's ability to earn a living, or the fact that the alien is a pauper.}

\(^{32}\) 374 U.S. at 458.

\(^{33}\) United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950) (alien had not departed or re-entered); United States ex rel. Rubio v. Jordan, 190 F.2d 573 (7th Cir. 1951) (alien had initially entered the United States illegally); United States ex rel. De George v. Jordan, 183 F.2d 768 (7th Cir. 1950) (alien had not departed or re-entered); United States ex rel. Bartsch v. Watkins, 175 F.2d 245 (2d Cir. 1949) (alien had initially entered the United States illegally); United States ex rel. Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947) (alien was forceably removed from an airliner en route from South America to Germany); Del Guercio v. Gabot, 161 F.2d 559 (9th Cir. 1947) (as a Filipino, respondent was a United States national).

\(^{34}\) 165 F.2d 207 (9th Cir. 1947).
do those involved in Delgadillo.\textsuperscript{35} And in \textit{Shoeps v. Carmichael},\textsuperscript{36} a resident alien was held excludable on re-entry from a one-day trip to Mexico. The court there said: "The intention to return to this country whether after a mere few hours or an extended vacation abroad, is immaterial. If the length of time spent abroad is an element to be considered, it must be made so by Congress, not the courts."\textsuperscript{37}

Only in \textit{Carmichael v. Delaney}\textsuperscript{38} could it be argued that there was any extension of the \textit{Di Pasquale} and \textit{Delgadillo} rules. In that case, an alien member of the United States Maritime Service whose ship stopped at many ports during World War II was held not to have re-entered the United States, on the ground that his ship was operating under secret naval orders. His departure was considered "involuntary" even though he had voluntarily enlisted in the service and could have anticipated being ordered into foreign ports. However, while the \textit{Delaney} decision may have broadened the scope of the area of "voluntariness," it did not go beyond the general rules of \textit{Di Pasquale} and \textit{Delgadillo}.

The reluctance of Congress to "precisely define" the term "entry" has been assumed by the Court to be a carte blanche for the creation of definitions outside the area laid down by the statute. The dissenters in \textit{Fleuti}, led by Mr. Justice Clark, argue cogently that "the Court can \textit{construe} statutes but . . . it can not \textit{construct} them."\textsuperscript{39} Certainly—as the dissent points out—the fact that Congress incorporated the very language of \textit{Volpe} into the statute should indicate that it intended to adhere to the established definition.\textsuperscript{40} It is surely significant that Congress was aware of the possibility of adding a "brevity of visit" exception to the \textit{Volpe} rule. At the committee hearings "numerous organizations unsuccessfully urged that the definition be narrowed to accomplish what the Court does today."\textsuperscript{41} Further, during debate on the House floor, a member of the Judiciary Committee arguing in support of the proposed legislation assured the members that the definition of "entry" merely restated the judicial definitions up to that time.\textsuperscript{42}

It is difficult to accept the tenuous inference which the Court draws from the fact that Congress, having given a liberal definition to "continuous residence" for naturalization purposes, also intended that a liberal construction be given to "entry" for residence purposes. The question of "entry" arises only when the resident alien falls into one of the excludable categories listed in section 212(a), and it is not unreasonable that Congress should have intended to

\textsuperscript{35} Id. at 208.
\textsuperscript{36} 177 F.2d 391, 401 (9th Cir.), cert. denied, 339 U.S. 914 (1949).
\textsuperscript{37} Id. at 396.
\textsuperscript{38} 170 F.2d 239 (9th Cir. 1948).
\textsuperscript{39} 374 U.S. at 463 (dissenting opinion).
\textsuperscript{40} Id. at 466.
\textsuperscript{41} Id. at 467.
\textsuperscript{42} 98 Cong. Rec. 4303 (1952) (remarks of Representative Graham).
impose a more rigid restriction on aliens having undesirable characteristics than
it imposes on those seeking naturalization. Regardless of whether one can
wholeheartedly approve the distinction which Congress has made between the
criteria for deportation and the criteria for exclusion, the distinction has, never-
theless, been made.

It is, of course, possible that Congress may, in reaction to the Fleuti decision,
amend the 1952 act to eliminate the “brevity of visit” exception created by the
Court. A “more precise” definition—avoided by Congress in 1952—could create
strictures on the judicial use of “voluntariness” and “intent,” thus halting the
gradual liberalizing trend of Di Pasquale to Delgadillo to Delaney, and forcing
a rigid adherence to the modified Volpe rule.

In the absence of further restricting legislation, the courts are faced with the
difficult problem of establishing standards. The Court in Fleuti suggested that
the length of time an alien is absent is a major factor relevant to whether the
alien’s intent to depart was meaningfully interruptive of his permanent residence.
The question now is “how brief is ‘brief’”? Another factor suggested by the
Court is whether the purpose of the trip is contrary to some policy reflected in
our immigration laws. So the question arises “what is a lawful purpose”? Even
the suggested factor—whether travel documents were necessary—is susceptible
of varied interpretation.

It would appear that the Court has created a whole new area in which Judge
Hand’s “sport of chance” may operate. The excludable-but-not-deportable
alien who now leaves the country will not know on his departure whether or
not his return will be a “re-entry.” During the period in which judicial standards
for application of the Court’s suggested factors are developed, the excludable
alien may well believe that “the law has been given a capricious application.”

MARJORY E. WINSTON

GOVERNMENT CONTRACTS—UNDER THE WUNDERLICH ACT, JUDICIAL
REVIEW OF AGENCY DETERMINATIONS OF FACT MADE PURSUANT TO THE
DISPUTES CLAUSE OF GOVERNMENT CONTRACTS IS CONFINED, EXCEPT IN
CASES OF ALLEGED FRAUD, TO THE ADMINISTRATIVE RECORD. United States

In July 1946, respondent, Carlo Bianchi & Co., contracted with the Army
Corps of Engineers for the construction of a flood-control dam. A dispute com-
menced as to whether there had arisen unanticipated conditions which required
the use of permanent steel in a tunnel to be constructed as part of the dam. After
the tunnel had been drilled, the contractor took the position that unforeseen con-
ditions had created hazards for the workmen, that permanent protection through-
out the tunnel was in fact necessary, and that additional compensation should
be paid for installing such protection.
The contract contained the standard "disputes" clause\(^1\) which provided in essence that all determinations of factual questions would be decided by the contracting officer with right of appeal to the head of the department or his authorized representative whose decision was to be final. Pursuant to this clause the dispute was taken to the contracting officer who decided that any further tunnel protection was to be made at respondent's expense.

Upon administrative appeal the conflict was resolved in accord with the contracting officer's decision and six years later, in December 1954, respondent sought review of that decision by bringing an action for breach of contract in the Court of Claims relying on the Wunderlich Act which allows appeals under certain circumstances.\(^2\) At a hearing before a commissioner in 1956, evidence was received, including a substantial amount of evidence which had not been placed before the Board. The Court of Claims in January 1959 accepted the commissioner's findings and conclusions, ruling that "on consideration of all the evidence, the contracting officer's decision [as affirmed by the Board] cannot be said to have substantial support."\(^3\) The Supreme Court, however, vacated the judgment of the Court of Claims. Held, under the Wunderlich Act, judicial review of administrative determinations of fact made pursuant to the "disputes" clause of a government contract is confined, except in cases of alleged fraud, to review of the administrative record, and therefore new evidence may not be received.\(^4\)

The Wunderlich Act was passed by Congress to overcome the effect of the Supreme Court decision in United States v. Wunderlich.\(^5\) In that case, the Court interpreted the "disputes" clause to mean that there could be no judicial review of the decision of a department head involving a question of fact unless fraud was alleged. The decision to a large extent deprived contractors of the right of judicial review and made the contracting agencies the final judges of their own decisions. This holding coming on the heels of United States v. Moorman,\(^6\) in

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1 The clause provides:

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.


