ARE TRADEMARKS AN ANTITRUST PROBLEM?

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The 77th Congress saw a great deal of activity on the front of patent and trade-mark law. As the introduction of early bills indicates, there is little doubt that the 78th Congress will continue to struggle with patent and trade-mark problems. In the course of the hearings before the Senate Patent Committee, voluminous testimony was heard on the institutional aspects of patents and patent licensing, especially from the point of view of the public interest. The proposed codification of the trade-mark law, on the other hand, was discussed primarily from the point of view of technical trade-mark lawyers and without particular regard to the protection of the public interest.

Indeed, not only the congressional hearings on trade-marks, but also the legal and economic literature is almost completely barren of any critical discussion of how the use of trade-marks affects the public interest. While patents and copyrights have frequently been described as monopolies, trade-marks have been placed in a different class. Edward S.

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The opinions expressed herein are those of the author and do not necessarily reflect the views of the Department of Justice.

1Patent Bills: S. 2303 and S. 2491 introduced by Senators Bone, O'Mahoney and La Follette, and S. 2730 introduced by Senator Lucas.


2Patent Bills: H.R. 109 introduced by Representative Voorhis (substantially the same as S. 2730, 77th Cong.).

Trademark Bills: H.R. 82 introduced by Representative Lanham (substantially the same as S. 895 as passed by the House of Representatives, 77th Congress).


5For the purpose of the following discussion, no distinction is made between technical
Rogers, for instance, has made the flat statement that while patents and copyrights are monopolies created by law, "a trade-mark is quite a different thing. There is no element of monopoly involved at all. . . . A trade-mark precludes the idea of monopoly. It is a means of distinguishing one product from another; it follows therefore that there must be others to distinguish from. If there are others, there is no monopoly, and if there is a monopoly there is no need for any distinguishing." In spite of this characterization of a trade-mark as a competitive device, Rogers admits a little later that the preference which a buyer might have for Quaker Oats is a habit which "is worth something to the producer of the goods to whose use we have become habituated. It eliminates competition for to us there is nothing 'just as good'." (Italics supplied).

It can safely be said that trade-marks, like patents and copyrights, have their monopolistic aspects, because it is one of the functions of trade-marks to lift the product bearing a mark out of its general class and to place it into a class of its own, thus eliminating competition of other goods, because the public believes that "there is nothing 'just as good'."

However, it is not the purpose of the present article to discuss these monopolistic aspects inherent in trade-marks, although this problem too, is of great importance from the point of view of the public interest. The question to be discussed here is twofold:

(1) Can trade-marks be used, as, for example, patents and copyrights, to lend legal color to agreements which but for the legal privileges flowing from trade-marks would be illegal under the Antitrust Laws?

(2) Excluding the type of cases where trade-marks are employed to supply legal color, can trade-marks be used for the purpose of implementing and strengthening patterns of restraints of trade, such as, for example, price fixing through the media of trade associations or patent licensing?

trade-marks, on the one hand, and trade names or firm names, on the other, since as far as their monopolistic aspects are concerned, all of them are in one and the same class. Indeed, modern writers on the subject of trade-marks have observed "that all of the alleged distinctions between infringement of a technical trade-mark and an unfair or unlawful use of a trade name, firm name, get up, etc., were erected on a wholly unsound and fictitious basis," and that recent court decisions, by relinquishing the requirement of fraudulent intent in unfair trading cases, have removed "the last of those barriers which had been artificially created . . ." DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING (1936) 46, 102.

6ROGERS, GOODWILL, TRADE-MARKS AND UNFAIR TRADING (1914) 51, 52.

7ROGERS, op. cit. supra note 6, at 56.

I. TRADE MARKS AND LEGAL PRIVILEGES

A consideration of some of the legal privileges flowing from the ownership of trade-marks is important, because ever since the enactment of the Sherman Act there have been many and varied attempts to find new legal forms to cloak activities designed to reap monopoly profits. The elements which make up the traditional patterns of restraint of trade and monopoly are relatively simple and few in number: price fixing; limitation of production; denying access to the market place to competitors; obtaining control over or achieving destruction of competing enterprises; division of fields—geographically or functionally; and tying agreements. The legal cloaks under which one or more of these patterns have been carried out vary infinitely. At different times different legal media enjoyed special prominence and later were relegated to comparative obscurity as the Department of Justice and the courts became aware of their existence and effects. Trusts, trade associations and corporate charters are some of the older examples. In more recent years, patents and copyrights have been more prominently used, but since the courts have borne down on abuses of these franchises attempts will be made, no doubt, in the future to use other legal forms with increasing frequency. To what extent trademarks might be used in this connection remains to be seen.

Under the Miller-Tydings Act trade-mark owners have the privilege of entering into agreements prescribing minimum resale prices for their trade-marked products in those states which have on their statute books so-called Fair Trade Acts. This privilege is subject, however, to two limitations: (1) The particular commodity for which a minimum resale price


10 For an attempt to control methods of distribution and prices of trademarked products at wholesale and retail levels, see U. S. v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (1942).


16 In U. S. v. Univis Lens Co., 316 U. S. 241 (1942) defendant manufactured lens blanks and controlled through resale price agreements the prices of the finished lens. The court found that the distributors did not sell the same commodity which they bought from defendant manufacturer and held as follows: "We find nothing in the language of the Miller-Tydings Act, or in its legislative history, to indicate that its provisions were to be so
price is fixed must be in free and open competition\textsuperscript{14} with commodities of the same general class produced or distributed by others. (2) The privilege extends to vertical agreements with dealers only, and does not include horizontal agreements between competing manufacturers, wholesalers, et cetera.\textsuperscript{15}

Under these circumstances it does not seem farfetched that trademark owners might cast their eyes around to find other legal privileges which might go with their trade-marks and which might render lawful restrictive agreements which, unprotected by such privileges, might be held illegal. A few decisions involving good-will protection—and trademarks are an important part if not at times the source of good-will—might point the way as to how the much desired protective legal coloring might be acquired.

In United States v. United Shoe Machinery Company\textsuperscript{16} the lessee of shoe manufacturing machinery covenanted that it would procure only from the lessor all duplicate parts needed or used in repairing the leased machinery. The Court upheld the validity of this clause\textsuperscript{17} in the following words:

"In the opinion of the court there is nothing unreasonable in this provision. The evidence shows that most, if not all, parts of these machines, are very delicate, and unless perfectly adjusted, will, if not entirely, at least very seriously, prevent the proper operations of the machine, and in some instances prove ruinous, necessitating costly repairs, thus depriving the lessee of a full output, and the lessor of royalties. They may also cause dissatisfaction with the machines, owing to the decreased and unsatisfactory output."

This holding was cited with approval in Pick Manufacturing Company v. General Motors Corporation\textsuperscript{18} in which plaintiff filed a bill of complaint alleging that certain agreements between General Motors and its dealers were illegal under Section 3 of the Clayton Act. Plaintiff manufactured

\begin{itemize}
\item\textsuperscript{14} See Matter of Eastman Kodak Company, Federal Trade Commission Docket No. 4322, involving color film sold under the trade name "Kodachrome."
\item\textsuperscript{15} Compare U. S. v. American Optical Co., et al., United States District Court for the Southern District of New York, Civil Action No. 10-391 filed September 16, 1940, in which a horizontal agreement to maintain minimum resale prices is alleged.
\item\textsuperscript{16} 264 Fed. 138, 167 (1920), aff'd, 258 U. S. 451 (1922).
\item\textsuperscript{17} Other tying clauses which required the lessees to lease shoe machinery and to purchase supplies used in conjunction with such machines from lessor only were held unlawful by the District Court, which holding was affirmed by the Supreme Court. The Government did not seek a review of the District Court's decision upholding the validity of the repair parts tying clause.
\item\textsuperscript{18} 80 F. (2d) 641 (C. C. A. 7th, 1935), aff'd, 299 U. S. 3 (1936).
\end{itemize}
and sold replacement parts for various kinds of automobiles, including those manufactured by General Motors. According to the provisions of the agreements, General Motors' dealers agreed not to sell, offer for sale or use in the repair of cars produced by General Motors any parts not manufactured by General Motors, but the dealers agreed that they thereby were not granted any exclusive selling rights in General Motors' parts. Plaintiff contended that the inevitable effect of these provisions was to prevent dealers in General Motors cars and replacement parts from purchasing and using for such cars replacement parts manufactured by plaintiff and other independent makers.

The Circuit Court of Appeals upheld the dismissal of the complaint on the following grounds:

"... In the minds of the owners [of General Motors cars], the cars are identified and associated with the manufacturer. If defective or inefficient repairs or replacements should be made, and the cars, as a result, should operate unsatisfactorily, the owners' recollections will naturally and inevitably revert to the specific name and manufacturer thereof. Defective parts, preventing efficient operation of cars, bring dissatisfaction with the automobiles themselves. The natural result is blame of the manufacturer and consequent loss of sales.

"... The restriction [imposed on General Motors dealers] is applicable only to appellees' cars. Clearly this protects appellees against the otherwise possible use of defective parts in repairing or making replacements in their products. The preservation of the good will of the public is directly involved.

"We believe that the covenants complained of protect appellees in their warranties of automobiles and in their continued sale thereof with the intent to promote and preserve the good will of the purchasing public, essential to business success; and that they do not and will not lessen competition substantially, within the meaning of the act, or tend to create a monopoly."19

Another case in which the plea of good-will protection was successful is Thoms v. Sutherland,20 where the court held that an agreement which provided for the division of trade territories between the contracting parties was legal, because the agreement was found to be ancillary to a transfer of assets. The facts in that case were as follows:

Eastman Kodak was engaged in the manufacture and sale of collodion photographic printing-out paper mainly, if not entirely, in North America. A German corporation was engaged in similar business mainly in Great Britain and continental Europe. It did not appear, and the court specifically noted the absence of any such evidence, whether the American and German companies were competitors in this or other lines in these or other countries, or whether together they had a monopoly of the product.

19Id. at 643, 644.
2052 F. (2d) 592 (C. C. A. 3d, 1931).
In 1903 the German company entered into a contract with Eastman whereby it agreed, among other things, that for 100 years it would not manufacture, deal in, or sell collodion paper in North America, Great Britain, France, Spain, and Portugal, and Eastman agreed that it would not sell the product in any other country of Europe. There were also mutual covenants against disclosing trade secrets and processes to anyone in the territory of the other. In consideration of the surrender of the four European countries by the German company and the acquisition of those countries as exclusive trade territory by Eastman, Eastman issued to the German company 2845 shares of stock. The number of shares was based on the business profit earned by the German company on the product in question in those countries for the previous year. One of the questions before the court was whether the consideration for which the stock was issued was illegal under the Sherman Act. The Court analyzed the problem as follows:

"The validity of the contract turns on two principles of law—recognized by all parties—one, that where the purpose of a contract is unreasonably to restrain trade, and other covenants, though valid in themselves, are but incidental to that purpose, the contract is void; the other, that where the purpose of a contract is the sale of a business, and a restrictive covenant as to territory is but ancillary to that legitimate purpose and necessary for the protection of property rights which pass from one to another, the contract is valid. The case, therefore, will be decided according as it may fall within one or the other of these principles."

Since no evidence was presented of the proposed or practical effect of the contract, the court attempted "to find from the contract—within its four corners—its proper and legal effect." Looking at the provisions of the contract set out above the court found that there might be "a question whether the Eastman Company bought territorial rights to which the business of the Dresden Company was a mere incident, or bought the business of the Dresden Company to which the territorial rights were merely incidental and protective."

Looking at the preamble and other provisions of the contract the court found that the German company had surrendered its right to use in the trade territory granted to Eastman, a secret process for the making of collodion papers owned by it together with customer lists, labels and trade-marks which it had used in that territory. Therefore the court came to the conclusion that "the restrictive covenants involving an extension of territory within which the purchaser might carry on the business and a restriction of territory which would prevent the seller molesting the purchaser in the conduct of the business it had bought, were but incidents—necessary because protective—to the business purchased."

These few examples, which by no means are supposed to constitute an
exhaustive study of legal privileges flowing from good-will, show that the courts have in the past justified certain types of restrictive agreements on the basis of good-will protection. In these cases the courts have pointed to certain criteria which induced them to apply to the agreements in question the label "designed merely reasonably to protect good-will" rather than the label "designed unreasonably to restrain trade." It is suggested that by observing carefully these criteria and by avoiding the pitfalls which caused other parties to fail, agreements in restraint of trade can without too much difficulty be dressed up to look to a casual reader like bona fide protective agreements. In enforcing the antitrust laws, therefore, the Government, when confronted with agreements which all too carefully and prominently are labelled: "designed merely reasonably to protect good-will," should be as suspicious as Hamlet when he exclaimed "The lady doth protest too much, me thinks."

II. TRADE-MARK MANIPULATION AS A METHOD OF IMPLEMENTING RESTRAINTS OF TRADE

The following discussion deals with a somewhat different trade-mark problem. The question is no longer what legal privileges flow from the legal concept of a trade-mark, but can trade-marks be manipulated in such a way that they implement and strengthen the basic elements which make up the conventional patterns of restraint of trade. A canvass of recent antitrust proceedings instituted by the Department of Justice and the Federal Trade Commission, and of testimony given before the Senate Patent Committee of the 77th Congress furnishes quite a variety of cases, in which trade-marks were so used.

(1) Joint Use of Trade-marks—Domestic

The misuse of a trade-mark was a prominent factor in a number of antitrust proceedings involving several lumber manufacturers and their trade associations. The indictment and the civil action filed against the

21Following the decision in the Pick case, defendants in a number of cases involving tying agreements pleaded good-will protection as a defense. However, while reaffirming the theory of the Pick case, the courts held the agreements in question invalid either because defendants failed to prove good-will or reasonableness and necessity of restrictive measures or both. Compare International Business Machines Corp., v. U. S., 298 U. S. 131 (1936); Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F. (2d) 764 (C. C. A. 6, 1936), and U. S. v. General Motors Corp., 121 F. (2d) 376 (C. C. A. 7th, 1941).

22See discussion on page 247.

23U. S. v. Southern Pine Association, District Court of the United States for the Eastern District of Louisiana, New Orleans Division, Criminal No. 19903 and Civil Action No. 275, both dated February 21, 1940. Defendants pleaded nolo contendere to the indictment and
Southern Pine Association may be taken as representative of that group of cases. The indictment alleges, among other things, the following: The Southern Pine Association offered to its members in return for the payment of a fee certain services which included the inspection of lumber grading operations. Those subscribing to these services were licensed to display on each piece of lumber the trade-mark "SPA" registered in the name of the Association for the purpose of certifying that the lumber had been graded and inspected by the Association. Among the subscribers were all the "big-mills" which while constituting only 4.2% of all southern pine mills produced 47% of the total production of southern pine. The vast majority of the "small mill" operators which comprised 95.8% of the mills and produced 53% of the total production of southern pine were not subscribers of the Association.

The indictment alleges that the Association misused the American Lumber Standards program by formulating and administering grading, grade marking and inspection rules for the purpose of giving an unfair competitive advantage to the products of its subscribers. The Association conducted extensive campaigns as a result of which in many localities only

paid $12,000 in fines. A consent decree was entered in the civil suit on February 21, 1940.

U. S. v. West Coast Lumbermen's Association, District Court of the United States for the Southern District of California, Central Division, Criminal No. 14532, indictment returned September 25, 1940, and Civil Action No. 1488-Y filed April 16, 1941. Defendants pleaded nolo contendere to the indictment and paid $106,500 in fines. A consent decree was entered in the civil suit on April 16, 1941.