2 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1958). Respondent alleged the decisions of the contracting officer and the Board were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence." 373 U.S. at 711. This is substantially the phraseology employed in the Wunderlich Act.


5 342 U.S. 98 (1951).

which the Court sanctioned the legality of a government contract provision making an agency decision final on questions of law, clothed government contracting officers with almost absolute power to decide questions of law and fact with finality. These decisions caused deep concern in business and legal circles, the extent of which is best measured by the promptness with which the Congress reacted to restore judicial review to a less restricted basis. After a series of bills designed to overrule the *Wunderlich* decision were introduced,7 Congress passed the present act, which essentially provides that the agency decision is not final if it "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."8 Furthermore, the act prevents the inclusion in government contracts of a clause providing that agency determinations of questions of law shall be final.9

Since the passage of the act, conflicting views regarding the scope of judicial review of agency determinations of fact have been expressed.10 In general, the district courts and the courts of appeals have limited the review to the administrative record.11 The Court of Claims, on the other hand, has permitted the introduction of new evidence.12 Prior to the *Wunderlich* decision, the Court of Claims' statutory jurisdiction in contract suits13 had been interpreted to provide an original proceeding based on competent evidence received from both parties in open court.14 Neither side had been restricted to evidence already in the administrative record, but could submit further proof substantiating its position.15 *Wunderlich* notwithstanding, this practice was reinstated by the Court of Claims

9 Ibid.
10 It should be noted that the Tucker Act of 1887 permitted the United States to be sued in the Court of Claims in any amount and in the United States district courts in an amount not to exceed $10,000, in actions based "upon any contract, expressed or implied, with the Government of the United States . . . ." 28 U.S.C. § 1346 (1958) (district courts); 28 U.S.C. § 1491 (1958) (Court of Claims).
13 28 U.S.C. § 1491 (1958) provides in pertinent part: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ."
in *Volentine & Littleton v. United States* where the court, although expressing misgivings about the correctness of its position, concluded that Congress, in enacting the Wunderlich Act, had intended to restore the practice which the court had followed prior to the *Wunderlich* case.

The Supreme Court in reversing the procedure followed by the Court of Claims based its decision on the language of the act, its legislative history and the practicability of limiting judicial review to the administrative record.

With respect to the statutory language, the Court noted that the act is designated as an act "to permit review" and that the reviewing function is one ordinarily limited to a consideration of the agency decision and the evidence on which it was based. In support of this thesis, the Court pointed to the standards of review adopted in the Wunderlich Act—"arbitrary," "capricious" and "not supported by substantial evidence"—and noted that these standards have consistently been associated with a review limited to the administrative record. As examples of such limitation the Court cited the Administrative Procedure Act, the Fair Labor Standards Act and the National Labor Relations Act. However, the Court did recognize that, unlike these statutes, the Wunderlich Act prescribes no procedural safeguards to insure either the existence or the preservation of an administrative record. This was one of the compelling factors which influenced the Court of Claims to follow the de novo procedure.

The Court also relied on the legislative history of the act to support its conclusion that the review permitted was in accord with generally prevailing administrative practice—review based on the administrative record. Although neither the statute nor its history refer directly to the issue in point, i.e., the nature of the trial in the Court of Claims or the district courts, the hearings on the proposed act and particularly the House report do contain support for the Court's position. The reference in the House report to the APA, which limits review to the administrative record, and the adoption by the House Judiciary

17 Id. at 641, 145 F. Supp. at 953.
18 373 U.S. at 714.
19 Id. at 715.
Committee of the term "substantial evidence" as interpreted by the Supreme Court in Consolidated Edison Co. v. NLRB,26 imply congressional intention to restrict review solely to the record.27 However, the legislative history is not completely clear on the point. The only definitive expression ascertainable is that Congress intended to restore to the Court of Claims a wider scope of review under the "disputes" clause.28 At best, it would seem that Congress did not anticipate the issue presented by Bianchi.

In adding the substantial evidence standard of review to the act, Congress also expressed concern with the quality of records maintained by appeals boards and indicated that this standard would act as an impetus to agency correction of such procedural defects.29 Echoing a similar concern, the Bianchi Court reasoned that the caliber of agency proceedings would not be improved if either side were free to withhold evidence at the administrative level and then introduce it in a later judicial proceeding.30 Review restricted to the administrative record, it was hoped, would act as a stimulus to agency perfection of their appeal processes.

One of the real bases of the Bianchi decision appears to be the fact that a review limited to the record is expedient. Writing for the majority, Mr. Justice Harlan noted: "Moreover, the consequences of such a procedure [de novo] would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in time and expense required to bring litigation to an end."31 After reciting the time lapses in the Bianchi situation,32 he stated: "This is surely delay at its worst and we would be loathe to condone any procedure under which the need for expeditious resolution would be so ill served."33 Whether such solicitude for the potential dilatory tactics of contractors is warranted is open to question. The record in cases arising out of "disputes clauses" has been termed a "mythical entity"34 since no procedural safeguards such as found in Section 7 of the Administrative Procedure Act apply.35 The absence of such safeguards in Bianchi allowed the Board to base its decision on evidence the receipt of which the Court of Claims later found to be erroneous. Had the Court of Claims not permitted the contractor to call additional witnesses in the

26 305 U.S. 197, 229 (1938).
28 H.R. Rep. No. 1380, supra note 25, at 4, wherein the committee stated: "A principal change which the amendment effects . . . is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions . . . ."
29 Id. at 5.
30 373 U.S. at 717.
31 Ibid.
32 The Supreme Court announced its decision in Bianchi approximately seventeen years after the contract was originally signed.
33 373 U.S. at 717.
34 Id. at 715.
judicial proceeding to rebut the ex parte evidence relied on by the Board the error would not have been unearthed.\textsuperscript{36}

The seeds of time consuming proceedings and dilatory tactics which so bothered the majority seem to stem from the procedural defects in board hearings. Examples of inadequate agency procedural rules include the General Services Administration rule which provides:

Hearings before the Board will be as informal as may be reasonably permitted under the circumstances. . . . The parties involved may offer such relevant evidence or argument as they deem appropriate, subject, however, to the exercise of reasonable discretion by the presiding member . . . .\textsuperscript{37}

Informal procedure is also found in the Veterans' Administration Board's rule "that rules of evidence and like formalities ordinarily observed in judicial and quasi-judicial proceedings will not be strictly followed."\textsuperscript{38} Awareness of shortcomings such as these probably influenced the Court of Claims to look beyond the incomplete record and, in effect, to review de novo in order to determine whether there was substantial evidence to support the conclusion of the contracting officer, especially since it was without authority to remand a case to the administrative agency.\textsuperscript{39}