U. S. v. National Retail Lumber Dealers Association, District Court of the United States for the District of Colorado, Criminal No. 9937, indictment returned April 14, 1941, and Civil Action No. 406 filed January 3, 1942. Defendants pleaded nolo contendere to the indictment and paid $55,470 in fines. A consent decree was entered in the civil suit on January 3, 1942.

U. S. v. Western Pine Association, District Court of the United States for the Southern District of California, Central Division, Criminal No. 14522, indictment returned September 18, 1940, and Civil Action No. 1389-R.J. filed February 6, 1941. Defendants pleaded nolo contendere to the indictment and paid $80,500 in fines. A consent decree was entered in the civil suit on February 6, 1941.

U. S. v. Retail Lumbermen's Association, District Court of the United States for the District of Colorado, Civil Action No. 378, filed October 24, 1941. A consent decree was entered on the same date.

U. S. v. National Lumber Manufacturers Association, District Court of the United States for the District of Columbia, Civil Action No. 11262, filed May 6, 1941. A consent decree was entered on the same date.

In the lumber industry an annual production of 6,000,000 board feet per year has been recognized as the dividing line between "big mills" and "small mills."

A standardization program inaugurated in 1922 by the allied lumber industries providing for uniformity as to sizes, grades, types of lumber, nomenclature, and practices applicable to the lumber industry.
Association trade-marked lumber could be purchased and used for building construction. When competing trade groups attempted to secure equal recognition for their trade-marks, the Association was successful in preventing this. Manufacturers who were not subscribers of the Association were thus forced, under pressure of otherwise being deprived of their trade, to subscribe to the Association's services. Thereby they became bound to comply not only with the grading and inspection rules but also with the distribution and production policies of the Association which were designed to fix the price for southern pine lumber.

The decree which was entered in the civil case\(^{26}\) with the consent of the parties, provides that all grading, standardization, inspection, and grade-marking activities shall be separated from the Association's activities and shall be carried on by a separate and autonomous bureau to be known as the Southern Pine Inspection Bureau. The services of this Bureau shall be at all times available on equal terms to all manufacturers of southern pine without favor or discrimination and without any requirement for joining or otherwise subscribing to the Southern Pine Association or to any other trade association. The decree contains detailed organizational provisions to insure impartial functioning of the Bureau. Charges to be made for the Bureau's services shall be fixed to cover actual cost and shall be assessed against the subscribers of the services without regard to membership in any trade association. The Bureau has a mark of its own which shall be made available to all subscribers complying with the Bureau's rules with respect to standards and grades.

Another instance of joint use of a trade-mark may be found in the Government's proceedings against General Electric Company and Westinghouse Electric and Manufacturing Company.\(^{27}\) The complaints allege that in the growth of the electric lamp industry in the United States, General Electric has been the dominating company and that Westinghouse has shared in this domination. The domination of the industry by General Electric was first secured through the ownership of the "Edison" patents, but has later been continued through a series of restrictive agreements based on certain other patents. These agreements allow Westinghouse and a few other companies to manufacture a limited quota of electric lamps. Westinghouse, however, is favored above the other manufacturers, because its quota is larger and because Westinghouse alone is permitted to share with General Electric in the use of the trade-mark "Mazda." The complaints allege that the two companies have sold under

\(^{26}\)See note 23 supra.

\(^{27}\)U. S. v. General Electric Co., et al., Civil Action Nos. 1364 and 2590, United States District Court for the District of New Jersey. These actions are still pending.
the Mazda trade-mark substantially all of the lamps of their manufacture which account for 80% of all electric lamps sold in the United States. The use of the single mark vastly increased the selling power of the two concerns and lessened the chances of independent manufacturers to compete for consumer acceptance of their product.

(2) "Joint Use" of Trade-Marks—International

Similarly, the device of having several companies use the same trade-mark has been employed for much the same purpose in the sphere of international trade. Here the scheme works as follows: Several companies which are located in different countries and manufacture the same product, conclude an international cartel agreement in which they divide the world market among themselves. Each cartel member then uses and registers in his territory the same mark. While the cartel members themselves are apt to abide by the cartel agreement, they experience, not infrequently, difficulties in controlling dealers and exporters who in spite of commitments to the contrary will be tempted to disregard export restrictions under the cartel agreement when profitable trading is expected in the forbidden land. It is in these cases that the identical trade-mark device assists in policing the cartel agreement. In the United States, the protection afforded by the law of trade-marks is further strengthened by Section 1526 of the Tariff Act of 1930. This section provides that it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise or the label or package bears a registered trade-mark which is owned by a citizen of the United States, and if a copy of the certificate of registration of such trade-mark is filed with the Secretary of the Treasury. Any merchandise imported into the United States in violation of this section is subject to seizure and forfeiture for violation of the Custom’s law, and any person dealing in such merchandise may be enjoined from dealing therein within the United States and is liable for the same damages and profits provided for wrongful use of a trade-mark.29


29§ 1526 of the Tariff Act of 1930 was enacted in order to avoid the decision in Bourjois & Co. v. Katz, 275 F. 539 (C. C. A. 2d, 1921). In that case the court held that the importation and sale in the United States of an article made in a foreign country bearing a foreign trade-mark, also owned in this country, did not infringe the rights of the owner of the trade-mark in this country. This decision was reversed by the Supreme Court in Bourjois & Co. v. Katz, 260 U. S. 689 (1923) and if the reversal had occurred prior to the date of Tariff Act, this section might not have been enacted.

In Sturges v. Clark D. Pease Inc., 48 F. (2d) 1035 (1931), the same Circuit Court had to apply this section to a situation involving the importation for plaintiff’s personal use of a second hand Hispano-Suiza automobile. The court held that "the object of this drastic
Testimony before the Senate Patent Committee of the 77th Congress shows that Section 1526 of the Tariff Act of 1930 was seized upon by at least one American firm for the purpose of making the Secretary of the Treasury the policeman for enforcement of international division of field agreements. According to this testimony, the New Jersey Zinc Company licensed several foreign zinc manufacturers under its patents on condition that the licensees would not export zinc so manufactured to the United States and would mark such zinc with the trade-mark owned by the New Jersey Zinc Company. This was done for the specific purpose of making applicable to such imports Section 1526 of the Tariff Act of 1930 and to prevent thus the importation of zinc into this country.\textsuperscript{30}

The use of identical trade-marks by different nationals has dangerous economic and political consequences as experience during the present war has shown, and these consequences may well have been intended by the foreign cartel partners who are now our enemies. In many instances the American members of international cartels bargained away to their German cartel partners their right to export to South America in return for a guaranteed monopoly in the home market.\textsuperscript{31} The German manufacturer used and registered in South America the same mark that the American manufacturer registered in the United States. When after the outbreak of the war it became impossible for the German cartel partners to supply their South American customers, American producers were effectively prevented from shipping their goods to South America under their customary trade-marks, because there those marks were registered in the name of the German manufacturer or of a local company dominated by him. Many American manufacturers are, therefore, now presented with the problem of developing new trade-marks of their own in South America—a task which not a few are unwilling to undertake. Consequently, South American markets either continue to be disregarded altogether or, worse yet, American products are exported to South America without trade-marks only to be resold there under enemy trade-marks. Thus, not infrequently American producers have, perhaps unwittingly, helped to keep alive enemy trade-marks and thereby enemy trade. This problem could have been avoided had the American firms used and registered in the United States and abroad trade-marks developed by themselves and different from those of their foreign competitors.

\textsuperscript{30}Statute is to protect the owner of a foreign trade-mark from competition in respect to goods bearing the mark” and that the statute was applicable.

\textsuperscript{31}Testimony before the Committee on Patents, United States Senate, 77th Congress on S. 2303 and S. 2491, Vol. 3, pages 1523, 1524 and 1550.

\textsuperscript{32}See BORKIN AND WELSH, GERMANY’S MASTER PLAN (1943) Chapter 10.
(3) Use of Different Trade-Marks

In some cases of international cartels where more than one American manufacturer became parties to an agreement, the American members desired to go further and divided the domestic market between themselves in order to avoid competition. Division along geographical lines would have proved impractical since the concerns operated on a nationwide scale and such division would have been too obvious. Therefore a different kind of division along functional lines was established, and different classes of consumers were allocated to each manufacturer. A case in point is that of a certain patented soapless detergent. The parties in interest were an American soap manufacturer and an American chemical concern. Both American firms were members of an international patent cartel which guaranteed them freedom from competition in the American market in return for their undertaking to refrain from exporting the detergent into the territory of the foreign cartel members. In order to avoid competition among themselves at home the two manufacturers attempted a division of fields along functional lines which proved to be difficult to achieve, since each of the parties desired the highly profitable textile trade for himself. The terms on which they finally agreed were as follows: the soap manufacturer would sell to the cleaning and dyeing trade and to related fields under the trade-mark X; the chemical concern would sell to customers outside of the cleaning and dyeing field under the trade-mark Y; and a corporation to be owned jointly by the two manufacturers would be supplied by the chemical concern and would sell to the textile trade under the trade-mark Z. This ingenious use of different trade-marks has enabled the manufacturers to hide from their customers the fact that X, Y, and Z are one and the same product and has therefore effectively eliminated competition.

Another example of a domestic functional division of fields superimposed on an international geographical division of fields may be found in the Du Pont and Röhm & Haas Company case. Both companies manufacture methyl methacrylate which is a plastic with a wide range of commercial and industrial uses. Some furniture, tableware, ornaments, and signs are made out of this plastic, while denture plates for false teeth are made almost exclusively from methyl methacrylate.

Röhm & Haas and Du Pont sold methyl methacrylate as a powder for manufacturing purposes other than the manufacture of dentures under

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the trade-marks "Crystalite" and "Lucite," respectively. The price for both "Crystalite" and "Lucite" was fixed according to the indictment at 85c per pound. For dental purposes Röhm & Haas distributed the same plastic under the trade names "Vernonite" (when distributed by one dental company) and "Crystolex" (when distributed by another dental company), while Du Pont sold the identical product under the trade name "Lucitone" (under which name it was distributed by a third dental company). The prices for "Vernonite," "Crystolex," and "Lucitone" were identical, the retail price being about $45.00 per pound.

According to the indictment, the scheme of selling the same product under different trade-marks at different prices to different classes of customers was seriously endangered when outsiders discovered the identity of the product and pretended to buy methyl methacrylate for commercial purposes, only to resell it to dental laboratories at prices far below those charged for "Vernonite," "Crystolex," and "Lucitone." In order to maintain the different price scales, Du Pont and Röhm & Haas hereafter required all commercial purchasers of methyl methacrylate to sign agreements forbidding the resale of the product to anyone using it for dentures. Obviously, without the use of different trade-marks it would have been practically impossible to sell substantially the same substance to one group of customers at $45.00 per pound while selling to other groups at 85c.33

33In this connection part of the opinion in *American Safety Razor Corporation v. International Safety Razor Corporation*, 26 F. (2d) 108, 114 (D. C. N. J. 1928), is of interest. Plaintiff, a manufacturer of safety razors and blades, sought an injunction restraining defendants, who manufactured similar products, from infringing upon plaintiff's trade-marks, "Gem," "Ever-Ready," and "Star." Plaintiff contended that defendants' advertising was designed to mislead the public as to the source of manufacture. The District Court held that defendants' advertising did not constitute an infringement of plaintiff's trade-marks because it did not tend to confuse the public as to who was the manufacturer of defendants' blades. Going beyond this finding, however, the District Court dismissed the complaint because "... by reason of the character of the complainant's advertising and literature, it has fallen far short of that standard of integrity which is required of a petitioner who seeks relief in a court of equity..." An employee of plaintiff had testified that the blades which were sold under the trade-marks "Gem," "Ever-Ready," and "Star" were in reality the same, manufactured in the same factory, and in the same way. Plaintiff in its advertising attributed to each of the three blades peculiar qualities due to different manufacturing processes and charged different prices for them. The Court held that "if the public knew the truth, it would buy that blade of complainant which is sold at the smallest price, and that its ignorance is costing it money without warrant every time it buys a blade at any figure beyond the minimum."

The Circuit Court of Appeals, 34 F. (2d) 445 (C. C. A. 3d, 1929), reversed the decision on two grounds. In the first place the Court found that there was ample evidence to support plaintiff's contention that defendants' advertising tended to confuse the public as to the source of manufacture. As to the second ground, the Court held that "The court is not
Not dissimilar from the plastics case is a case involving rubber tires which came before the Federal Trade Commission. In that case the Federal Trade Commission issued a cease and desist order charging Goodyear with a violation of Section 2 of the Clayton Act by discriminating in the price of tires between those sold in interstate commerce to Sears Roebuck & Co. on the one hand and to dealers on the other, with the effect of lessening competition and tending to create a monopoly in their manufacture and distribution.

Goodyear over a period of years had entered into several agreements with Sears Roebuck according to which Goodyear undertook to supply all tires required by Sears in its mail order and retail store business. The tires manufactured for Sears while otherwise substantially identical with those sold by Goodyear to dealers bore a different trade-mark and tread design. Sears Roebuck's first and second line tires bore the names "All State" and "Companion," while the dealers' tires were named "All Weather" and "Pathfinder." Goodyear sold "All State" and "Companion" tires to Sears Roebuck at prices substantially lower than those at which dealers were able to purchase "All Weather" and "Pathfinder" tires. In order to protect Goodyear from the certain wrath of its dealers on account of the discrimination practised against them by Goodyear, Sears Roebuck agreed not to divulge that "All State" and "Companion" tires were manufactured by Goodyear.

Goodyear argued that Section 2 of the Clayton Act did not apply, because the commodity sold to Sears Roebuck was commercially an entirely different commodity from that sold to Goodyear dealers. The tires sold to Sears Roebuck, so Goodyear stated, were "an aggregation of

the keeper of the public conscience, and it would be going very far to hold that, because a complainant did not in some manner measure up to the court's ideas of ethical fairness, the fact is sufficient to bar it from all redress in a court of equity. . . ."

*In the Matter of The Goodyear Tire & Rubber Co., Docket No. 2116. Cease and desist order issued March 5, 1936.

In Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 F. (2d) 620 (C. C. A. 6th, 1939), cert. denied, 308 U. S. 557 (1939) the Court of Appeals set aside the order of the Federal Trade Commission holding that the proviso in Section 2 of the Clayton Act did not limit quantity discounts to discounts reflecting differences in selling or transportation costs. The Commission had contended that the proviso exempting " . . . discrimination in price between purchasers of commodities on account of differences in the . . . quantity of the commodity sold . . ." had to be construed restrictively in the light of the phrase immediately following which exempts discrimination in price "that makes only due allowance for difference in the cost of selling and transportation . . ." The decision of the Circuit Court of Appeals, while setting aside the Commission's order charging Goodyear with violation of Section 2 of the Clayton Act, leaves unaffected the findings of the Commission as to the practices engaged in by Goodyear and the changes resulting from those practices in the competitive picture in the tire industry.
rubber and fabric and nothing more.” On the other hand, “Goodyear sells to its dealers a tangible and an intangible. The tangible is the material content of the tire. The intangible is the right to sell the tire under the Goodyear trade-mark.\textsuperscript{35}

The commission found that the sale by Goodyear to Sears Roebuck of “All State” and “Companion” tires at prices lower than those charged dealers for “All Weather” and “Pathfinder” tires had a tendency to increase still further Goodyear’s already large share of the tire business, by driving out of business independent retail tire dealers and small competing tire manufacturers dependent upon the former as their outlets. The use of different trade-marks for the same product contributed in no small way to the successful perpetration of Goodyear’s discriminatory practices, because in keeping from its dealers the truth about the sale to Sears Roebuck of the identical product at different prices, it helped to keep down organized dealer opposition and prevented the taking of effective counter measures on their part.