Recognizing such motivation, the Court indicated that if the Court of Claims found an agency proceeding to contain some substantive or procedural inadequacy, it could stay its proceedings or render judgment for the contractor,\textsuperscript{40} citing Pennsylvania R.R. v. United States.\textsuperscript{41} But the procedure to be followed, when the Court of Claims determines that the record is inadequate to support an affirmative judgment, is somewhat uncertain. The Pennsylvania R.R. case did not concern review proceedings, but rather the question whether the Court of Claims could stay an action for the payment of freight charges pending the determination by the district court of an appeal from an Interstate Commerce Commission order establishing certain rates as reasonable and applicable. Further, even if the Court of Claims should stay its proceeding pending a later administrative hearing, the effort might be in vain, for there is no assurance that such a hearing would be held within a reasonable period of time or, for that matter, at all. The court has no authority to require an administrative agency

\begin{itemize}
\item \textsuperscript{36} According to dissenting Mr. Justice Douglas, the Board's decision was based on a letter which "somehow . . . came into the hands of the Appeal Board and was considered by it before a decision was rendered on the appeal." 373 U.S. at 720. The Justice called the letter an "\textit{ex parte} hearsay statement" which the claimant did not see and could not refute and the receipt into evidence of which would have constituted reversible error had § 7 of the Administrative Procedure Act been applicable. Id. at 721.
\item \textsuperscript{37} 41 C.F.R. § 5-60.210 (1963).
\item \textsuperscript{38} 38 C.F.R. § 1.763(c)(3) (1956).
\item \textsuperscript{39} Cf. United States v. Jones, 336 U.S. 641 (1949).
\item \textsuperscript{40} 373 U.S. at 718.
\item \textsuperscript{41} 363 U.S. 202 (1961).
\end{itemize}
to have a further hearing and the agency may not even have established procedures for granting such hearings.

But the lack of a record and/or the inability of the Court of Claims to remand cases for further proceedings are not the only difficulties involved. The function of the Court of Claims (and the district courts when they act concurrently) is primarily that of a court having original jurisdiction—not that of an appellate court. It is not at all comparable to an appeals court's review of agency decisions on the whole record. Consequently, to handicap the Court of Claims with a literal interpretation of what "substantial evidence" means when applied to appellate review of decisions of other administrative agencies is questionable.

It appears, therefore, that the Supreme Court, in concluding that judicial review under the Wunderlich Act precludes, except in the case of fraud, a de novo trial, spotlights but does not resolve the underlying problem involved in such a review, namely, that the courts cannot rely on the administrative record and are powerless, under the Bianchi holding, to correct any discernible abuses. Conceivably, the Court's opinion may trigger voluntary reforms in those agencies which lack procedural safeguards and formal hearings. However, it should be recalled that Congress, in enacting the Wunderlich Act, manifested an intent that proceedings before the various boards be improved. Yet, nine years after passage of the act no reforms have been effected. Therefore, government contractors, by virtue of Bianchi, are once again faced with inadequate protection from the arbitrary decisions of contracting officers or agency heads. In eliminating de novo trials upon review of such decisions, the Supreme Court has deprived them of the only real protection, short of statutory reform, heretofore available.

HERMAN BRAUDE
EDWARD L. MAGGIACOMO


Fred Meyer, Inc., a Portland, Oregon supermarket chain with thirteen retail outlets, conducted an annual coupon book promotion in which its suppliers' participation was solicited. The promotion consisted of selling to customers books of coupons each of which entitled the customer to purchase specified...

merchandise at a price reduced as much as one third. Meyer induced certain of its suppliers to grant an allowance of three hundred and fifty dollars each for the privilege of having one page in the coupon books devoted to a product of the supplier's choice. The suppliers made such allowances available only to Meyer, excluding other customers who competed with Meyer. The Federal Trade Commission charged Meyer with engaging in an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act\(^1\) by knowingly inducing suppliers to grant promotional allowances prohibited by Section 2(d) of the Robinson-Patman Act.\(^2\) Section 2(d) prohibits a seller from granting promotional allowances which are not made "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."\(^3\) Finding that Meyer's suppliers failed to grant proportional payments to their wholesalers and to other direct-buying retail customers, the Commission issued an order requiring Meyer to cease and desist from inducing and receiving allowances which are not made available by the supplier on proportionally equal terms to other customers competing with Meyer in the distribution of products, "including other customers who resell to purchasers who compete with respondents [Fred Meyer, Inc.] in the resale of such supplier's products."\(^4\) Held, a wholesaler, whose retailer customers compete with a direct-buying chain store, competes in the distribution of products with the chain store and is therefore protected by Section 2(d) of the Robinson-Patman Act.\(^5\)

Section 2(d) of the Robinson-Patman Act was designed to prevent discriminatory advertising allowances, a means of evading section 2(a) which prohibits discriminatory prices.\(^6\) Prior to the instant proceeding the Commission applied section 2(d) only in those instances where such discrimination occurred on the same level of distribution. Thus, in *Atalanta Trading Corp.*\(^7\) the Commis-

\(^1\) 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), which provides in pertinent part: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful."


\(^7\) 53 F.T.C. 565 (1956), rev'd on other grounds, 258 F.2d 365 (2d Cir. 1958).
sion adopted a hearing examiner’s finding that the strict wholesaler does not compete with a direct-buying chain store. Again, in *Liggett & Myers Tobacco Co.*, the Commission refused to apply section 2(d) where the respondent had granted allowances to vending machine operators which had not been made available to wholesalers who supplied over-the-counter retailers competing with the vending machines. However, in *Krug v. International Tel. & Tel. Corp.*, the United States District Court for the District of New Jersey reached the opposite conclusion in holding that a “violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer.” Dissenting in *Liggett & Myers Tobacco Co.*, Commissioner Kerns stated that to refuse to apply section 2(d) in such circumstances “permits businessmen to so manipulate their concessions to selected customers as to completely frustrate the nondiscriminatory objectives of the statute.”

When this question arose again in the instant case, the Commission expressly rejected the *Liggett & Myers Tobacco Co.* decision and adopted “the views expressed in the dissenting opinion of Commissioner Kerns in that case . . . and of the court in *Krug v. International Telephone and Telegraph Corp.*” Rather than take refuge behind the previous decisions that those on different functional levels do not compete, the Commission looked to the legislative intent of the Robinson-Patman Act, to the words of section 2(d), to the realities of competition in the chain of distribution, and to the effects which would accrue from a continued refusal to place the independent wholesaler under the protective wing of section 2(d). The Commission rejected Meyer’s contention that only those who buy *directly* from the same seller and who operate on the same level of distribution are competing “customers” within the meaning of section 2(d) because

The net result of this argument is that the entire structure of “independent” food merchants—including the traditional wholesaler and his numerous, small retailer-customers—are [*sic*] placed completely outside the pale of Section 2(d) . . . insofar as their competition with the direct-buying “chains” is concerned.

The Commission stated further that “the startling nature of this conclusion is even more evident . . . when it is considered that those who *would* be entitled to claim the protection of 2(d) in this situation are the other ‘chains’ located in the

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8 56 F.T.C. 221 (1959).
10 Id. at 236.
11 56 F.T.C. at 256 (dissenting opinion).
13 Id. at 21214.
area." Thus all chains, through advertising allowances, would be put in a most advantageous competitive position which might enable them to drive independent retailers out of business—a result that flies in the face of the purpose of section 2(d) to give the independents the same competitive advantages from promotional allowances as the chains.