III. Evolution of Trade-Mark Function and the Public Interest

The facts adduced herein indicate that trade-marks can be employed for the purpose of implementing restraints of trade. Adherents of traditional trade-mark doctrine will ask the question, how can this be so, if the single function of a trade-mark is to designate origin?\textsuperscript{36} The

\textsuperscript{35}Respondent’s Motion to Dismiss and Brief in Support thereof.

The Brief further contains the following interesting statement: “It is known to everyone that a nationally advertised trade-marked article will sell to the consumer more readily and for a higher price than an unmarked, unidentified article . . . In many instances the intangible is more valuable than the tangible; for instance probably a greater proportion of the price a consumer pays for toothpaste is attributable to the trade name rather than to the chemical mixture.” This statement is in strange contrast with the allegation commonly made that nation-wide advertising increases sales and therefore permits lower prices.

\textsuperscript{36}In Albany Perforated Wrapping Paper Company v. John Hoberg Co., 102 Fed. 157, 158, 159 (C. C. E. D. Wis. 1900), the court dismissed for want of equity a bill filed by plaintiff to enjoin the use by defendant of thirteen different trade-marks owned by plaintiff and used upon toilet paper manufactured and sold by him. The court held as follows: “... A trade-mark must denote origin. ... How can that purpose be accomplished, if a manufacturer dealing in a single article used a thousand different trade-marks to designate the article and its origin? Such use necessarily produces confusion, and fails of the single purpose of the trade-mark,—to designate with certainty the origin of the product. ... It may be that in the struggle for trade, the whims of retailers must be consulted and that the rivalry between dealers to present something attractive to the public eye must exist; but courts of equity do not sit to indulge the whims of purchasers, or to protect one in creating confusion. ...”

This decision is no longer considered good law. Compare Derenberg, Trade-Mark Protection and Unfair Trading (1936) 159 et seq., and Nims on Unfair Competition and Trade-Marks (3d ed. 1929) 513 et seq.
answer is that a functional evolution has taken place gradually with respect to trade-marks to the end that most modern trade-marks advertise and guarantee the goods rather than the origin of the goods. This evolution vitally affects not only trade-mark owners who have criticized the courts for having been too slow in recognizing this shift in the trade-mark concept and who have been clamoring for modern trade-mark legislation, but also the public interest which is in dire need of additional protection. The impact of this change in trade-mark function on the trade-mark owners on the one hand and the public interest on the other hand can be demonstrated in the case of licensing of trade-marks. Proponents of the traditional indication-of-origin doctrine could not conceive of the possibility of licensing a trade-mark. Nims, for instance, states "... it is vital to the existence of a trade-mark that it should be used by one and by only one concern. A trade-mark cannot serve two masters; it cannot identify two sources at the same time and remain a trade-mark ... all uses of such marks by lease, license or grant are unnatural ones, confusing to the public, and all contracts of lease, license or grant are contrary to the public policy...."

In Great Britain modernization of the British trade-mark statute was under discussion in 1934, and the British Board of Trade prepared a report to Parliament on proposed trade-mark legislation which contains, among others, the following observations with respect to proposals to permit the licensing of trade-marks:

"A number of witnesses representing industrial and professional interests gave evidence before us to the effect that the circumstances of modern industry make it very desirable in some cases that certain persons associated with the proprietor of a registered trade-mark should be allowed to use his mark in trade, and that proprietors of trade-marks are severely hampered by the fact that under the existing law such user would render the mark invalid on the ground that it no longer distinguished the goods of the proprietor of the mark. It was stated by several of the witnesses that the cases in which such a provision would be most useful are those of groups of companies or firms which are separate entities in law but which are controlled by a parent company, but it was pointed out that the present limitation of user also causes great difficulty in connection with modern methods of rationalization, where arrangements between competing companies for the joint development of their businesses are made, and it was urged that any alteration of the law should apply equally to such cases. (Italics supplied.)

"We have given careful consideration to the representations made to us on

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8Nims, op cit. supra note 36, at 1021 and 67.

9Report of the Departmental Committee on the Law and Practice relating to Trade-Marks, presented by the President of the Board of Trade to Parliament by command of his Majesty, April 1934.
this subject, and we agree that the trend of modern commercial development requires some relaxation of the existing restrictions on the use of registered trade-marks by persons other than the proprietor.\footnote{Id., Sections 118 and 120.}

The Board of Trade recommended against the adoption of legislation permitting the free licensing of trade-marks but suggested the enactment of amendments which would permit the limited use of registered trade-marks by persons other than the proprietor. Following the recommendations of the Board of Trade, The Trade-mark (Amendment) Act of 1937 created the institution of registered users\footnote{The Trade Marks (Amendment) Act, 1937, 1 Edw. 8 and 1 Geo. 6, c. 49 § 8.} which permits the use of trade-marks under certain conditions set forth in the statute by persons other than the owner, whose names must be registered in the Registrar's office. Such registrations are subject to the scrutiny of the Registrar, and considerations of public policy, among others, determine whether registration shall be permitted or not, or whether a registration shall be cancelled or not. The decision of the Registrar is subject to court review.

Similarly, the British Trade-Marks Act of 1919\footnote{1919, 9 and 10 Geo. 5, c. 79, § 12.} provided with respect to standardization trade-marks\footnote{Now called "certification trade-marks," The Trade Marks Act 1938, 1 and 2 Geo. 6, c. 22 § 37.} which are designed "to certify the origin, material, mode of manufacture, quality, accuracy, or other characteristics of any goods," that the Board of Trade shall permit the registration of such marks only if and so long as the Board is satisfied that the association owning the standardization mark is competent to certify, and that such certification is to the public advantage.

These two examples show that the British trade-mark statutes do not leave the registration of trade-marks and the exercise of statutory trade-mark privileges entirely to the discretion of trade-mark owners but provide for some machinery to safeguard the public interest. The public interest is involved not only in so far as the licensing of trade-marks and the registration of certification marks is concerned, but pervades the entire law of trade-marks, and it is suggested that no trade-mark legislation should be enacted unless first the impact of such legislation on the public interest is thoroughly explored in all of its aspects and some machinery is provided for the protection of that interest.
THE PRAGMATISM OF MR. JUSTICE HOLMES

PAUL L. GREGG, S.J.*

LONG ago Mr. Justice Holmes wrote: "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. . . . It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject."1

Underlying every form of law is a substratum of philosophy,—a theory of law. As the architect’s plan determines the design and the dimensions of a house, so the basic theory of any legal system gives direction, contour and scope to the law. If the theory of the law be that men are endowed by their Creator with certain inalienable rights, the law will reaffirm the inherent dignity of the individual and sanction his natural rights to life, liberty and property. Legislators and judges will acknowledge that there are limits beyond which public policy may not go. And this, indeed, is the theory of our Federal and State Constitutions.2 On the other hand, if the theory of the law be that men have no rights save those created by the state, then the law may sacrifice life, liberty and property to any extent, at any time, for any reason, or for no reason. What the state creates it can unquestionably annihilate. Under this totalitarian theory men become the mere tools of the dominant party in power. They have no rational complaint against whatever sacrifices and indignities they may be required to bear. For the justification of the law is simply the power of the dominant group to compel obedience by force.

As a judge, Mr. Justice Holmes gave effect to the natural law theory of the Constitution because he believed that, as a matter of positive law, it was his duty to do so. But as a philosopher, he did not give intellectual assent to the theory of natural rights. In his opinion the theory of the Constitution is merely an experiment,3 and . . . "the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle."4 Indeed, in his philosophy, eternal principles are non-extant, at least for man. Dismissing absolute truth as humbug, his philosophy of law was completely pragmatic.

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1Holmes, COLLECTED LEGAL PAPERS (1920) 200.
2Wright, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931) c. IV, V, VI.
4Holmes, op. cit. supra note 1, at 239.
It is the purpose of this paper to bring together the basic assumptions upon which his pragmatism was founded, and so endeavor to go to the bottom of his philosophy of law. This done, it will appear what fruits his theory of law may be expected to bear.

TRUTH

Mr. Justice Holmes pursued truth with vigor. The references in his letters and notes to the multitudinous volumes of philosophy and science read by him, indicate the speed and range of his pursuit.\(^5\) He spoke of his open mind, his receptivity,\(^6\) which is the prime condition for the attainment of truth. Yet, in spite of his superior mind and his prodigious labors,\(^7\) he never grasped anything more substantial than hypothesis or opinion. Early in life he came to believe that absolute truth is for man a chimera. One could imagine that he had captured it, could feel certain of its absolute reality, could even make the supreme sacrifice for it. But when one had realized that "time has upset many fighting faiths,"\(^8\) one had to be humble enough to admit the sheer relativity of his certitude, even though he might still be proud enough to fight and die for it. In things worth fighting for, truth could be made in a practical way by "the majority vote of that nation that could lick all others."\(^9\) This belief never left him. Hence, there is something pathetic in the man's life-long search for ... "an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."\(^10\) It was a search that ended where it began, in the gloomy labyrinth of doubt and scepticism.

The environment deeply marked the man. Beneath the surface of his sometimes whimsical, usually urbane, always delightful literary style, there runs a dark river of thought that waters the roots of the law with acid. Some philosophers, so Holmes said, choose for their guiding star the superlative.\(^11\) Holmes seems to have preferred the regrettable. The

\(^5\)"I have in my possession a book in Holmes' hand in which he recorded the books that he read. . . . It began in 1876 with notations from works which Holmes consulted in his legal research. From 1882 on, he entered each year the books read during the year, with the infrequent addition of a note of an important event. The numbers of books recorded are almost incredible." PALFREY, 1 HOLMES-POLLOCK LETTERS (1941) xxii.

\(^6\)HOLMES-POLLOCK LETTERS (1941) 252.

\(^7\)For example: "It strikes me that you might get profit from Ehrlich's Sosiologie des Rechts, which I painfully worked through with a dictionary some years ago and thought a great contribution." Letter of Holmes to Dr. Wu, Shriver, JUSTICE OLIVER WENDELL HOLMES (1936) 159.


\(^9\)HOLMES, op. cit. supra note 1, at 310.

\(^10\)Id. at 202.

\(^11\)Id. at 310.
pattern of his thought is neatly crystallized in the retort of a young man to his sceptical talk: "You would base legislation upon regrets rather than upon hopes." This unhappy attitude passes among the more ardent of Holmes' admirers for realism. But cooler temperaments would see in it only an assumed scepticism running its logical course down hill into cynicism. No realist is forever in the state of doubt.

Unlike most thorough-going sceptics, Holmes appears to have taken his own existence for granted. His first and fundamental doubt was the existence of reality outside himself.

"I noticed once (he wrote to Dr. Wu) that you treated it as a joke when I asked you how you knew you weren't dreaming me. I am quite serious, and as I have put it in an article referred to above, we begin with an act of faith, with deciding that we are not God, for if we were dreaming the universe we should be God as far as we knew. You never can prove that you are awake. By an act of faith I assume that you exist in the same sense that I do and by the same act assume that I am in the universe and not it in me." Dr. Wu's reply has not been published. But an adequate answer is suggested by Holmes' apercu: "Consciously or unconsciously we all strive to make the kind of world that we like." If there were no world of bodies outside of us, and if we ourselves were the sole cause of our perceptions, there would be no need of striving. There would be no reason why a blind man should not see the pine-crowned hill against the winter sky as well as we do, nor why we all agree in seeing the same hill and sky. There would be no explanation for our inability to perceive only the kind of world that we like, and for the necessity we experience of perceiving much in the world that we abhor.

Without objective reality, it is idle to talk of truth. For the truth of thought simply means that the mind is conformed to objective reality, that the thought in the mind corresponds to some physical or moral fact which exists outside and independent of the thinking mind. It is the

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12Id. at 307.
14Dr. John C. H. Wu (1899- ), formerly Judge of the Shanghai Provisional Court, Principal of the Comparative Law School of China, Member of the Law Codification Commission. SHRIVER, op. cit. supra note 7, at 151, n. 1.
15Holmes, op. cit. supra note 1, at 303, 304.
16SHRIVER, op. cit. supra note 7, at 165.
17Holmes, op. cit. supra note 1, at 305; SHRIVER, op. cit. supra note 7, at 153.
18Cotter, Logic and Epistemology (1st ed. 1930) 122.
19Cotter, op. cit. supra note 18, at 7, 91, 207; Pratt, What Is Pragmatism? (1909) 65 et seq.
outside world that conditions the truth of our thought, and not our thought that conditions the truth of the world. Fire burns even if one denies it.

With his act of faith that he was not God dreaming the universe, Holmes accepted objective reality as a working hypothesis and so provided himself with a foundation for the discussion of truth:

"When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped."²⁰

Challenging his old friend's sceptical talk, Sir Frederick Pollock wrote in defense of the power of the human mind to know at least some truths that are absolute:

"On greater matters I believe in the supremacy of reason because your can't help postulates it. The fundamental can't help is the law of contradictories: and there is nothing but reason to vouch for it. In a world of unreason (if there could be one) nothing would prevent A = B (and) A = not B, from both being true under identical conditions, and there would be no can't help at all."²¹

Holmes bristled, and restated his position:

"I don't understand your seeming inclination to controvert my can't helps. I see nothing behind the force of reason except that ich kann nicht anders—and I don't know whether the cosmos can or not. I do not see what more there is in your law of contradiction, except to assert that the universe can't make nonsense sense. Even to that I should simply say I don't know. I can't imagine it—but I hardly think that the measure of the possible."²²

If a proposition is true because it is an experience as to which there is no choice except belief, it is so because an unbiased mind knowing the definition of the subject and predicate, must necessarily affirm their identity. This necessity²³ can follow only upon objective evidence that is clear, strong and complete. In the absence of such evidence, a healthy disciplined mind will not give firm assent. It will acknowledge that, as far as the mind is concerned, the proposition is merely doubt-

²⁰Holmes, op. cit. supra note 1 at 304, 305.
²¹Holmes-Pollock Letters (1941) 250. Italicized portions of quotations used in this paper are in every case italicized in the original, unless the contrary is noted.
²²Id. at 251, 252.
²³This necessity is not blind necessity. Experience shows that, even when a proposition is clearly stated and its terms are clearly defined, the mind often proceeds from doubt to probability to certitude. Firm assent is withheld until the object has impressed itself upon the mind.
ful or probable, or a matter of opinion or ignorance. No sane human mind has ventured apodictically to number the fish in the sea. But as to the number of fish in a bowl, the mind does not hesitate. We need not know all the things that Holmes’ cosmos can do, in order to know some of the things that it cannot do. It cannot bring into being a thing that is an intrinsic impossibility.24 As in action, so in thought: Holmes’ cosmos has its limitations. By taking thought it could not have brought it about that, at the same time and in the same respect, Mr. Justice Holmes both was and was not Mr. Justice Holmes; that he both was and was not the author of his dissent in Lochner v. New York (1904), 198 U. S. 45, 74. Holmes did not positively say that his cosmos could do these things. He merely said that he did not know. But he held tenaciously to the possibility. One can, therefore, readily agree with him when he writes to Lady Pollock: “My mode of thinking and doing things sometimes seems to me academic to the point of unreality.”26

If we assume that Holmes’ cosmos has a mind that is infinite, we may also assume that it has knowledge which men do not and cannot have. Nevertheless, the truth of knowledge—its conformity to reality—is essentially the same for all minds. Holmes’ cosmos may know a thing in itself and in all its possible relations, while men can know it only in some of its relations. Therein lies the familiar scholastic distinction between adequate and inadequate knowledge. But in so far as inadequate knowledge corresponds with reality, it is universally true. The mere addition of details does not change the essential truth of what was known before. An apple now hangs ripening in the sun. One judges it to be what it is—an apple ripening in the sun. His judgment is true, although he may not know what Holmes’ cosmos is assumed to know, that tomorrow the apple will be a dumpling. In like manner, we need not know all that Holmes’ universe may know, in order to know some truths that are absolute. Among them is the commonplace judgment of Holmes that . . . “the part cannot swallow the whole.”26 Yet he insists: “I don’t believe or know anything about absolute truth.”27

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24 If an essence is made up of incompatible elements, it is not-being, and incapable of existence. McCormick, Scholastic Metaphysics (1928) 47. A familiar example is the square circle. The elements square and circle cancel each other, leaving nothing. It would be fatuous of Holmes’ universe to exert its “infinite” cosmic energies to produce a mere nothing.

25 Holmes-Pollock Letters (1941) 116. Shriver, op. cit. supra note 7, at 192, quoting a letter of Holmes: “In writing decisions, while one always has one’s theoretical views in the back of one’s head, one generally, I think, finds it better not to exhibit them too freely, as one doesn’t wish to seem pedantic or unpractical.”

26 Holmes, op. cit. supra note 1, at 315.

27 Shriver, op. cit. supra note 7, at 165.
To show that the ultimates of human reason are at one with those of the cosmos,\textsuperscript{28} Pollock points out to Holmes that the cosmos itself must be reasonable:

"As to can't help, I would amend ICH kann nicht anders into MAN kann nicht anders. A can't help not common to you and me would not be of much use to us as social animals: so the possibility of that community is fundamental. Which for me is another way of saying that the universe (or the only cosmos that can concern us) is reasonable."\textsuperscript{29}

Holmes replied:

"... the I can't help is the ultimate. If we are sensible men and not crazy on -ists of any sort, we recognize that if we are in a minority of one we are likely to get locked up and then find a test or qualifications by reference to some kind of majority vote actual or imagined. Of course the fact that mankind or that part of it that we take into account are subject to most of the same can't helps as ourselves makes society possible but what interests me is that we start with an arbitrary limit which I know no reason for believing is a limit to the cosmos of which I am only a small part. Most if not all our ultimates seem to me to bear the mark of the finite. Of course you may say de non apparentibus et de non existentibus eadem est ratio. I do not find in that a warrant for believing that this cosmos can go no farther than I can, little as I can imagine how."\textsuperscript{30}

Sufficient has been said above to solve this perennial doubt of Holmes. The quotation immediately above is of interest particularly because it refers to a majority vote as the test of truth. It is true that under proper conditions the morally universal opinion of mankind on certain subjects is one of the valid tests of formal certitude. But, in any case, for Holmes "... certainty generally is illusion.\textsuperscript{31} We are not sure of many things and those are not so.\textsuperscript{32} Nevertheless, men must be active, and their activity must tend toward definite ends. Being rational by nature, men work for those ends which, for one reason or another, appeal to them as worthy. This fact presupposes some principles by which conduct and the ends to which it is directed are appraised. If our ultimate principles are not and cannot be absolute, then our evaluations of things are merely relative. One man's truth is another's falsehood. Truth for men may not be truth for the cosmos. Still we must get things done, even in the face of conflicting doubts on what to do and how to do it. Hence, Holmes' rule of thumb that "the best test of truth is the power of the thought

\textsuperscript{28}Throughout their correspondence, Holmes and Pollock seem to use the terms universe and cosmos where believers would use God and Supreme Being.

\textsuperscript{29} Holmes-Pollock Letters (1941) 255.

\textsuperscript{30} Id. at 255, 256.

\textsuperscript{31} Holmes, op. cit. supra note 1, at 181.

\textsuperscript{32} Holmes-Pollock Letters (1941) 59.
to get itself accepted."38 By this rule truth is a matter of counting noses and measuring the fighting power behind them. Similarly, but with some unexplained reservations, John Dewey summarizes Holmes' views:

"At times, his realism seems almost to amount to a belief that whatever wins out in fair combat, in the struggle for existence, is therefore the fit, the good, and the true."34

This "realistic" view of truth had a profound influence, as we shall see, upon Holmes' philosophy of law and morals. But before passing on to consider his legal and moral philosophy, it is well to examine his philosophy on man. For the subject of both law and morality is human conduct.

**MAN**

"I look on man (wrote Holmes) as a cosmic ganglion."35

The cosmos, as Holmes conceived it, is "an I know not what, beyond my capacity to predicate."36 Yet he entertained a number of hypotheses concerning it. Essentially, it is made up of streams of energy.37 It is seemingly without life, consciousness or intelligence,38 without free will or creative power.39 It has, nevertheless, the power to produce not only the visible world, but consciousness, intelligence and ideals as well.40 The obvious question to be asked is how a cosmos of blind energies can produce an ordered world, wherein design and purpose and the most precise adaptation of means to ends are everywhere in evidence.41 Holmes' only answer appears to be his admittedly conjectural formula, that the universe is "a spontaneity taking an irrational pleasure in a moment of rational sequence."42

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34John Dewey, *op. cit. supra* note 13, at 43.

35 Holmes-Pollock Letters (1941) 182.

36 Holmes-Pollock Letters (1941) 152; Shriver, *op. cit. supra* note 7, at 185, quoting a letter of Holmes: "I frame no predicates about the cosmos."

37 Holmes-Pollock Letters (1941) 178; Shriver, *op. cit. supra* note 7, at 185.

38 "I misgave that it (cosmos) lives to the extent of thinking him (man) an independent center (of the universe)." 2 Holmes-Pollock Letters (1941) 180. "I like one thing—that he (Whitehead) like Dewey begins his cosmos without any conscious ego, and lets it come in later as quasi an accident." Id. at 272.

39 Chauncey Wright a nearly forgotten philosopher of real merit, taught me when young that I must not say necessary about the universe, that we don't know whether anything is necessary or not... That leaves a loophole for free will—in the miraculous sense—the creation of a new atom of force, although I don't in the least believe in it." Id. at 252.

40 Shriver, *op. cit. supra* note 7, at 185.


42 Holmes-Pollock Letters (1941) 185.
As an epigram Holmes' formula leaves nothing to be desired, but as a postulate of cosmology it leaves the question unanswered. However, it is Holmes' philosophy that we are studying, and we must take it as we find it.

One of the products of the spontaneous swirl and concatenation of the cosmic energies, is the human personality.

"I believe (Holmes wrote to Dr. Wu) . . . that our personality is a cosmic ganglion, that just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after meeting as they did before, so, when certain other streams of energy cross, the meeting point can frame a syllogism or wag its tail."43

Aside from its felicity of expression, there is little in Holmes' opinion that is new or original. Indeed, there is much in it to remind one of Heraclitus and Democritus, born about 530 B.C. and 460 B.C. respectively.44 But as a theory of the genesis of man, it is pregnant with implications as to his position and dignity in the universe, and the importance of his life and efforts. The first implication is that mankind has exaggerated his own dignity by self-apotheosis:

"I think men even now, and probably more in Goethe's day, retain the theological attitude with regard to themselves even when they have given it up for the cosmos. That is, they think of themselves as little gods over against the universe, whether there is a big one or not. I see no warrant for it."45

Holmes' phrase "theological attitude" seems to refer very particularly to the Neo-Platonists whose idealism is subjective and acosmic: the world is their dream.46 It may also refer to the teaching of the Scholastics that man is part matter, part spirit. His body is material, and differs from the rest of the material world—minerals, plants, animals—only in structure. But his soul, the principle of his intellectual and volitional life, is spiritual. In this latter respect, man bears the image of God the Creator of the universe, Who is Pure Spirit, Infinite Intellect and Will. By reason of his spiritual endowment, man is therefore essentially different from purely material substances, and is superior to them in dignity and worth. Finally, the "theological attitude" may refer to the Biblical account of God's gift to Adam and his descendants, of dominion over the remainder of the terrestrial creation.47

43Shriver, op. cit. supra note 7, at 185. Compare with 2 Holmes-Pollock Letters (1941) 178.
44Turner, History of Philosophy (1903) 53-56, 65-68.
45Shriver, op. cit. supra note 7, at 185.
46"If we were dreaming the universe we should be God so far as we knew." Letter of Holmes to Wu, Shriver, op. cit. supra note 7, at 165.
47Genesis, I: 28-29; Psalm VIII (Douay Version).
account goes hand in hand with the philosophy of the Scholastics. Both meet the Neo-Platonic philosophy on common ground in making man the lord and master of the material world. With this exaltation of man, Holmes had no sympathy:

"I often say over to myself the verse 'O God be merciful to me a fool,' the fallacy of which to my mind ... is in the 'me' that it looks on man as a little God over against the universe, instead of a cosmic ganglion, a momentary intersection of what humanly speaking we call streams of energy, ... but always an inseparable part of the unimaginable ... no more needing its mercy than my little toe needs mine." 48

"I think rather more than ever that man has respected himself too much and the universe too little. He has thought himself a god and has despised 'brute matter', instead of thinking his importance to be all of a piece with the rest." 39

"I guess that you (Pollock) think man a more important manifestation than I do. ... Of course from the human point of view he is important; he hardly would live if he didn't think so. Also I hasten to admit that I don't dare pronounce any fact unimportant that the Cosmos has produced. I only mean that when one thinks coldly I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand." 50

When the dignity of man is equated with that of the baboon and the grain of sand, it follows that all that man is and has—life, liberty, property—may be disposed of on equal terms with the brute and the clod. Holmes embraced the consequent without flinching. With cold inflexible logic he applied his general principle as a yardstick to measure the intrinsic sacredness of human life. He found it to be a minus quantity:

"I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction." 51

"I don't believe that it is an absolute principle or even a human ultimate that man always has an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it." 52

"The most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it." 53

"We all try to make the kind of a world that we should like. What we like lies too deep for argument. ... If the different desires of different peoples come in conflict in a region that each wishes to occupy (especially if it is a physical region) and each wishes it strongly enough, what is there to do except to remove the other if you can? I hate to discourage the belief of a young man in reason.

48 Holmes-Pollock Letters (1941) 178.
49 Id. at 234.
50 Id. at 252.
51 Id. at 36.
52 Letter of Holmes to Wu, Shriver, op. cit. supra note 7, at 187.
53 Holmes, op. cit. supra note 1, at 314.
I believe in it with all my heart, but I think that its control over the actions of men when it comes against what they want is not very great."\(^{54}\)

"When the Germans in the late war disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can."\(^{55}\)

Pollock wrote of war atrocities—the murder of innocent French non-combatants by the German military\(^{56}\)—and Holmes replied:

"I receive all stories (of like killings) with doubt and, if I believe them, I feel much as I should if the same deaths had occurred by shipwreck or earthquake."\(^{57}\)

Here we have an arresting example of Holmes' hitching his wagon to a regrettable star. It is regrettable that men too often are moved by passion rather than reason. It is also regrettable that men abuse their brothers and force them to serve ends which most philosophers would call unnatural and unjust. But the function of philosophy, according to Holmes,

"... is simply to see the universal in the particular, which perhaps is a commonplace, but is the best of commonplaces if you realize that every particular is as good as any other to illustrate it, subject only to the qualification that some can see it in one, some in another matter more readily, according to their faculties."\(^{58}\)

"Men to a great extent believe what they want to—although I see in that no basis for a philosophy that tells what we should want to want."\(^{59}\)

"Philosophy does not furnish motives, but it shows men that they are not fools for doing what they already want to do."\(^{60}\)

"We get our motives from our spontaneity—and the business of Philosophy is to show that we are not fools for doing what we want to do."\(^{61}\)

The desires of men therefore take precedence both in time and in rank over reason, which is pure pragmatism. But of that we shall speak later. For the present it is interesting to note Holmes' method. It is wholly empirical. There is no demonstration of a priori principles of "the fit, the good and the true"\(^{62}\) on the basis of human nature in its abstract essence. Everything is computed in terms of life in the concrete, that is, individual men in the act of getting what they want. In many instances men take

\(^{54}\)Letter of Holmes to Wu, SHRIVER, op. cit. supra note 7 at 187.

\(^{55}\)Id. at 187.

\(^{56}\)HOLMES-POLLOCK LETTERS (1941) 228.

\(^{57}\)Id. at 230.

\(^{58}\)Letter of Holmes to Wu, SHRIVER, op. cit. supra note 7, at 164, 165.

\(^{59}\)HOLMES, op. cit. supra note 1, at 314.

\(^{60}\)Id. at 316.

\(^{61}\)HOLMES-POLLOCK LETTERS (1941) 161.

\(^{62}\)John Dewey, op. cit. supra note 13, at 43.
human life to gain their private or group ends, and they do so with impunity because they are too powerful to be vulnerable. In many other cases human life is a community ideal and is protected by the public force. The general principle is, therefore, that human life is of right only under the aegis of one’s own or another’s physical strength. The ultimate is desire backed by force. Otherwise, the universal would not flavor all the particulars of experience. The sacredness of innocent human life cannot per se be an ultimate principle, because it is not always respected in fact. Briefly, it does not work. And that, again, is pragmatism.

A small volume could be filled with encomiums penned by Holmes in praise of men whose work he admired: Descartes, Brandeis, Cardozo, Pollock, Montesquieu, to name only a few. There is, moreover, a lengthening shelf of books printed in tribute to the work of Holmes himself. Writers who do not agree with his philosophy are nevertheless appreciative of his valiant fight for improvement in the law. Holmes was, indeed, in some respects great, as were the men whom he esteemed. But when one considers his life work and theirs—their consecration of heart and mind to great causes, their years of endless toil, their sacrifices and failures, their brilliant triumphs, their impact upon their times, which has left its mark and commands the respect, if not the affection, of all who have eyes to see—what significance has it all? In fact, what significance has any human life?

According to Holmes, we know nothing of the ultimate significance of human life, if it has any. Perhaps the cosmos knows, perhaps not. Be that as it may, we ganglia are only private soldiers who “... have not been told the plan of campaign, or even that there is one.” We have no reason for demanding “the plan of campaign of the General—or even asking whether there is any general or any plan.” It is enough for us that we are part of the cosmos, that we “have faith and pursue the unknown end.” For us, functioning is all there is:

“A platitude has come home to me with quasi religious force. I was repining at the thought of my slow progress—how few new ideas I had or picked up—when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life—victuals—procreation—rest and eternal terror. And I bid myself accept the common lot; an adequate vitality would say daily: ‘God—what a good sleep I’ve had.’ ‘My eye, that was dinner.’