In addition to its analysis of the economic effects of refusing to apply section 2(d), the Commission bolstered its holding by giving the phrase “competing in the distribution” a liberal interpretation. While recognizing that only the retailer-customers of the wholesalers competed with Meyer in the direct resale of goods, it thought it significant that the wholesalers and Meyer were competing for the same consumer dollars. Every time Meyer gained a sale from the independents the wholesaler lost a corresponding amount in volume. Thus, Meyer was competing in the “distribution” of goods with the wholesalers even though there was no direct competition at the retail level. Consequently, those wholesalers should have received from common suppliers promotional allowances proportionate to those given Meyer.

Commissioner Elman concurred with the majority that there was a violation of section 2(d), but dissented in the order because it required only that allowances be given to the wholesalers. He would have had the Commission issue an order requiring that all of Meyer’s retail competitors be given the promotional allowances, since they are the ones that the Robinson-Patman Act is supposed to protect. The Commission’s construction of section 2(e), which requires that “services or facilities” be “accorded to all purchasers on proportionally equal terms,” was cited by Commissioner Elman as authority substantiating the issue of such an order. Under this section the Commission in Elizabeth Arden, Inc. ordered a producer to make promotional services available to “competing retailers on proportionally equal terms.” Commissioner Elman argued that sections 2(d) and 2(e) are sufficiently related so that the word “customer” in 2(d), as “purchaser” in 2(e), should be construed to include all retailers who handle a product in competition with other retailers.

Though it is easy to reconcile Commissioner Elman’s view with the acknowledged purposes of section 2(d) and the rest of the Robinson-Patman Act, the word “customer” in 2(d) seems to be a barrier to any order which would require a manufacturer to grant proportional allowances directly to retailers who deal only with the independent wholesaler. That the term “customer” requires some relationship between the manufacturer and retailer is recognized

14 Ibid.
15 Id. at 21215.
16 Id. at 21231 (dissenting opinion).
18 39 F.T.C. 288 (1944), aff’d, 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947).
19 39 F.T.C. at 305. (Emphasis added.)
by those cases which extend section 2(d) to retailers on the "indirect purchaser" theory,\textsuperscript{20} \textit{i.e.}, where there is a course of direct dealing or other contact between the manufacturer and wholesaler's retailer-customer. \textit{Elizabeth Arden, Inc.}, cited by Commissioner Elman to support his theory that promotional allowances should be given directly to the retailer, must be distinguished from the instant case in that Elizabeth Arden, Inc. sold only to retailers and not to wholesalers.\textsuperscript{21} Since the word "purchaser" in \textit{Elizabeth Arden, Inc.} referred to the direct-buying retailer, that case offers no support to the proposition that the indirect-buying retailer should be called a "customer" (or "purchaser") of the supplier. Thus, it would seem Commissioner Elman's reliance on \textit{Elizabeth Arden, Inc.} removes much of the validity from his dissent.

Certainly it ignores practical economics to say, as the FTC had previously indicated, that no rivalry exists between a chain store, whose size enables it to bypass the wholesale function, and the wholesaler supplying independent retailers who compete with the chain. The Commission's economic analysis and statutory construction in the instant case provide sound bases for departure from its previous holdings. However, the order approved by the majority in \textit{Fred Meyer, Inc.} will involve complications in its application.

The determination of the amount of the allowance due any given wholesaler could be very difficult if the supplier wished to apportion the allowance on the basis of the volume purchased—the most common method of apportionment.\textsuperscript{22} At the time of the sale to a wholesaler who resells to both non-competing retailers and to retailers competing with each other and with a chain store, the wholesaler would not know how much he would resell to competing retailers and, therefore, the proper allowance could not be determined. The other alternative for apportionment on the basis of volume would be to calculate the allowance due to a wholesaler after he has resold the merchandise. This would require that a wholesaler accumulate and furnish to every supplier with a volume-based allowance plan, data revealing the amount of each product—a wholesaler may handle several hundred—sold to each of his many retailers. While some wholesalers may be equipped to perform such a task, smaller wholesalers may find such a system too burdensome.

If a wholesaler is denied participation in promotional allowances because he is unable to furnish a supplier with such data, there is some question as to whether the allowance would be "available" to him under section 2(d). The allowances would appear not to be "available," since the burden of establishing arrangements whereby the "customer" can participate is on the supplier.\textsuperscript{23}


\textsuperscript{21} 39 F.T.C. at 298, 300.

\textsuperscript{22} See Rowe, op. cit. supra note 20, at 399-414.

\textsuperscript{23} Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954); Elizabeth Arden, Inc., 39 F.T.C. 288 (1944), aff'd, 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947).
Further, the 1960 FTC Guides for compliance with section 2(d) clearly indicate that there can be no de facto exclusion of any group of competing customers.\(^{24}\) It seems that the supplier could only avoid this problem by devising a plan proportionalizing the allowances on some basis other than sales volume.

As Commissioner Elman pointed out, the order's primary weakness is that it does not require the wholesaler to pass on or otherwise use the allowance for the benefit of the retailer who incurs the primary injury. However, in the final analysis, the Commission's order is a commendable attempt to achieve the purposes of the statute within the confines of its language. The increasing economic power of chain stores, evidenced by the practices of Meyer, requires that the protection of section 2(d) be extended to the independent wholesaler who supplies the chain's competitors. The order will present practical problems in its implementation but these will be minor in comparison with the adverse effects on competition which would follow a refusal to so extend section 2(d).

**CHARLES MC CLURE**  
**JOHN MC INNES**

**WARRANTY—A CIGARETTE MANUFACTURER IS ABSOLUTELY LIABLE FOR BREACH OF AN IMPLIED WARRANTY OF MERCHANTABILITY WHEN THE SMOKING OF ITS CIGARETTES WAS THE PROXIMATE CAUSE OF CANCER, EVEN THOUGH THE MANUFACTURER COULD NOT, BY REASONABLE APPLICATION OF HUMAN SKILL AND FORESIGHT, HAVE KNOWN THAT IT'S PRODUCT WAS CARCENOGenic.** *Green v. American Tobacco Co.,* 154 So. 2d 169 (Fla. 1963).

Decedent's widow and the administrator of his estate\(^{1}\) brought a consolidated suit based on diversity in a federal district court in Florida against the American Tobacco Company claiming that the decedent had contracted lung cancer as a result of smoking defendant's cigarettes. The jury, in answer to interrogatories, found that the smoking of defendant's product was the proximate cause of death from lung cancer, but that defendant had no means of knowing that its cigarettes were carcogenic. In view of an instruction that an "implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge," the jury returned a general verdict for the tobacco company. Upon appeal, the

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\(^{24}\) Federal Trade Commission, Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act, Rule 9, 1 Trade Reg. Rep. ¶ 3980 (May 19, 1960).

\(^{1}\) Decedent sued American Tobacco Company in December 1957, and died several months later. The claim passed under the Florida Survival Statute to his son, as administrator of his estate. Fla. Stat. Ann. § 45.11 (Supp. 1962).
United States Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. Rehearing was granted, and because of an absence of Florida decisions on the point, the court, pursuant to statutory authority, certified to the Supreme Court of Florida the question of whether a merchant is liable for breach of an implied warranty of quality when awareness of the dangerous propensity of his product was beyond the scope of human knowledge. The Florida court answered the question affirmatively. Held, a cigarette manufacturer is absolutely liable for breach of an implied warranty of merchantability when the smoking of its cigarettes was the proximate cause of cancer, even though the manufacturer could not, by reasonable application of human skill and foresight, have known that its product was carcinogenic.