63 ROONEY, LAWLESSNESS, LAW, AND SANCTION (1937) 135.
64 SHRIVER, op. cit. supra note 7, at 179.
65 Ibid.
66 HOLMES, op. cit. supra note 1, at 315.
67 H. HOLMES-POLLOCK LETTERS (1941) 163.
68 SHRIVER, op. cit. supra note 7, at 175.
'Now for a rattling walk'—in short realize life as an end in itself. Functioning is all there is—only our keenest pleasure is in what we call the higher sort. I wonder if cosmically an idea is any more important than the bowles.'^69

So we go on functioning, doing our work, not knowing its ultimate significance, or if it has any. But in order to do our work well, we must be serious;^70 and to be serious we must have a worthy purpose in view. As St. Thomas Aquinas has observed: "The rule and measure of human acts is reason: it being the part of reason to direct to the end, which is the first principle of conduct. . . . As reason is the principle of human acts, so in reason itself there is something which acts as a principle or mainspring in regard to all the rest. . . . Now in matters of conduct, which are the domain of practical reason, the prime mainspring is the last end in view."^71 In Holmes' view there is no ultimate end that we can know. Consequently, as reasonable ganglia, we posit proximate ends for our conduct, and "... leave to the unknown the supposed final valuation of that which in any event has value to us."^72

"If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves. The motive, to be sure, is the common wants and ideals that we find in man. Philosophy does not furnish motives, but it shows man that they are not fools for doing what they already want to do. It opens to the forlorn hopes on which we throw ourselves away, the vista of the farthest stretch of human thought, the cords of harmony that breathes from the unknown."^73

After nearly three-quarters of a century of throwing oneself away on forlorn hopes, one can say with Holmes:

"It makes me enormously happy when I am encouraged to believe that I have done something of what I should have liked to do, but in the subterranean misgivings I think, I believe that I think sincerely, that it does not matter much."^74

"I may work on for a year or two, but I cannot hope to add much to what I have done. I am too sceptical to think that it matters much, but too conscious of the mystery of the universe to say that it or anything else does not. I bow my head, I think serenely, and I say as I told some one the other day, O Cosmos—Now lettest thou thy ganglion dissolve in peace."^75

And so the end comes to each of us. "To the philosopher everything

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^69Holmes-Pollock Letters (1941) 22.
^70Shriver, op. cit. supra note 7, at 185.
^71Summa Theologica, I-II, Q. 90, Art. 1 and 2, translated by Rickaby, 1 Aquinas Ethicus (1892) 264 (Italics supplied).
^72Holmes, op. cit. supra note 1, at 316.
^73Ibid.
^74Shriver, op. cit. supra note 7, at 185.
^75Ibid.
is fluid—even himself. There is nothing of our personality that remains after death to reap the eternal reward or punishment due to a life of functioning for good or evil. As ganglia we simply dissolve. And the rays of which we were composed go on as they did before, perhaps to intersect again at a point which cannot make a syllogism, but can only wag its tail.

A dark sunless thing is Holmes' conception of man. But it is the only light in which he sees the problem of morality.

**Natural Law and Morality**

Diving on one occasion into a favorite pool of thought, Holmes used the concept *mercy* for his springboard.

"I often say over to myself the verse 'O God, be merciful to me a fool', the fallacy of which to my mind ... is in the 'me', that it looks on man as a little God over against the universe, instead of as a cosmic ganglion ... always an in-severable part of the unimaginable ... no more needing its mercy than my little toe needs mine."  

Strictly speaking, mercy is the disposition to treat an offender or an enemy with less severity than he deserves in exact justice. In a wide sense, mercy means either forbearance to injure another when one has the power to injure, or benevolence in relieving the suffering of another. Holmes cannot have used the wide sense, for the various energies of his cosmos can be both harmful and helpful to man's purely material interest. His use of the strict sense presupposes that there can be no question of justice, offense or enmity between man and God. This assumption releases man from all moral responsibility to his Creator, and at once empties of their meaning such terms as sin, morality and natural law. For, in scholastic terminology, the natural law is simply the Will of God manifested in the objective order of nature, which is discoverable by the natural reason of man, and is binding upon his will to the end that the order established by the Creator shall be preserved. Although Salmond does not accept the doctrine of natural law, nevertheless he states it correctly:

"Natural Law is also the law of Reason, as being established by that Reason

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76 Holmes-Pollock Letters (1941) 239.
77 Holmes-Pollock Letters (1941) 178.
78 The only "god" acknowledged by Holmes appears to be the material universe (cosmos) of which man is an integral part. Holmes refers to it as "the infinite." But there is no scientific evidence to support this assumption, and reason repudiates it. Since the material universe is not infinite, it does not contain within itself a sufficient reason for its own existence, but depends upon an ultimate cause which is infinite. This cause is God. Aquinas, Summa Theologica, I, Q. 2, Art. 3; Q. 7, Art. 1, 2; Q. 25, Art. 2; Q. 44, Art. 1; 2 Summa Contra Gentiles, c. XX, XXI.
by which the world is governed, and also as being addressed to and perceived by the rational nature of man. It is also the Unwritten Law (jus non scriptum), as being written not on brazen tablets or on pillars of stone, but solely by the finger of Nature in the hearts of men."79

Holmes' view of the natural law, on the contrary, is very much awry:

"The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."80

Perhaps it was over-eagerness to reach a favored conclusion, that led Holmes to overlook or ignore the data which falsify his judgment. His insinuation that adherents to the natural law school have not thought the matter quite through, is, to speak temperately, very unfair,—at least to the masters of the school. Far more penetrating minds than Holmes—Aquinas and Suarez, for example81—have analyzed the doctrine with power and distinction, and have found it worthy. To think of such men as naïve is silly. Nor does every familiar and accepted institution per se fall within the precepts of the natural law: wearing a white tie with tails, driving on the right or the left of the highway, universal suffrage, bicameral legislatures, going to church on Sunday,—none of these are prescribed by natural law. As a matter of fact, most of our familiar and accepted institutions per se are matters of indifference,—neither good nor bad, neither prescribed nor prohibited—in point of natural law. When they come within its purview at all, it is because of their accidental relation to some other object, end or circumstance which is within the law. If philosophers and jurists rightly say that an institution is a matter of natural law, the reason is not that the institution is merely familiar and accepted, but that it is intrinsically reasonable and conformable to the natural order established by God. Two passages from Holmes, quoted

80Holmes, op. cit. supra note 1, at 312.
81St. Thomas Aquinas (1225-1274), author of the classic Summa Theologica, Summa Contra Gentiles; Francis Suarez (1548-1617), author of the monumental De Legibus. Holmes' essay, Natural Law in Collected Legal Papers (1920) 310-316, was first published in 32 Harv. L. Rev. (1918). As early as 1913, Holmes had received a folio volume of Suarez, De Legibus, as a gift from Canon Sheehan of Doneraile. 1 Holmes-Pollock Letters: (1941) 207. As late as 1929, Holmes apparently had not read Suarez. 2 Id. at 256. The only reference in the Holmes-Pollock Letters to Aquinas is Pollock's complaint that Dante "assumes you have read Thomas Aquinas." 2 Id. at 156. Hence, there is some reason to think that Holmes had missed Aquinas also. The reason may be Holmes' preference for modern books which, in his opinion, contain "the latest and most profound conceptions." Shriver, Justice Oliver Wendell Holmes (1936) 178.
with approval by John Dewey, appear to coincide with this fundamental principle of natural law philosophy:

"If the world is a subject for rational thought it is of one piece; the same laws are found everywhere, and everything is connected with everything else; and if this is so, there is nothing mean, and nothing in which may not be seen the universal law."

"All that life offers any man from which to start his thinking or striving is a fact. And if this universe is one universe, it is so far thinkable that you can pass in reason from one part of it to another, it does not matter very much what that fact is. . . . Your business as thinkers is to make plainer the way from something to the whole of things; to show the rational connection between your fact and the frame of the universe." ^82

There are, then, universal laws: "... the cord of harmony that breathes from the unknown." ^83 Things stand in rational relation one to another and to the universal law. But, as Holmes realized, man is physically free to disrupt the rational order and so place himself out of harmony with the laws of nature. Such conduct is wrong and is punished by nature itself:

"Nature has but one judgment on wrong conduct . . . the judgment of death. . . . If you waste too much food, you starve; too much fuel, you freeze; too much nerve tissue, you collapse." ^84

If we can admit that man is subject to physical laws which are universal, it is easy to admit that he is also subject to moral laws which are similarly universal. For the moral life of man, equally with his physical life, transpires within the frame of the universe and is subject to the same Lawgiver. This becomes more apparent if we take human nature as the fact from which to start our thinking.

Man is endowed, not only with physical being (in common with the grain of sand) and sensible appetites (in common with the baboon), but also with the superior gifts of reason and free will. Human conduct is not blind activity like that of the clod and the brute. With his intellect man can appreciate the quality of his actions, and with his will he can freely choose between good and bad. The good is the suitable, the befitting; the bad is the unsuitable, the unbecoming. It is a self-evident truth that every being ought to act and react according to its own nature. Rational human nature is no exception. In human affairs, therefore, the good means those actions and institutions which are perfective of man as man; the bad, those which are at odds with his human nature.

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^82 John Dewey, Justice Holmes and the Liberal Mind, in Mr. Justice Holmes, Frankfurter, editor (1931) 35, 36.
^83 Holmes, Collected Legal Papers (1920) 316.
^84 Id. at 272.
Both reason and experience approve the disjunction. Hence, we are not fools for calling certain actions and institutions human, humane, rational, reasonable, natural; and others, unreasonable, unnatural, inhuman, decadent, degenerate, brutal.

Consequently, the first and fundamental rule of the natural law is, that man ought to live in harmony with his rational nature: to do good and avoid evil.

Human nature in the concrete, that is, as it exists in the individual man, is not isolated. For, as Holmes has intimated, man bears essential relations to the rest of the universe: to his Creator, to his fellow-men and to inferior creatures. Some of these relations are simple and easily perceived; others are complex and discernible only by dint of more or less mental effort. They are discoverable, however, by natural reason unaided by Divine Revelation inasmuch as they are necessary to the preservation of the natural order fixed by the Creator. In that degree they are precepts of the natural moral law. Hence it is that reasonable men have not arbitrarily said that certain rights and institutions—marriage, private property, contract, and the inviolability of innocent human life—are sanctioned by the natural moral law. Holmes, nevertheless, dissents:

"No doubt it is true that, so far as we can see ahead,85 some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the OUGHT of natural law.

"It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You cannot help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute. It is a necessity of less degree but practically general that they should live in society. If they live in society, so far as we can see,85 there are further conditions. Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms.85 But that seems to me the whole of the matter. I see no a priori duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with emotional affirmation and begin to talk about duties and rights . . .

85Italics supplied.
but that does not seem to me the same thing as the supposed a priori discernment of a duty or the assertion of a pre-existing right.86

Man's desire to live and to live in society is an instinct implanted in him by his Maker. It is as much a part of him as his sex or his sense of smell. And in this respect it is arbitrary. One can in many ways, no doubt, do violence to his nature. Holmes once planned suicide.87 Others have become asocial or anti-social. But man is compelled by nature to live in society if he is to develop his powers as a rational being. Even Henry David Thoreau, who sneered so contemptuously at society, was yet dependent upon society for the nails that held his woodland hermitage together, and for the salt that seasoned his solitary meals. As experience teaches, men who live their lives remote from the companionship of their kind become unbalanced. Nature metes out more than one type of death-penalty.

A civilized society is one in which men live according to the law of their nature, and not according to the jungle-law established for brutes. Such a society necessarily depends upon order, security, peace. These, in turn, depend upon the institutions of the natural law. Reason and experience bear witness, as Holmes acknowledged. But he did so with the reservation so far as we can see ahead.

If we can understand this protatic expression to mean as long as human nature remains what it is—human nature, it is quite unobjectionable. No philosopher or jurist of the natural law school would say that the natural moral law, as it applies to men in the present world, would apply with equal force to creatures of essentially different nature and placed in essentially different circumstances. For nature itself in its essential relations is the norm of morality and the index to the natural law. And, if we can believe the scientific anthropologists of our day, the institutions that Holmes mentioned above are the common institutions among both marginal and non-marginal primitive peoples.88 Forms may have varied, but the substance had endured. The elements of natural rights, duties and institutions are not peculiar to our society, nor to "any society that may spring from our own and that would seem to us to be civilized." They are peculiar to human nature itself.

We come now to a consideration of the OUGHT of natural law. Briefly, it is a moral obligation. Holmes is mistaken in his identification of

86 Holmes, op. cit. supra note 83, at 312-314.
87 Holmes-Pollock Letters (1941) 64.
obligation with physical force—"putting the screws on"—expressed in terms of legal sanction. For sanction follows upon obligation, either by way of reward for keeping the law or by way of punishment for violating it. The moral obligation of which we speak consists in the conditioned necessity that, if one does not keep the natural law, one does God a wrong and becomes liable to a proportionate punishment established by God. To elucidate: Necessity is a determination to one thing. Determination is the result of a cause in some way efficacious. Determination to one thing, therefore, is the result of a cause in some way efficacious to one effect, so that the effect is in some way inescapable. There are, moreover, different kinds of necessity: physical and moral. In the purely natural order, physical necessity is absolute. The force of gravity absolutely determines bodies placed within finite distance of each other to mutual attraction. Moral necessity, on the other hand, is conditional. It too determines the subject to one effect which is inescapable, and in this way it is absolute; but the effect contains two alternative members, and for this reason it is also conditional. Moral necessity is a term with two senses. The wider sense is used when we say that it is morally necessary for a man to work if he wishes to be paid. Although every man is bound by the will of any employer to the complex effect, still he is at perfect liberty to choose, without wrong-doing, between the two members of the effect; for the employer has no authority, that is, no right, to demand anything of one not yet bound to him by contract. This last clause hints at the distinction between strict moral obligation (obligation in conscience) and the wider moral necessity. For the efficient cause of strict moral obligation is the Will of God legislating for us, and binding us in a way that may be paradoxically called inescapable and yet free. We are bound to observe the law or to incur liability of fault and liability to punishment.

Strict moral obligation, therefore, introduces a feature that is not present in the wider moral obligation, namely, liability of fault and liability to punishment. For God has authority over us—the right efficacious to demand the service of his creatures. If one refuses to work for a potential employer, no injury is done him. But God has absolute dominion over his creatures. Yet he leaves them some liberty. This paradox, indicated above, requires a brief explanation.

God had made all creatures out of absolute nothing. Consequently, both they and their activity are wholly His property. By His physical

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89 Absolute necessity here means that there is only one member, and consequently no alternative, in the effect to which the subject is determined. The word absolute is not here used to denote metaphysical necessity.
laws. He has retained complete control over some of His creatures and their acts. In the case of man, however, He has placed the human acts of man in man’s physical and moral power, that is, He has given man a right over them, with the restriction that he observe the divine law. Hence, when man violates the law, he is usurping a right, acting as if he had a right which he actually does not have. This is an offense, that is, an inequality by which one takes away what is due to another. It is called fault when it is imputable to him, when he is morally responsible for it. By a moral fault one upsets the order of right or justice. Since rights are of their own nature coactive, one further incurs liability to punishment. There is need of restoration of the disturbed order: the wrong-doer has not only taken something that did not belong to him, but in doing so he has committed a fault against the Person, God, who holds that right. From the nature of the case, there is only one way in which right order can be restored, if at all, by man; and that is the endurance of pain. Liability to punishment is the necessary consequent of the commission of a moral fault.

This analysis of the concept of obligation brings us to the ultimate: it is fitting to render to a person that which, by its nature, is destined for his exclusive use. This is the suum of the classical expression suum cuique tribuere. If it be asked why such conduct is befitting, no answer can be given beyond the statement that it is immediately evident.