Florida has adopted neither the Uniform Sales Act nor the Uniform Commercial Code; however, the provisions of sections 13 through 16 of the Sales Act and the corresponding sections of the Code substantially reflect the common law of warranty of that state. That state is included in the expanding group of states that hold manufacturers and purveyors of foodstuffs strictly liable for breach of an implied warranty of quality and indeed, the first of its food cases held that privity was not a requisite for recovery.

The two warranties generally invoked in cases dealing with product liability are the warranty of merchantability and the warranty of fitness for use. The former requires that the goods be salable as goods of the general kind which they were described or supposed to be when purchased, or reasonably suitable for the ordinary uses for which they were manufactured. The warranty of fitness for use, on the other hand, arises when the buyer makes his need known to the vendor and relies on his superior judgment, skill and experience in selecting a chattel for a particular purpose. If the article is not fit for this

2 Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).
5 §§ 2-312-317.
7 The cases on the subject are legion. See Annot., 80 A.L.R.2d 681 (1961); Annot., 77 A.L.R.2d 7 (1961); Annot., 75 A.L.R.2d 39 (1961); Annot., 74 A.L.R.2d 1111 (1960). See generally Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1103-10 (1960).
8 Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944).
9 The Uniform Sales Act § 15(2) provides that there is a warranty of merchantable quality when goods are bought by description from a seller who deals in goods of that description. The corresponding section of the Uniform Commercial Code reflects the broad interpretation given by the courts to the requirement of description, and in § 2-314 it is eliminated entirely; substituted instead is that the seller be "a merchant with respect to goods of that kind." Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code) 42-43 (1958).
10 See Uniform Sales Act § 15(1); Uniform Commercial Code § 2-315.
particular purpose, although coming within the general description of articles of its kind, the vendor is nevertheless liable on the warranty.

In the case of foodstuffs and other articles intended for human consumption, there is little, if any, distinction between the two types of warranties since the particular purpose can be neither more nor less than the general use. The Florida courts in a somewhat unique handling of this situation have synthesized the two to evolve with an implied warranty of wholesomeness and fitness for human consumption. It was upon the nature of this warranty that the federal and state courts differed.

The Fifth Circuit failed to recognize that the warranty of fitness referred to in the food cases was not the warranty of fitness for a particular purpose, but was instead a warranty of fitness for human consumption. Thus, it had no difficulty in finding a requirement for reliance by the buyer upon the seller.


12 Food Fair Stores, Inc. v. Macurda, 93 So. 2d 860, 861 (Fla. 1957); Florida Coca-Cola Bottling Co. v. Jordan, 62 So. 2d 910 (Fla. 1953); Sencer v. Carl's Mkts., Inc., 45 So. 2d 671, 672 (Fla. 1950); Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476, 477 (Fla. 1949); cf. Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961); Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940).

13 The court acknowledged plaintiff's contention that "the Trial Court erred . . . in ruling that the implied warranty of fitness which a manufacturer of products for human consumption is held by Florida law to make does not cover deleterious substances . . ." But it responded by stating:

[W]ith that insistence we cannot agree. To the contrary, we are convinced that the doctrine of implied warranty . . . of the qualities and fitness of the thing sold for the purpose for which it is intended or desired is founded on his superior opportunity to gain knowledge of the product.

304 F.2d at 72-73.

14 Grouped together by the court were cases dealing with nonfood products with those concerning articles for human consumption. Compare Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961) (riding sulky); Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952) (stepladder); Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940) (lipstick); and Berger v. E. Berger & Co., 76 Fla. 503, 80 So. 296 (1918) (lumber), with Food Fair Stores, Inc., v. Macurda, 93 So. 2d 860 (Fla. 1957) (canned spinach); Florida Coca-Cola Bottling Co. v. Jordan, 62 So. 2d 910 (Fla. 1953) (beverage); Sencer v. Carl's Mkts., Inc., 45 So. 2d 671 (Fla. 1950) (sardines); Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949) (meal in restaurant); and Blanton v. Cudaby Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944) (canned meat). Cf. Uniform Sales Act § 15(1): "[A]nd [if] it appears that the buyer relies on the seller's skill or judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose"; Uniform Commercial Code § 2-315: "[A]nd . . . [if] the buyer is relying on the seller's skill or judgment . . . there is . . . an implied warranty that the goods shall be fit for such purpose."
and hence a need for the buyer to believe that the seller was in a position
to make an informed judgment in regard to his merchandise. The court reasoned
that the buyer could not have had that reliance or belief if the harmful effect
of smoking could not have been known by any developed human skill or fore-
sight.\textsuperscript{15}

The Supreme Court of Florida, however, noted that the warranty in issue
was one of merchantability. In the opening sentence of its opinion it stated that
it was dealing with an “implied warranty liability for lack of merchantability
or fitness,”\textsuperscript{16} later calling it an “implied warranty that a product supplied for
human consumption shall be reasonably fit and wholesome for that general
purpose.”\textsuperscript{17} To dispel any doubts, it specifically recognized and distinguished
the warranty of fitness for a particular purpose.\textsuperscript{18} It thus eliminated any require-
ment for reliance upon which the federal court’s holding was bottomed.\textsuperscript{19}

In answer to the assertion that the cigarette manufacturer could not possibly
have had knowledge of the defect, the court could see no distinction between
it and a retailer who is held liable for the sale of a sealed can of deleterious
food where any attempted inspection by the retailer would destroy the product’s
salability.\textsuperscript{20} The recognition in the earlier cases of the defendant’s opportunity
for knowledge, it said, was a factor affecting policy considerations rather than
determining the limits of warranty liability.\textsuperscript{21} The only standard to be applied,
the court stated, in determining wholesomeness is “actual safety for human
consumption.”\textsuperscript{22}

Cigarettes and other tobacco products have often been considered together
with food as products for human consumption in determining the applicability
of warranty liability. This had early been done in cases involving foreign matter
found contained in the tobacco products,\textsuperscript{23} and several of the later “smoking”

\textsuperscript{15} 304 F.2d at 77.
\textsuperscript{16} 154 So. 2d at 170.
\textsuperscript{17} Id. at 171.
\textsuperscript{18} The Florida decisions recognize a distinction between the ordinary merchantability
warranty involved in the instant case and a warranty of fitness for a particular purpose
which must and necessarily does depend upon whether or not “the buyer relied upon his own
judgment at the time of the purchase or relied on the skill and judgment of the seller.”
Id. at 172.
\textsuperscript{19} Cf. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944). Neither the
Uniform Sales Act nor the Uniform Commercial Code makes reliance an element of a
warranty of merchantability.
\textsuperscript{20} See Sencer v. Carl’s Mkts., Inc., 45 So. 2d 671 (Fla. 1950).
\textsuperscript{21} 154 So. 2d at 171.
\textsuperscript{22} Id. at 173.
\textsuperscript{23} Liggett & Myers Tobacco Co. v. De Lape, 109 F.2d 598 (9th Cir. 1940); Pillars
v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Dow Drug Co. v. Nieman,
57 Ohio App. 190, 13 N.E.2d 130 (1936); Foley v. Liggett & Myers Tobacco Co., 136 Misc.
cases have also considered the relation.24 In the Florida court, this problem was substantially eliminated because earlier food cases had spoken of "foods or other products . . . which are offered for sale for human consumption . . . ."25 This analogy is important not only in equating the warranty of fitness to the warranty of merchantability, but also for the purpose of the privity requirement. Of those states which impose strict product liability there are few which allow recovery in non-food cases without privity of contract between the plaintiff and defendant.26 Without classifying smoking with eating, a cancer victim will be limited to an action against his corner tobacconist which probably would be economically futile.