Applying this notion to our essential relations with God, it is clear that, as a result of creation, His or Suum embraces man and all his activity. God, it is true, has transferred to man part of this relation, so that we can correctly speak of suum in reference to man. Nevertheless, by the natural law, God has placed restrictions upon human conduct. When man over-steps those limitations, he breaks the bonds that bind his conscience, violates the natural law, and usurps the dominion of God.90

If there is no natural law, there are no objective standards of right conduct. Morals are reduced to mere matters of individual taste. The distinction between good and evil disappears. For the murderer’s taste for taking human life is subjectively as good as the physician’s taste for preserving it. Each does what he likes, and that is the end of the matter. But, as Holmes would say, most men have a prejudice—an arbitrary feeling that they cannot help entertaining—against murder. They are, therefore, inclined to “put the screws on to” murderers. Thus the sanctity of innocent human life is born a purely municipal ideal.

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90The treatment here of moral obligation closely follows that in Rueve, Francis Suárez and the Natural Moral Law c. 5, pt. 1 (Unpublished doctoral dissertation in St. Louis University Library, 1933).
In Holmes’ lexicon the word *ideals* is synonymous with *morals*. Between the two his preference lies with *ideals* rather than *morals*. The reason probably is that *morals* and *morality* suggest *sin*, a concept for which Holmes entertained little respect. The notion of sin is meaningless unless it is associated with the notion of a Personal God. Ideals, on the contrary, can be made in a purely materialistic world without the interference of God. At any rate, in Holmes’ opinion, to make ideals is quite natural to man:

"Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal."92

Moreover, when a group of idealists are sufficiently powerful to impose their ends upon the rest of the community, we have municipal ideals, that is, public morality or the morality of the state. This theory elevates taste above reason, positive law above natural law, man above God. It constitutes subjectivism the norm of morality.

The fallacy of the subjective approach to morality is well illustrated by reference to certain conduct which all reasonable men, including Holmes, abhor:

"The other day I was looking over Bradford’s history . . . and I was struck to see recounted the execution of a man . . . for an offense which still, to be sure, stands on the statute book as a serious crime, but which no longer is often heard of in court, which many would regard as best punished simply by the disgust of normal men, and which a few think of only as a physiological aberration, of interest mainly to the pathologist."93

Holmes does not name the crime, but he seems to speak of something akin to bestiality or homosexuality.94 If such a vice were merely a physio-

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91"In fact even in the domain of morals I think that it would be a gain, at least for the educated, to get rid of the word and notion Sin." 2 HOLMES-POLLOCK LETTERS (1941) 200. "It would be well if the intelligent classes could forget the word sin and think less of being good. We learn how to behave as lawyers, soldiers, merchants, or what not by being them. Life, not the parson, teaches conduct." Id. at 178.
92Id. at 181, n. 2.
93HOLMES, op. cit. supra note 83, at 213.
94Holmes evidently read the manuscript of Bradford’s History of Plymouth Plantation which is in the Massachusetts State Library. I have not seen the manuscript. Neither the Davis edition (1908) nor the Paget edition (1909) of Bradford’s History contains the episode referred to by Holmes. But Davis permits Bradford to tell us of “the breaking out of sundrie notorious sins . . . espeditiously drunkennes and unclaines; not only incontinenc betweene persons unmaried . . . but some maried persons alson. But that which is worse, even sodomie and bugerie, things fearfull to name, have broak forth in this land, oftener then once” (p. 364). In a footnote, Davis afterwards explains that several pages of the manuscript have been omitted because “it has been deemed proper” (p. 367).
logical aberration, why should it be punished by the disgust of normal men? One would not think of punishing a leperous or cancerous unfortunate with the disgust of healthy men. Punishment implies free will and moral responsibility in its object. Everyone who does not swallow behaviorism whole, knows that persons who, for one reason or another, are inclined to such vices, can and do retain their self-control by force of good will. The repugnance of normal men to such disorders is not founded exclusively upon emotion, but upon sound reason as well. It is evident from the structure and physiology of the genital organs of male and female, of man and beast, that such crimes are against nature—a conclusion that is confirmed by the social evils that follow in their wake. Being contrary to nature, they are immoral and offensive to the Author of nature. To repeat: it is the objective nature of conduct that measures its morality. Individual or group opinions and conduct, no matter how powerful or influential, have no effect upon objective morality.

Unnatural vices were not uncommon in the Graeco-Roman world of St. Paul's day.95 If Holmes' theory of morality is the correct one, the Graeco-Romans are blameless. They fulfilled their destiny as ideal-makers as well as any group that one could mention, and in that degree they are praiseworthy. But suppose that the dominant group in American society—which is something quite different from a majority—went over to unnatural sex practices, and constituted them the municipal ideal. Marriage, child-bearing, and all the moralities that sustain the family, would become immoralities. Since the family is the social unit on which the state depends for its continuance, the new order would see the state wither at its roots. But as long as the state could endure under the dominant group of sexual degenerates, normal men and women would be considered abnormal and immoral.—fit subjects, of course, for ostracism, imprisonment, sterilization, mutilation, or any other "social remedy" that the dominant group of perverts might approve. These deductions, no doubt, appear grotesque. But they are solidly founded upon Holmes' premises.

With profound insight and admirable candor Holmes wrote: "... I do agree . . . that one's attitude on these matters is closely connected with one's general attitude toward the universe."96 If man is only a cosmic ganglion whose dignity and function is all of a piece with the baboon and the dust, then man is morally responsible to no one; and, within the limits of his physical strength, he can make his ideals fit

96 Holmes, op. cit. supra note 83, at 314.
his most bizarre desires without scruple, without blame, and—be it noted—without praise. For standards worthy of the name have vanished. But if man is made in the image of his Creator, with an objective standard to guide his conduct to an end beyond mere physical functioning, then he is worthy of praise or blame accordingly as he measures up to his God-given trust.

As one holds either the one or the other of these antithetical principles, so will the positive laws that he frames be conceived, administered and judged.

**Pragmatism and Positive Law**

Few definitions of law have equaled that of St. Thomas Aquinas. Law, he says, is an ordination of reason for the common good, established by competent authority and promulgated. This generic definition applies to both natural and positive law. For, if the universe is ruled by Divine Providence, it is clear that the whole is governed by Divine Reason, and that the plan of government manifested in the nature of things bears the character of law,—natural law. Positive law depends for its moral obligation ultimately upon God alone, more proximately upon the natural law, and immediately upon the consent of the governed. Political power considered in general, without descending in particular to Monarchy, Aristocracy or Democracy, comes ultimately from God alone; for this power follows of necessity from the nature of man, and that nature comes from Him Who made it. Moreover, the same power derives from the natural law, since it does not in substance depend upon the consent of men; for willing or unwilling, men must submit to political rule, unless they wish the human race to perish, which is contrary to the primary instinct of nature. The immediate deposit of political power is in the whole community, because by Divine law this power is given to no particular individual or group; and, in the absence of positive law, there is no reason why, in a multitude of political equals, one rather than another should rule. It is by delegation of the multitude that the power to make and administer law rightfully comes into the hands of particular persons. Since their power is derived from God and the natural law, it is evident that, in the exercise of the power, they are morally bound to observe the restrictions of the natural law of God.

Hence the state cannot justly deprive any man of the rights secured him by the natural law, even under the pretext of the greater good

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*Aquinas, Summa Theologica, I-II, Q. 90, Art. 4, translated by Rickaby, 1 Aquinas Ethicus (1892) 267.*

*Bellarmine, De Laicis, or Treatise on Civil Government (Fordham Press ed. 1928) 24-27.*
of social interests. Among men in society there is a solidarity of interest which we call the common good. Men are made to live in society, and society is ordained for the common good of man. Neither man nor society is independent one of the other. The good of the individual is the good of the group, and the good of the whole is the good of the part. To the extent that human conduct must be limited for the common good, there exist no natural rights in individuals. And, conversely, to the extent that individuals possess inalienable rights, there can be no infringement by the state without impairment of the social organism in its constituent parts. This is especially true in a democratic society which is predicated upon the inherent dignity of the individual.

"What is wrong with Nazism is not its science. As a matter of fact, I cannot think of any progressive measures which we have adopted, which Germany did not have before we adopted them, some of them even long before Hitler's time: old age insurance, unemployment insurance, relief measures, even crop control, the caveat vendor idea of the Securities Exchange Act, legislation aimed at financial stability, curbing excessive profits of corporations and individuals, and health laws directed towards the physical welfare of the people. . . . They are taking good care to provide their people with food, clothing and shelter; to have strong, warm, well sheltered and even well educated—what? Beings, animals beings of the state, beings of economic and military value to the government. . . . It is the (Nazi) philosophy of the nature of a human being, of a man. It is the false philosophy of life, law and government; that philosophy of healthy, warm, well sheltered and well trained animals, mighty lions with the dignity and the independence that a cage provides, a philosophy that divorces itself from the moral dignity of man. Why did the Nazis adopt this system? Because their philosophy is the philosophy of the deification of the state and social interests, claims and demands, and the philosophy of what is useful and works; realism, utilitarianism and pragmatism."\(^{100}\)

Viewed as a philosophical synthesis, pragmatism is American in origin. Fathered by William James and fostered by John Dewey and Roscoe Pound, it has become the dominant force in American sociology, education and jurisprudence. This is not surprising in a country noted for its men of action rather than of thought. For pragmatism is preeminently the philosophy of action. The end to be attained conditions everything. Ideas, logic, reason, morals, and all else, are merely tools by which plans of action are forged and made to work. There are no ultimate principles by which ends, means and actions are assayed. The only critical rule is that an idea—"a plan of action"\(^ {100}\)—is true if it works, that is, if it brings about the end desired.

\(^{100}\)Lucy, Jurisprudence and the Future Social Order in (1941) 16 Social Studies 211.

\(^{100}\)This is John Dewey's expression. See (1907) 16 Mind 335-336; (1908) 5 Journal of Philosophy 88.
"Thus the important thing about an idea to the pragmatist is, not its present relation to its object, but its influence upon conduct, its motive power or guiding force. Starting from the biological view of mind, the pragmatist insists that the purpose of thought is, not the acquisition of 'truth', but the useful reaction of the organism upon environment. Our 'ideas' are thus essentially tools by which to handle and to mold our experience. . . . As a 'plan of action' is . . . but a way of grouping our data or guiding our conduct, it cannot, of course, be maintained that its 'truth' depends upon its relation to some other reality . . . . There is nothing for it to mean but usefulness and successful action. A true idea in this sense is therefore one that works."

The impact of the pragmatic habit of mind upon the field of ethics reduces morality to a mere matter of convenience. In the words of William James: "'The true', to put it briefly, is only the expedient in our way of thinking, just as 'the right' is only the expedient in the way of our behaving."

The epistemology and the ethics of pragmatism have been carried over into the now dominant sociological theory of law. That theory is agnostic in regard to fundamental and immutable principles with which the law must square. Its relativistic hypotheses are entirely fluid, and its standards of value are wholly functional, wholly empirical. In the pragmatic view, law is not something derived ultimately and in principle from God, but it is an agency of social control which is of purely human origin and authority.

"Postulating a priority of complex cultural forces over any specific legal institution, sociological jurisprudence . . . devotes itself to a rational critique of the ideals which clash in society. . . . These conflicting ideals . . . furnish the raw materials of what Roscoe Pound calls the jural postulates of civilization . . . the A Posteriori formulation of legal standards or norms derived from a critical evaluation of the interests whose conflict menaces the general security. . . . Relative to the civilization of a given time and place, these jural postulates are pragmatically conceived norms of justice translated into legal categories and projected from the ethical and juridical plane. . . . These jural postulates . . . keep the legal system generally true to the highest ideals of justice applicable to the civilization in which they are philosophically created."

William James, the guiding spirit of the pragmatic synthesis, died in 1910. As late as 1908, Mr. Justice Holmes wrote to Pollock: "I think pragmatism an amusing humbug—like most of William James's speculations." Nevertheless, the school of sociological jurisprudence which

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101 Pratt, What Is Pragmatism? (1915) 109, 110. Moore, Pragmatism and Its Critics (1910) 88: "The idea is a purposed connection of things for a specific end, and is true when it works in the way proposed."
102 James, Pragmatism (1940) 222.
103 Aronson, Roscoe Pound and the Resurgence of Juristic Idealism in (1940) 6 Journal of Social Philosophy 47, 82.
104 Holmes-Pollock Letters (1941) 138, 139.
avows pragmatism as its dogma, also acclaims Holmes as one of its chief prophets if not its pope. The claim is well founded. We have already seen the pragmatic strain in Holmes' theories of truth and morality. A little further study will show how thoroughly he acquiesced in the "amusing humbug" as a theory of law.

The general character of law, according to Holmes, is not reasonableness and justice in the ordering of conduct for the common good. Law is rather like a mirror reflecting the passions and desires of men, both good and bad, right and wrong.

"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time this passion is not one which we encourage, either as private individuals or as law-makers.

History, no doubt, points out many laws that were enacted for the sole purpose of appeasing the base desires of men. But this excess lies outside the true character of law, which is reasonableness. In positing the excess as the essential, Holmes again yields to the regrettable. In addition to that fallacy, Holmes apparently did not see that the passion of revenge has many brothers and cousins—greed, intemperance, lust, idleness—which are curbed by sound laws. Such laws are sound because they tend to keep human passions from overflowing the bounds of reason. No human passion is in itself bad; only when it is carried to excess does it become evil. Retribution in the sense of restitution is only the reasonable demand of commutative justice; and in the sense of punishment it is only the proportionate sanction without which peace and order could not be maintained. The desire for security, justice, peace and order—the ends toward which sound law must tend—can hardly be called bad. If the law does cater to the evil in men, it is accidental and regrettable, but not essential.

The end or purpose of law, as fixed by Holmes, is the satisfaction of social needs, desires and wants. These ends are not necessarily those of society in general, that is, of the common good, but rather those of individuals and groups within the commonwealth. To legislate for the common good is to assume a solidarity of interest among the component parts of society. For Holmes this premise is heretical:

105Aronson, Roscoe Pound and the Resurgence of Juristic Idealism (1940) 6 Journal of Social Philosophy 47, 54; John Dewey, op. cit. supra note 82; Sheridan, Justice Touched with Fire, id. at 199.
107Holmes, op. cit. supra note 83, at 225.
"The tacit assumption of the solidarity of the interest of society is very common, but seems to us to be false. . . . But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action."  

Besides throwing civilization back to the Hobbesian bellum omnium contra omnes, this unqualified Holmesian observation shows a want of proportion. No man rightly, that is reasonably, prefers his own interest unless it is at least of equal value with that of his neighbor. A push-cart vendor's interest in an orange cannot reasonably be preferred over a thieving little gamin's interest in his life. In any event, society has a common interest in the protection of both life and property. Moreover, the selfish struggles of rival groups have operated with lamentable results upon the common interest, as the conflicts between capital and labor—to cite only one instance—bear witness. The interests of society cannot be severed from the interests of its components. Admittedly, there are conflicts of wills within society. But the business of the law is to resolve them on the basis of commutative, legal and social justice, which is the only basis upon which both individual and community interests can be preserved in order and peace.

Holmes insisted, however, that it is the dominant group whose interests shall be served by the law:

"All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community."

"What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of good government is that the dominant power has its way."

Good government leads to destruction? Thoughtful men have always supposed that the prime virtue of good government lies in its power to

106 Holmes, The Gas-Stokers Strike (1931) 44 Harv. L. Rev. 795; (1873) 8 Amer. L. Rev. 358; quoted by Frankfurter, Mr. Justice Holmes and the Supreme Court (1938) 27.

107 Great Northern Ry. v. Local Great Falls Lodge of International Association of Machinists, 283 Fed. 557 (D. C. Mont. 1922); Falcigilia v. Gallagher, 164 Misc. 838, 299 N. Y. S. 890 (1937); Associated Flour Haulers and Warehousemen, Inc. v. Sullivan, 168 Misc. 315, 5 N. Y. S. (2d) 982 (1938); Busch Jewelry Co. v. United Retail Employees' Union, 169 Misc. 156, 7 N. Y. S. (2d) 872 (1938); Busch Jewelry Co. v. United Retail Employees' Union, 169 Misc. 854, 9 N. Y. S. (2d) 167 (1939); Stalban v. Friedman, 11 N. Y. S. (2d) 343 (1939). See also The Labor Dispute and the Third Party Interest in Jaeger, Cases and Statutes on Labor Law (1939) 299-332.

108 Holmes, op. cit. supra note 108, at 796.

109 Holmes, Collected Legal Papers (1920) 258.
preserve. This supposition, however, postulates that government means a rational economy in the service of the common welfare. When group desires are favored over the common good, destruction may well be expected. This is especially true if the dominant group is unenlightened and unlimited by objective principles of values, especially moral values. These elements are altogether alien to the Holmesian philosophy:

"I should think the only principles worth talking about were the existing notions of public policy . . . and personally I should not speak of justification which presupposes an absolute criterion, whereas I should think the only problem was: does this decision represent what the law-making power must be taken to want." 112

"Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough. . . . So when it comes to the development of a corpus juris the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." 113

There are passages in Holmes' writings, to be sure, which seem to palliate the harshness of his doctrine. While "every opinion tends to become law", 114 still law-makers ought to be scientific and selective. In giving legal force to some group desires over others, legislators and judges ought to be guided by quantitative rather than qualitative judgments: their election ought not to be an emotional, impressionistic reaction, but rather a considered choice based upon accurate measurement and reason. 115 But, Holmes goes on,

". . . in the law we only occasionally can reach an absolutely final quantitative determination, because the worth of competing social ends . . . cannot be reduced to number and accurately fixed. The worth, that is, the intensity of competing desires, varies with the varying ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can." 116

"But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, . . . The social question is which desire is stronger at the point of conflict." 117

The truly scientific spirit, Holmes cautioned, will carefully guard against too much dogma and too much logic in the development of the

112 Shriver, op. cit. supra note 81, at 188.
113 Id. at 187.
115 Holmes, Collected Legal Papers (1920) 231.
116 Id. at 231. (Italics supplied).
117 Id. at 238, 239.
law. It will insist, first, upon the accurate measurement of social desires, and, secondly, upon the establishment of legal postulates from within the field thus measured.\textsuperscript{118} These postulates are triple in number: What condition, result or end is desirable? What means are appropriate to bring it about? What must be given up to get it, and is it worth the price?\textsuperscript{119} There is about all this, no doubt, an atmosphere of science and objectivity. But it is merely specious. It vanishes when one recalls that in Holmes' philosophy there neither are nor can be objective principles by which ends, means and values can be measured. His legal postulates are, consequently, nothing more than tools for rationalizing the subjective desires of the group in power; or, in other words, the rationalization of class legislation. Holmes was accordingly quite consistent in finding no fault with class legislation:

"The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class has gained in power, or that it transcends the limits of self-preference which are imposed by sympathy."\textsuperscript{120}

So once more we hear, like the repeated chorus of an old ballad, the theme of Holmes' jurisprudence: the life, liberty and property of individuals and minorities are at the mercy of the dominant group in power. But the sacrifices of minorities, Holmes thought, should be reduced to a minimum by "the spread of an educated sympathy."\textsuperscript{121} One can have sympathy for a beast of burden, but one can defer to inalienable rights only in a man. Moreover, Holmes' plea for an "educated sympathy", which was penned for publication, seems inconsistent with views found in his private letters. Speaking of the scheme of life proposed in the \textit{New Testament}, and particularly of its emphasis upon the virtue of charity, Holmes said:

"I replied . . . that to love my neighbor as myself did not seem to me the true or at least the necessary foundation for a noble life, that I thought the true view was that of my imaginary society of jobbists, who were free to be egotists or altruists on the usual Saturday half holiday, provided they were neither while on their jobs. Their job is their contribution to the general welfare and when a man is on that, he will do it better the less he thinks either of himself or of his neighbors, and the more he puts his energies into the problem he has to solve."\textsuperscript{122}

Precisely what claims, in point of obligation, the "general wel-
fare" can have upon any man, is not clear in view of the sum total of Holmes' theory. For every man, he maintained, rightly preferred his own selfish ends. But to continue with Holmes' opinions upon "educated sympathy":

"Also, if there is a form of speech for which I have less sympathy than another it is the talk about 'exploitation', as a hostile characterization of modern commercial life, and an implication that dominant brains are to blame. I think it drivelling cant and I have a standing war with my dear friend Laski, as to his passion for Equality, with which I have no sympathy at all."123

Quite evidently, minorities can expect little practical help from whatever content may lie hidden in Holmes' concept of "educated sympathy". The only hope of minorities under his system is the hope of coming one day into power. For that, in the final analysis, is for Holmes the source, the obligation, and the norm—in one word, the whole—of the law:

"The ever growing value set upon peace and the social relations tends to give the law of social being the appearance of the law of all being. But it seems to me clear that the ultimate ratio, not only of regum, but of private persons, . . . however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold on it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing."124

"I believe that force, mitigated so far as may be by good manners, is the ultimate ratio, and between two groups that want to make inconsistent kinds of world, I see no remedy except force."125

"If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands.126

From this it follows that the party in power, whether a majority or a minority, has carte blanche in the field of legal experiment. There are no preexisting rights which may not be tampered with, mutilated, destroyed. As a jurist, Holmes believed in the widest possible experimentation, limited only by the narrowest constitutional construction:

"There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."127

123 Id. at 197.
124 Holmes, The Common Law (1881) 44.
125 Holmes-Pollock Letters (1941) 36.
127 Truax v. Corrigan, 275 U. S. 312, 343 (1921); Lief, Dissenting Opinions of Mr. Justice Holmes (1929) 13.
On the basis of similar passages, John Dewey has pointed out that Holmes' "liberalism" in this respect, is not predicated upon any firm faith in the nostrums of contending social groups, nor upon any idealization of popular judgment. It is based, Dewey says, upon the right of the community to experiment, and this right in turn is "based upon the fact that experimentation is, in the long run, the only sure way to discover what is wisdom and in whom it resides."128 Dewey is careful to say, however, that Holmes believed in experimentation only within "the limits set by the structure of social life—and every form of social life has a limiting structure."129

There are numerous passages in the judicial opinions of Holmes to support this qualification: experimentation within the form of American society is subject to Constitutional limitations. However, we are not discussing Holmes as a jurist, but as a philosopher. As a jurist, he felt himself bound by the legal dogmas of a particular juridical creed—the Constitution of the United States. As a philosopher, his thoughts and beliefs transcended particular forms of law, and rose to generalizations which he hoped were "an echo of the infinite . . . a hint of the universal law."130 The Constitution, Holmes thought, is only another experiment, and its claim to respect lies simply in its de facto existence and not in its representing an eternal principle.131 Nothing of the essential is stored in it. With the coming of a new force into power on the morrow, an wholly antithetical constitution might replace the old one, sweeping away all guaranties of individual rights; but the change would be accidental, not substantial. The form of the law—constitutional principles—would change, but the only eternal principle of law—the will of the mighty—would still remain intact.

At this point it is well to state the position of the natural law school on the question of experimentation. The natural law secures to man a minimum residue of rights in life, liberty and property which are inalienable. To deprive man of these rights which are essential to his dignity as a human being, is to reduce him to the level of an animal—however well governed, housed and fed. Over and above his natural rights, man in society may enjoy legal rights of positive origin. Merely positive rights may be sometimes more, sometimes less. Within the field of purely positive rights, as distinct from natural rights, lies the proper field of experimentation. And, as will be seen at once, this field

128John Dewey, op. cit. supra note 82, at 37. (Italics supplied).
129Ibid.
130Holmes, Collected Legal Papers (1920) 202.
131Lief, The Dissenting Opinions of Mr. Justice Holmes (1929) 50; Holmes, op. cit. supra note 130, at 239.
is vast and expansive, extending over the far greater portion of the juridical terrain.

A common but erroneous supposition is that the natural law is a metaphysical code covering every phase and detail of civil life, in every society, in all times and places. Moreover, these detailed rules are often thought of as absolutely rigid and hostile to change in any degree, under any circumstances. But, as already indicated, this view is false. The fundamental principles of the natural law are immutable because human nature, upon which the law is founded, is fundamentally immutable. Still the great mass of positive law does not impinge upon the essentials of either human nature or natural law. For example: It is a matter of indifference, from the point of view of natural law, whether Americans in the middle of the twentieth century cede more power to their executive and administrative agencies than was ceded by the Founding Fathers in the eighteenth century; provided only that the essential rights of man are not bargained away. This is the only limitation placed by natural law upon juridical experimentation. And this seems to be the sense of the Fourteenth Amendment. "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."\(^{132}\)

Many there are among the followers of Holmes' philosophy, who do not take the Constitution seriously. Let it stand, they say, but let it be a tool and not a testament; let it be an instrument for affecting the social reforms that the people want. This is, in brief, the tenor of such recent books as Mr. Justice Jackson's *The Struggle for Judicial Supremacy*, and Levy's *Our Constitution—Tool or Testament*, as well as countless other books and law review articles too numerous to catalogue here. Of many quotations which might be cited to show the temper of the new pragmatism in Constitutional law, one will suffice for our present purpose. It was written by Mr. Justice Frankfurter sometime before his elevation to the Supreme Court. He says:

> "Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the world. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in civilized society."\(^{133}\)

Before the weaving of pragmatism into the fabric of American jurisprudence, chiefly by Holmes and Pound, men had always assumed that the Constitution, by its very nature, is a document to be interpreted by


\(^{133}\)Frankfurter in *Mr. Justice Holmes* (1931) 58.
reference to itself; that it is the deposit of the fundamental principles—absolute at least within the frame of our Constitutional system—by which the fate of cases and legislation should be determined; that it is the guarantee of substantial individual rights against encroachment by dominant majorities or minorities. In short, the Constitution has until recently been thought of as the ultimate safeguard against what has aptly been called "an unbridled juristic impressionism buffeted by gusts of popular frenzy." But in the new juristic pragmatism there is no safeguard. The Constitution is to be interpreted in terms of current public policy and popular will.

History—recent history for that matter—shows that, in the absence of fixed principles of law and legal rights, the popular will soon dwindles into the will of the party in power, and the party will shrivels into the will of the party leader. Where there are no absolute principles of individual rights, there will soon be no democracy.

The dictatorship forms of government have constitutions which guarantee individual rights. Generally speaking, these rights are interpreted, as is the whole constitution, in the light of present public policy. Or, in other words, their constitutions are pragmatic instruments for social control. Under the dictators the pragmatic philosophy has borne its natural fruits for all the world to see: complete subversion of the rights of individuals to life, liberty and property, race and religious persecution, secret and irregular trials for capital crimes, concentration camps, engineered starvation, blood purges. And now, if we can believe the press, the latest social experiment in Nazi Germany is the Gnadenstod. Persons whose only crime is mental deficiency or incurable disease, are put to death by the State. These killings are said to have taken place secretly in State institutions without previous notice to relatives. In every case the victim's body is cremated before it is released to the bereaved family. Hence it is impossible to know the means by which death was inflicted. Several conjectures have been made as to the reason behind this social experiment. Is it to save food? Is it to release doctors and nurses to care for more promising patients? Is it to test some extreme eugenic theory? Finally is it a means of experimenting with new poison gases and death rays?

One may look upon the Gnadenstod reports as war-time propaganda or sensational journalism. Perhaps the reports are wholly contrary to fact. But for a pragmatist is the Gnadenstod entirely outside the scope of possible future policy even in America? What principle in the pragmatic

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philosophy, and especially in the Holmesian brand, would condemn such a policy? Who can say that the United States, at some future time, will not be dominated by bureaucrats whose social philosophy is kindred to that of Hitler, Goering, Goebbels and Himmler? If the sociological school of jurisprudence is successful in turning the Constitution into a mere pragmatic tool, such spirits will find ready-made for their use a strong engine for totalitarian domination. And if poison gases and death rays then need testing, what is there in the pragmatic philosophy to limit the experiment to the mentally deficient? What principle of Holmes’ philosophy would prevent its extension to, let us say, all the adverse critics of the then public policy? Why, it may be asked, have the Nazi and Soviet Governments rejected the philosophy of natural law and natural rights, and chosen in its place the philosophy of pragmatism? The answer is that totalitarianism and dictatorship can live and flourish under pragmatism, but under the natural law they are still-born embryos.

If totalitarianism ever becomes the form of American government, its leaders, no doubt, will canonize as one of the patron saints Mr. Justice Holmes. For his popularization of the pragmatic philosophy of law has done much to pave the way.

**Conclusion**

Mr. Justice Holmes once said that “one mark of a great lawyer is that he sees the application of the broadest rules.”\(^{135}\) The same truth applies to philosophers and the broadest principles. Indeed, every person who is interested in the continuance of our Democracy would do well to forecast the possible applications of the new pragmatism introduced into our legal theory, largely through the influence of Holmes and his followers.

Holmes’ pragmatism springs from his scepticism. Objective reason is cast off as the norm of right and wrong, and subjective desires are put in its place. Inalienable human rights and absolute principles of law are denied. Man is the tool of dominant powers. All that he has, even his life, is the proper subject for even the wildest social experiments. God, of course, is ruled out of the juridical scheme of things. In His place, the ultimate authority is brute force. Truth, man, the common good, even God, are nothing,—desire and power are everything. In the end, as Holmes clearly intimates, there remains only cynicism:

> “The fact is that legislation in this country, as well as elsewhere, is empirical.

\(^{135}\)Holmes, Collected Legal Papers (1920) 195-196.
It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else.\textsuperscript{136}

"I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does—but that is immaterial." \textsuperscript{137}

A realistic projection of Holmes' pragmatic principles into the social order of the future makes one hesitate to give unqualified assent to Mr. Justice Frankfurter's lyrical estimate: "To quote from Mr. Justice Holmes' opinions is to string pearls."

\textsuperscript{136}Holmes, The Gas-Stokers Strike, supra note 108, at 796.

\textsuperscript{137}1 Holmes-Pollock Letters (1941) 163.
SETTLEMENT OF CLAIMS BY FEDERAL COURTS

E. E. NAYLOR*

UNDER existing law there are three courts which under particular circumstances may entertain jurisdiction over certain designated types or classes of claims against the Federal Government. These courts are the United States Court of Claims, the Federal District Courts and the Supreme Court of the United States. Each will be discussed in the order mentioned.

THE UNITED STATES COURT OF CLAIMS

The Court of Claims is a legislative court, and its powers and jurisdiction are limited to those conferred upon it by legislative enactment. Under proper circumstances and when not barred by other law, this court has jurisdiction over money claims against the United States under the following classifications:

(a) Claims founded upon the Constitution of the United States.