Of all the reported cases dealing with suits by victims of cancer allegedly induced by smoking, the instant one has been the first to grant recovery on any theory.27 Several of the cases were returned for trial on the merits, the court hinting that there might be recovery on various theories of warranty or negligence.28 None, however, prior to Green, had permitted recovery.

Not only does Green serve as a precedent generally, and particularly for the courts of Florida, but it may have a substantial effect on the law of a neighbor-
ing jurisdiction. After certification, but prior to the Florida court's decision, the United States Court of Appeals for the Fifth Circuit again had occasion to entertain a suit substantially identical to *Green* in fact and legal theory. In *Lartigue v. R. J. Reynolds Tobacco Co.*, the court recognized that under Louisiana law there is a warranty of fitness for human consumption connected with food products, and making an "*Erie educated guess*" held that Louisiana would classify cigarettes with food and drink. Then, relying heavily on its interpretation of Florida law in *Green* and using the same reasoning, the court again found a requirement of foreseeability of harm and similarly again denied relief. The ruling of the Florida court casts grave doubts on the efficacy of *Lartigue*. The Florida decision's effect is somewhat weakened, however, when it is recognized that the court's reasoning in *Green* was partially based on the implied liability of a retailer for canned foods who can have no knowledge of his merchandise, whereas in Louisiana the warranty of wholesomeness does not apply to a retailer of sealed merchandise. However, the knowledge of the condition of food products is imputed to the preparer or manufacturer and this would seem to encompass a cigarette manufacturer as well.

It is not to be assumed that *Green* has opened the floodgates of liability to a sea of cancer victims either in Florida or elsewhere. The cases may follow *Lartigue* and deny recovery since the risk would not be determinable by the application of human skill and foresight. Secondly, the parties may resort to evidence that such knowledge was available. This tactic has often been alluded to but assiduously avoided by all parties in all cases but one. Such evidence, if presented by the plaintiff, would subject him to the near perfect defense of contributory negligence or assumption of risk. It could hardly be submitted

30 Id. at 35.
32 Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952).
33 The limitless consequences foreseen by Lord Abinger in the extension of product liability do not seem to be brought very much nearer by the ruling in the instant case. Winterbottom v. Wright, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (Exch. 1842).
35 Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 299-301 (3d Cir. 1961). Plaintiff offered for evidence a bibliography containing 795 references to articles supposedly dealing with the harmful effect of tobacco on the human body. Additionally, he offered abstracts or reprints of 251 of the articles and testimony that literature pertaining to the connection between smoking and cancer had been disseminated for a period of fifty years.
36 Prosser, supra note 7, at 1147-48.
37 154 So. 2d at 170 n.2(a).
by the cigarette manufacturers while they were at the same time publicly professing innocence and claiming scientific uncertainty as to the true cause of cancer. However, the economics of litigation may one day force them into that position. The defense of lack of privity generally or in non-food cases particularly, and the absence of strict liability entirely in some jurisdictions will all serve to reduce the flood to but a trickle.

SHELDON I. COHEN
MILES GIBBONS

38 The establishment of prior knowledge of tobacco's qualities as a defensive measure might well be used in suits against distributors or retailers of those products.
BOOK REVIEW


This is an admirable book which throws more light on Supreme Court thinking than any number of recent rather heavy studies of the Court by law professors. The reason is that here we have the Court itself speaking; melius est petere fontes quam sectari rivulos.

It is a matter of some wonder that such a book was not compiled long ago. What the Justices have said about both the Court and themselves is certainly a matter of prime interest; no better authority exists. Professor Westin has gone about his work seriously, and has given us a fine cross-section of self-criticism. The Appendix, containing a bibliography of extra-judicial writings by Supreme Court Justices, shows the extent of Professor Westin's research. From the mass of material thus unearthed Professor Westin has made a judicious selection to which he has added an interesting Introduction of his own.

In his Introduction Professor Westin quotes Mr. Justice Frankfurter's statement that he would like to speak out but was suffering from what might be called "judicial lock-jaw." As a matter of fact no one has spoken or written more often about the inner life of the Court than Mr. Justice Frankfurter. Taking judicial biography as his opportunity, Mr. Justice Frankfurter has given us his views on a wide variety of subjects, including the Court, in writing about Chief Justice Marshall, Justice Brandeis, Justice Holmes, Chief Justice Stone, Chief Justice Hughes, Justice Cardozo, Justice Roberts and Justice Jackson. Added to the above is his Chief Justices I Have Known and frank discussions of the

1 E.g., Black, The People and the Court (1960); Rodell, Nine Men (1955). The latter was acutely reviewed by Frederic Bernays Wiener in 51 Nw. U.L. Rev. 155 (1956).
2 Westin, An Autobiography of the Supreme Court 35 (1963) [hereinafter cited as Westin].
3 Westin 1.
5 55 Harv. L. Rev. 181 (1941).
7 1946 American Philosophical Soc'y Year Book 334.
Court and its processes such as The Job of a Supreme Court Justice,13 The Supreme Court in the Mirror of Justices14 and finally Some Observations on the Nature of the Judicial Process of Supreme Court Litigation.15 This is all to the good and it seems strange to hear him disclaim, without need, the role of Bacon’s “over-speaking judge.”16

Justice Cardozo was more cautious and during his term as Supreme Court Justice was completely silent out of court, remarking that “a member of the Supreme Court must lay upon himself a self-denying ordnance.”17 Mr. Justice Black expressed the same viewpoint.18

It was not always thus. In the early days of the federal judiciary, when it was struggling for status, the Justices, in Professor Westin’s words, “engaged in far-ranging and free-swinging commentary.”19 Not only did they make speeches backing political candidates but several Justices ran for office themselves. Thus, Justice Cushing while sitting on the Supreme Court ran for Governor of Massachusetts and Chief Justice John Jay for Governor of New York—an interesting estimate of the comparative prestige of a Supreme Court Justice and a governor of a state.20 In 1819 Justice Story harangued a town meeting in Salem, Massachusetts, on the Missouri Compromise. In the 1830’s and 1840’s Justice McLean, a perennial candidate for President, wrote numerous letters to newspapers on political questions.21

Also, as Professor Westin points out, there was considerable political talk from the bench in the guise of charges to the federal grand juries. Some of these charges are first rate performances, such as Chief Justice Jay’s, part of which our author reprints.22 It was largely through such charges that the people were educated in the principles and operation of the new form of government. Of course these charges are also self-

17 Hellman, Benjamin N. Cardozo: American Judge 271 (1940).
18 Address, 13 Mo. B.J. 173 (1942).
19 Westin 6.
20 Along the same line, Robert Harrison was appointed Supreme Court Justice by President George Washington but five days later was appointed Chancellor of Maryland. Since this was a far better position in his opinion he refused the Supreme Court appointment. John Rutledge resigned as Supreme Court Justice to accept appointment as Chief Justice of South Carolina.
22 Westin 51.
revealing documents of the Justices’ constitutional views. One such charge, that of Justice Chase to the Baltimore grand jury in 1803, led to his impeachment.\textsuperscript{23} Even the prim Justice Story harangued the grand jury on the New England slave trade.\textsuperscript{24}

Another source of judicial commentary was the defense by particular Justices of their Supreme Court and circuit decisions. Justice Johnson defended his decision in *Gilchrist v. Collector of Charlestown*\textsuperscript{25} by writing a public reply to the newspapers. Chief Justice Marshall published an anonymous defense of the Court’s decision in *McCulloch v. Maryland.*\textsuperscript{26} The defense is reprinted in the present work and makes interesting reading.\textsuperscript{27} Revealing self-criticism came also from particular Justices’ teaching and lawbook writing activities. Thus, Justice James Wilson was a professor at Philadelphia College and Justice Story was Dane Professor of Law at Harvard. In more recent years, Justice Samuel Miller, Chief Justice White, Justice Brown and Justice Stephen J. Field taught at Georgetown University. Justice Story’s commentaries on almost every branch of the law are well known, the most important being his *Commentaries on the Constitution of the United States* (1833). Justices Baldwin and Samuel Miller likewise wrote treatises on the Constitution.\textsuperscript{28} Justice Baldwin’s work was in large part a refutation of Justice Story’s views; the battle between the Justices was out of court instead of in court as at present.

Professor Westin traces interestingly the Court’s out-of-court statements after the Civil War. The Court’s impaired prestige after *Dred Scott v. Sandford*\textsuperscript{29} put a damper upon its members’ urge for either the spoken or the written word for a twenty-year period. The 1880’s, however, saw the rise of Justice Stanley Matthews as the Court’s valedictorian; in his belief the federal judiciary and the Supreme Court in particular were well-nigh perfect. As the Chancellor sings in Iolanthe:

\begin{quote}
The law is the true embodiment
Of everything thats excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.\textsuperscript{30}
\end{quote}

\textsuperscript{23} Id. at 12-16.
\textsuperscript{24} Id. at 16-17.
\textsuperscript{25} 10 Fed. Cas. 356 (No. 5420) (C.C.D.S.C. 1808).
\textsuperscript{26} 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{27} Westin 77.
\textsuperscript{28} Baldwin, A General View of the Origin and Nature of the Constitution and Government of the United States (1837); Miller, The Constitution of the United States (1880).
\textsuperscript{29} 60 U.S. (19 How.) 393 (1857).
\textsuperscript{30} Iolanthe, 1 The Savoy Operas by W. S. Gilbert 241 (1962).
Substitute "The Court" for "The law" and you have Justice Matthews' viewpoint. An even more vocal "rightist" than Matthews was Justice Field's nephew Justice Brewer. Justice Brewer's mood is illustrated by the very titles of his speeches. His Yale Law School speech in 1891 entitled Protection to Private Property from Public Attack— which would provoke a well-bred howl of derision from the Yale Law School of today, if he were permitted to deliver it at all—dealt with destruction of private property by public agencies in the name of the police power, a matter now put on ice, apparently, for all time. His great opponent was the liberal Justice Henry Billings Brown, a man unaccountably overlooked by those now engaged in rewriting the Constitution by judicial interpretation. Speaking of the Constitution, he said in 1906: "Being practically un-amendable, it can only be adapted to new conditions by construction.

This statement is historically untrue for in 1906, when Justice Brown spoke, there were already fifteen amendments on the books. Since then eight additional amendments have been ratified and others are in the process.

Justice Brown added another glimpse of his struggle for the present day angels of the amendment:

My colleagues once poked a good deal of fun at me for saying that the law was "to a certain extent a progressive science," that restrictions once necessary were such no longer, and were even detrimental, while in recent times a vast extension of the police power has been found useful to the proper protection of the individual and the well-being of society. But I have seen no reason to change my opinion upon that point. I am not frightened at the charge of judicial legislation.

Perhaps not, but the rest of us are. As the Duke of Wellington remarked at a parade of his generals in Spain, "I do not know whether they will throw terror into the hearts of the enemy, but they throw terror into me, sir."

In recent years the Justices of the Supreme Court have begun to "talk all at once" as the saying goes, and nothing but good has resulted. The present era was ushered in by Chief Justice Hughes who published in 1928 The Supreme Court of the United States. This was prior to his reappointment to the Court as Chief Justice. The Justice's book judiciously refrains from giving us any inside information; it is a monument to clarity

32 Dinner Given May 31, 1906 in Honor of Mr. Justice Henry Billings Brown 19 (Bar of the Supreme Court of the United States ed. 1908).
33 Westin 26-27.
and dullness. The same year Justice Harlan F. Stone gave a talk on *Fifty Years' Work of the United States Supreme Court.* It gave us no secrets of the boudoir, but was an uninspiring recitation of principal case holdings. The most spectacular commentary from the Court came from the retired Justice John H. Clarke who gave a radio talk in 1937 in favor of President Roosevelt's court-packing plan. This was regarded as an aberration and did the Court no harm. Indeed the prestige of the Court was never higher than in 1937.

As our author puts it, "since the arrival of the Franklin Roosevelt appointees, the Justices have produced continuous, revealing, systematic, and far-ranging commentary about the Court and its inner conflicts." As he says, "the nation is presently immersed in the politics of activist government, open group conflict and interaction, and in a psychological climate of introspection typical of a challenged society." He continues: "The Court itself has made a dramatic shift from a jurisprudence designed to adjust property relations to a jurisprudence especially focused on personal and group rights of status and liberty." He concludes: "The result of these factors has been that articulate Justices accustomed to speaking boldly and frankly about the judicial process before they joined the Court have continued to speak boldly and frankly . . . ." The most prolific of these commentators, as Professor Westin's admirable bibliography shows, is Mr. Justice Frankfurter. Not far behind, however, is Mr. Justice Douglas "whose out of court literary output comes close to matching his pages of opinions." Mr. Justice Douglas has not only, on occasion, boldly lifted the curtain, but has been the Court's chief defender of its innate decency. When the Supreme Court reporter for the omnipotent *New York Times* publicly wrote in *The
Reporter magazine for August 17, 1961, that dissension in the Court had reached the point where the Justices had begun to suspect the good faith of each other, Mr. Justice Douglas courageously gave him a public rebuke in a letter which appeared in the September 14, 1961 issue of The Reporter. As our author says, "probably only Douglas, among the present Justices, would publish such a letter."48

Before his untimely death in 1954, Justice Jackson almost matched Mr. Justice Douglas in literary output relating to the Court. His writings covered such diverse subjects as stare decisis, the full faith and credit clause, statutory interpretation (a ticklish area), wartime rights and obligations and judicial protection of liberty, the relation between civil liberties and property questions, freedom of speech and its protection and many other topics.44 Justice Jackson's writings have great distinction, as the excerpt in Professor Westin's book shows.49 Justice Jackson's reflections culminated in the lectures published as The Supreme Court in the American System of Government issued posthumously in 1955, from which the excerpt is taken. Of the present members of the Court, aside from Mr. Justice Douglas, the most active speaker and writer appears to be Mr. Justice Brennan,46 although Mr. Justice Clark frequently addresses bar associations and alumni groups on topics relating to the Supreme Court.47 Also, the present Mr. Justice Harlan speaks infrequently but interestingly on Supreme Court practice.48

It is surprising to note the tremendous volume of literature from which the author had to pick and choose, as the bibliography shows. Wisely, the author does not reprint much of the commentary prior to the time of Justice Holmes. It is rather stodgy stuff, and this applies to Chief Justice Marshall's famous anonymous letters to the Philadelphia Union49 and the excerpt from Justice Story's Commentaries on the Constitution of the United States (1833).50 With Holmes, however, we enter the area of crisp thought and felicitous expression. His address to the Harvard Law School Association51 in 1913 is Holmes at his best. It contains his well

43 Id. at 32-33.
44 Id. at 31-32, 43.
45 Id. at 360.
46 Id. at 36. Mr. Justice Brennan's most recent article is "Inside View of the Supreme Court," N.Y. Times, Oct. 6, 1963, § 6 (Magazine), p. 35.
47 Westin 38.
48 Id. at 41-42.
49 Id. at 77.
50 Id. at 102.
51 Id. at 134.
known statement: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."52

Scarcely less distinguished, in expression at least, is Mr. Justice Frankfurter's *The Supreme Court in the Mirror of Justices*, a learned examination of the current agitation to limit Supreme Court appointments to those having prior judicial experience.53 More colloquial is Mr. Justice Frankfurter's "The Court Years of Oliver Wendell Holmes, Jr."54 and *Chief Justices I Have Known.*55 The latter title makes us think of "Wild Animals I Have Met," but it is a mine of information on the Chief Justices from Fuller to Hughes. Mr. Justice Frankfurter is invariably interesting and on the serious and analytical side is well represented by "Reflections on Reading Statutes"56 and "Self-Willed Judges and the Judicial Function."57

The gems of the present collection come from Justices Jackson and Brennan. To the working lawyer Justice Jackson is the "beau ideal" of a Supreme Court Justice; there is never any difficulty in trying to understand him. His opinions have none of the Delphic condensation of Holmes or the tropic perfume of Cardozo. His objective is always to put over a thought, not to give it a nick-name, as is too often the case with Holmes. Contrast the maddening obscurity of Holmes' statement: "A party is privileged from producing evidence but not from its production,"58 with the clarity of Justice Jackson's: "[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."59

Many of Holmes' choicest epigrams60 are like the baffling captions in

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52 Id. at 137.
53 Id. at 163.
54 Id. at 194.
55 Id. at 211.
56 Id. at 305.
57 Id. at 436.
60 For example: "[C]onduct under duress involves a choice." Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918); "I recognize ... that judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motions." Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion); "The Constitution is not to be satisfied with a fiction." Hyde v. United States, 225 U.S. 347, 390 (1912); "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905).
the present day magazine *Time*—they make no sense until you have read the entire article. Then, on a rereading the epigram seems very smart indeed, also very useless, since language is made to convey thought\(^61\) at the first reading, not the second. The fine flower of the fashion Justice Holmes set is reached in Wigmore’s *Evidence* whose captions “The Prophylactic Rules,”\(^62\) “Autoptic Preference,”\(^63\) etc. have baffled and irritated whole generations of students.\(^64\) It was probably Justice Holmes’ example that set Justice Cardozo in perpetual search for the mot juste, the Holy Grail of his era, with results sometimes good, sometimes bad, but usually having the air of contrivance and smacking of the midnight oil.\(^65\) Justice Jackson eschewed all these artificialities and produced a body of legal writing which for close reasoning and clear expression is a model for the opinion writers of the future.

Mr. Justice Brennan’s contributions are likewise of a high order; he is on his way to becoming the Robert H. Jackson of the present Court. The neat discrimination shown by *State Court and Supreme Court*\(^66\) has the ring of truth; there is a quite valid change in attitude of a state court judge after he is appointed to the Supreme Court. He has Justice Jackson’s directness, as when he says, “our States are not mere provinces of an all-powerful central government.”\(^67\) And he has Justice Jackson’s depth and clarity, as illustrated by his James Madison lecture “The Bill of Rights and the States.”\(^68\)

A careful reading of the present work should reassure those who are alarmed at the present Supreme Court’s decisions. The average lawyer has a deep respect for the Court; he is shocked at the road signs littering the State of Florida reading “Impeach Earl Warren.” These signs cannot be

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\(^61\) Or perhaps to conceal it, as Talleyrand said.

\(^62\) Referring to the oath requirement of a witness, etc. 4 Wigmore, Evidence § 1172, at 300 (3d ed. 1940).

\(^63\) Referring to producing as evidence a weapon in open court, etc. Id. § 1152.

\(^64\) In spite of this, Wigmore’s treatise is, as all concede, an absolute masterpiece of arrangement and dichotomy.

\(^65\) For example: “[T]o stick in the bark of a hard and narrow verbalism.” Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113, 129 (1935); “[T]he correcting statute may be as narrow as the mischief.” Williams v. Mayor of Baltimore, 289 U.S. 36, 46 (1933); “The privilege takes flight if the relation is abused.” Clark v. United States, 289 U.S. 1, 15 (1933); “[T]he claim has been swollen in disfigurement of truth.” Thomann v. City of Rochester, 256 N.Y. 165, 172 (1931).

\(^66\) Westin 348.

\(^67\) Westin 349. This statement was made before the decision in Baker v. Carr, 369 U.S. 186 (1962).

\(^68\) Westin 415.
laughed off as the work of cranks; worse things are being said and done in Alabama and Mississippi. It may be that a new crisis for the Court is in the offing and that it faces a return to the era of Jefferson or of Dred Scott, when any rock was good enough to throw at it. For some of the present day criticism the Court has only itself to blame, notably in the field of interpretation or "making" law. While over a century ago Chief Justice Taney said unequivocally that "it is the province of a court to expound the law, not to make it," there is the equally unequivocal statement by Justice Cardozo that "the power to declare the law carries with it the power, and within limits the duty, to make law when none exists . . ." Also, Justice Holmes states "that judges do and must legislate but they can do so only interstitially." In contrast, there is the rigid statement by Justice Sutherland that "the judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation." There is an uneasy feeling among the people and probably even among lawyers that the Cardozo views have won out and that the Court stretches a point now and then in pursuit of the result they desire.

This much certainly is true: we have a Court of able and enlightened lawyers whose hearts are in the right place. No breath of scandal has ever touched it. If it has not produced a canonized saint, as in the case of Lord Chancellor Sir Thomas More, it likewise has never had a Francis Bacon, a Judge who took bribes, or a Chief Justice like Sir Edward Coke, whose prosecution of Sir Walter Raleigh shows he was little better than a scoundrel. On the side of honor and intellect we have a right to feel proud of our Supreme Court, as this book shows.

Professor William J. Hughes, Jr.*

69 Jefferson stated that the federal judiciary would be the curse of the republic. Padover, Jefferson 326 (1942).

70 Luther v. Borden, 48 U.S. (7 How.) 1, 40 (1849). This sentiment was repeated by Chief Justice Waite in Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874).

71 Cardozo, The Nature of the Judicial Process 124 (1921). On the other hand, he said, "we are not at liberty to revise while professing to construe." Sun Printing Ass'n v. Remington Co., 235 N.Y. 338, 346 (1923).

72 Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion).

73 West Coast Hotel v. Parrish, 300 U.S. 379, 404 (1937) (dissenting opinion).


75 The nearest approach was probably Cardozo, although the Holmes people might as well canonize Holmes. The "Yankee from Olympus" is already in the Pantheon; all that is required is formal high church action to permit public worship.

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**BOOKS RECEIVED**