(b) Claims founded upon any law of Congress unless such jurisdiction is precluded by other law or the grant of exclusive jurisdiction to another tribunal. Thus where Congress in appropriating money does not give exclusive jurisdiction to accounting officers to settle claims arising thereunder, the Court of Claims has jurisdiction to hear such claims.

(c) Claims based upon any regulation of an executive department.

(d) Claims founded upon any expressed or implied contract with the Government. In this connection, contracts implied in fact may

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2For a more complete discussion of this matter, see Naylor, The United States Court of Claims (1941) 29 GEORGETOWN LAW JOURNAL 719.


6Ibid.

7Sowle v. United States, 38 Ct. Cl. 525, 533 (1903).


be the basis of actions against the Government in the Court of Claims but contracts implied in law may not.  

(e) **Claims for damages, liquidated or unliquidated, in cases not sounding in tort,** where the party would be entitled to redress against the United States in a court of law, equity or admiralty if the United States were suable.  

(f) **Suits by Government employees or officers for fees and salary.** Claims for salary by the President and the judges of the constitutional courts do not come within the jurisdiction of the Court of Claims but claims for salary and mileage by Congressmen do come within the jurisdiction of this court because such claims are founded on acts of Congress. Where the right to government office is disputed, the court does not have jurisdiction to hear and determine a claim for back salary until the right to such office has been determined by a court of competent jurisdiction.  

(g) **Suits by Disbursing Officers for relief on account of loss of Government funds or documents.** An officer seeking relief has the burden of proving affirmatively that the loss occurred without fault or negligence on his part. The jurisdiction of the Court of Claims covers disbursing officers for the various executive departments as well as officers of the Army and Navy, but it does not extend to a collector of internal revenue or a postmaster.  

(h) **Petitions by persons indebted to the United States whose accounts have remained unsettled for 3 years.**

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10However, Congress by special statute may confer jurisdiction upon the Court of Claims to hear and determine particular tort claims. Andrew Raydell Oyster Co. v. United States, 78 Ct. Cl. 816 (1934); Walton v. United States, 24 Ct. Cl. 372 (1889). The Act of May 24, 1938, 52 Stat. 438, 18 U. S. C. § 729 (1940) conferred general jurisdiction upon the Court of Claims to hear claims for damages sustained by persons who have been wrongfully convicted and imprisoned for alleged crimes against the United States.  
16Goodwin v. United States, 76 Ct. Cl. 218 (1932).  
17O'Neil v. United States, 60 Ct. Cl. 413 (1925).  
18Hobbs v. United States, 17 Ct. Cl. 189 (1881).  
19Stapp v. United States, 4 Ct. Cl. 219 (1868).  
20Henderson v. United States, 42 Ct. Cl. 449 (1907).  
(i) **Claims or matters involving controverted questions of fact or law referred by the head of an executive department.** Such references are made either for the purpose of obtaining an advisory opinion as to facts and conclusions of law on a claim presented, or for the purpose of having the claim finally adjudicated. It is not necessary that the head of a department obtain the consent of the claimant in order to transmit the claim or matter to the Court of Claims, but where such consent has been obtained and the court has jurisdiction it will proceed to judgment.

(j) **Bills referred by Congress.** These cases may be classified as those on which Congress desires only a report of the findings of the court, without the rendition of judgment. Judgment will be rendered where the subject matter of the claim so referred is within the general jurisdiction of the court and when the case is one as to which Congress by special act confers jurisdiction upon the court to determine the facts and render judgment. The findings in reports by the Court of Claims to Congress on cases referred to it for a report are to aid the Congress in performing its legislative functions and such reports should contain everything which is necessary so that Congress may readily understand the case, but conclusions of law should not be set forth in such reports.

(k) **Claims filed by aliens, where the Court of Claims has jurisdiction of the subject matter, provided Americans are permitted to prosecute claims against the government of the alien in its courts.**

(l) **Claims where it appears that the accounting officers have made a mistake in stating the claimants' accounts.**

(m) **Certain claims arising under revenue laws.** Where a claim is allowed by the Commissioner of Internal Revenue, but payment is refused, the claimant may take the claim to the Court of Claims, which has jurisdiction since no specific means of enforcing pay-

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23 In re White Earth Roll, 50 Ct. Cl. 19 (1914).


Wilkes v. United States, 43 Ct. Cl. 152 (1908).

The Friendship, 49 Ct. Cl. 204 (1913).

Guttormsen v. United States, 43 Ct. Cl. 299 (1908); Ayers v. United States, 44 Ct. Cl. 110 (1910).


Briggs & Turinas Inc. v. United States, 72 Ct. Cl. 674 (1931); Gove v. United States, 49 Ct. Cl. 251 (1914).
ment has been provided.\textsuperscript{30} However, where a specific means or procedure for recovering taxes or duties illegally exacted has been provided by law, the Court of Claims would not have jurisdiction under its general jurisdiction of claims based on a law of Congress.\textsuperscript{31}

(n) \textit{Certain claims arising out of the taking of private property for public use.} Where land is forcibly taken and held by agents of the government against the will of the owner claiming title, such action on the part of the government is an unequivocable tort, and the Court of Claims does not have jurisdiction of a suit by the owner claiming title. But where the United States takes possession, admitting the ownership to be in the plaintiff, an implied contract to pay the value of the land will arise and the Court of Claims will have jurisdiction of such suit.\textsuperscript{32}

(o) \textit{Claims arising out of appropriation of patents by the government.} The act of June 25, 1910,\textsuperscript{33} as amended by the Act of July 1, 1918,\textsuperscript{34} gave the Court of Claims jurisdiction to entertain suits against the United States for the manufacture or use by the Government of patented articles without the license of the owner. In a case\textsuperscript{35} decided by the Supreme Court since the enactment of these statutes, it was held that where the government makes permissive use of a patented invention there arises an implied contract to pay reasonable compensation for the use of such invention rather than a liability for tortious appropriation of the patented invention.

(p) \textit{Claims for money by a state against the United States.}\textsuperscript{36} However, the Supreme Court has held that a suit by a state against the United States to enforce payment of a tax by the United States was not within the jurisdiction of the Court of Claims.\textsuperscript{37}

In addition to the legal jurisdiction discussed above the Court of Claims has certain equity powers. Such powers are limited to judgments for money\textsuperscript{38} and the reformation of written instruments

\textsuperscript{31}Foster v. United States, 32 Ct. Cl. 170 (1897).
\textsuperscript{32}Langford v. United States, 101 U. S. 341 (1879); Dooley v. United States, 182 U. S. 222 (1900).
\textsuperscript{34}40 STAT. 705 (1918), 35 U. S. C. § 68 (1940).
\textsuperscript{35}Bethlehem Steel Co. v. United States, 258 U. S. 321 (1922).
\textsuperscript{36}United States v. Louisiana, 123 U. S. 32 (1887).
\textsuperscript{37}Alabama v. United States, 282 U. S. 502 (1930).
\textsuperscript{38}United States v. Jones, 131 U. S. 1 (1889).
under the doctrine of mutual mistake.\textsuperscript{39}

It may be presumed in view of the nature of the Court of Claims, i.e., a court of conferred jurisdiction, that where a claim does not fall within one of the classes over which this court has been granted jurisdiction such claim may not properly be adjudicated by the Court. In addition to the general proposition stated above there are certain types of claims which have been expressly reserved from the jurisdiction of the Court of Claims.

- **Claims for pensions.**\textsuperscript{40}
- **Claims for violation of treaties;** such matters must be adjusted and settled through the channels of diplomacy.\textsuperscript{41}
- **Claims arising out of treaties with Indian tribes.**\textsuperscript{42} However, by a special act, Congress may confer such jurisdiction upon the court.
- **Political matters and matters of state which are wholly within the discretion of the President.**\textsuperscript{43}

When the government is sued in the Court of Claims it may set up offsets and counterclaims against the claimant\textsuperscript{44} and it may plead the statute of limitations if the statutory period for the bringing of the action, i.e., 6 years, has run.\textsuperscript{45} A counterclaim need not be formally pleaded.\textsuperscript{46} Notwithstanding the foregoing, where two or more persons have a joint contract with the government for rendering services and bring suit for an amount alleged to be due such joint contractors, the United States cannot set up as a counterclaim a claim which it has against one of the parties under another contract.\textsuperscript{47} In connection with the statute of limitations, although the Court of Claims does not have jurisdiction over a claim after the statutory period has run, it does have jurisdiction to render an advisory opinion to Congress on a claim submitted to it by that body for information purposes.\textsuperscript{48} Also where Congress passes an appropriation act

\textsuperscript{39}Federal Motor Truck Co. v. United States, 71 Ct. Cl. 545 (1931); Olympia Shipping Corp. v. United States, 71 Ct. Cl. 251 (1930).
\textsuperscript{41}George E. Warren Corp. v. United States, (1938) 94 F. (2d) 597 (1938).
\textsuperscript{43}Ingenio Porvenir v. United States, 70 Ct. Cl. 735 (1930).
\textsuperscript{44}Sec. 145, Part II of the Judicial Code, 28 U. S. C. § 250 (2) (1940), Sec. 146 of the Judicial Code, 28 U. S. C. § 252 (1940).
\textsuperscript{45}Sec. 156 of the Judicial Code, 28 U. S. C. § 262 (1940).
\textsuperscript{46}Keith v. United States, 72 Ct. Cl. 236 (1931); Florida Central & Peninsula R.R. v. United States, 43 Ct. Cl. 572 (1908); Vulcanite Cement Co. v. United States, 74 Ct. Cl. 692 (1932).
\textsuperscript{47}Marietta Manufacturing Co. v. United States, 61 Ct. Cl. 122 (1925).
\textsuperscript{48}Wales Island Packing Co. v. United States, 73 Ct. Cl. 615 (1932).
appropriating money for the payment of a class of claims which have been barred by the statute of limitations, the claims are revived and the statute is no longer a bar.49

THE DISTRICT COURTS OF THE UNITED STATES

Generally speaking, the jurisdiction of the District Courts is concurrent and co-extensive with that of the Court of Claims in cases involving amounts up to $10,000. There are, however, two outstanding exceptions to this rule.50 First, the Act of March 9, 1920,51 vested jurisdiction over maritime causes of action against the United States exclusively in the District Courts. Secondly, the Act of March 3, 1911,52 took from these courts jurisdiction over claims by officers of the government. These officers must therefore prosecute their claims in the Court of Claims in Washington, D. C.

THE SUPREME COURT OF THE UNITED STATES

The Supreme Court may perform one of two functions in connection with claims tried in the Court of Claims. By the Act of February 13, 1925,53 the Court of Claims may certify questions of law to the Supreme Court for instructions. The Supreme Court will not entertain certification of questions of fact, or of mixed questions of fact and law, or a hypothetical question, but it will not refuse to accept certification of proper questions merely because its answer of the questions may prove decisive of the case.54 Also upon petition of either the Government or the claimant the Supreme Court may require by certiorari that any case in the Court of Claims be certified to it for review and determination of all errors assigned. In such event the Court of Claims includes in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned to be settled by the Court.55

In concluding this section it is desired to point out that Section 154 of the Judicial Code56 provides that a person may not sue the United States in the Court of Claims or, on appeal therefrom, in the Supreme Court on

49Sanderson v. United States, 41 Ct. Cl. 230 (1905).
50The Court of Claims, which has no jury trials, has its own procedure and is not governed by civil procedure in use in other Federal courts.
a claim for which he is already suing in another court the person who acted as agent for the United States in the transaction out of which the claim arose. This provision does not apply where the United States, instead of its agent, is defendant in the suit pending in another court, because the purpose of the provision is to require an election between a suit in the Court of Claims and one brought in another court against an agent of the government, in which latter case the judgment would not be res adjudicata in the suit pending in the Court of Claims.57

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ADMINISTRATIVE LAW
JUDICIAL DETERMINATION OF COVERAGE IN ENFORCING ADMINISTRATIVE SUBPOENAS

SINCE the decision of the Supreme Court which established that a justiciable case or controversy was presented to a federal district court on application for enforcement of an administrative subpoena, the function of the court passing on such application has been a disputed and oft-litigated issue. It is established that “appropriate defence may be made”. What defenses are “appropriate”, however, has not yet been clearly determined. The doctrine of Endicott Johnson Corporation v. Perkins forms an important link in the chain of cases leading to a final determination of the issue.

The first link in that chain was forged in an era when an eminent authority, speaking of the doctrine of “supremacy of law”, stated (in 1885) that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.” The development of administrative regulation and law, necessitated by the “broadening concepts of the responsibility of government” and “a new complexity in the economic structure”, has reduced that concept to a rôle of purely historical significance. The change is a result of the strug-
gle of administrative agencies for recognition and power commensurate with the needs of effective regulation—a struggle that has been directed against the rigidity of a system resting upon nine centuries of judicial experience.\textsuperscript{9} While the function and duty of the courts is to protect the constitutional rights of persons affected by legislative delegations of power to administrative agencies, "under the guise of constitutional and statutory interpretation, efforts to thwart the effects of those legislative judgments are not uncommon."\textsuperscript{10}

Typical of the cases in the early stage of administrative regulation are the Brimson,\textsuperscript{11} Harriman,\textsuperscript{12} and Ellis\textsuperscript{13} cases. Since the determination of those cases, however, "the extension of administrative activities has increasingly brought to the attention of the Supreme Court the problems of the rôle of administrative bodies in our governmental setup, with a resultant evolution of a new judicial attitude as to their relation to the courts."\textsuperscript{14} Circuit Judge Jerome Frank lists four evidences of the change in attitude:\textsuperscript{15}

(1) modification of the doctrine of the Ellis case, which stressed the impropriety of administrative inquiry into private business;\textsuperscript{16}

(2) the emphasis today upon the collaborative nature of the administrative and judicial functions;\textsuperscript{17}

(3) the recognized importance of promptness as well as adequacy in

\textsuperscript{9}Dean Landis speaks of the judicial review of legislative and administrative action as "a contest between two agencies of government—one, like St. George eternally refreshing its vigor from the stream of democratic desires, the other majestically girding itself with the wisdom of the ages." Landis, The Administrative Process (1938) 123.

\textsuperscript{10}Ibid.

\textsuperscript{11}Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894).

\textsuperscript{12}Harriman v. Interstate Commerce Commission, 211 U. S. 407 (1908) (where the ICC was held to be without power to undertake an investigation not pursuant to a specific complaint of any violation of the Act).

\textsuperscript{13}Ellis v. Interstate Commerce Commission, 237 U. S. 434, 444 (1915), in which Mr. Justice Holmes stated: "The appellant's refusal to answer the series of questions put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the [company which he represented]—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up."


\textsuperscript{15}Ibid.


\textsuperscript{17}United States v. Morgan, 313 U. S. 409, 422 (1941); Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 141 (1940).
administrative investigations; 18

(4) the stress now laid on the doctrines of "primary jurisdiction" 19
and "administrative finality" 20

This change in the "climate of opinion" 21 with respect to administra-
tive agencies is in line with a series of decisions restricting the function
of an auxiliary court when it is asked to lend its aid pursuant to statute.
It has been held, for example, that where judicial aid is sought to
compel testimony or procure evidence in connection with a grand jury
investigation, "witnesses are not entitled to take exception to the juris-
diction of the grand jury or the court over the subject matter that is
under investigation. In truth it is in the ordinary case no concern of one
summoned as a witness whether the offense is within the jurisdiction of
the court or not. At least, the court and grand jury have authority and
jurisdiction to investigate the facts in order to determine the question
whether the facts show a case within their jurisdiction." 22 Also, where
the aid of an auxiliary court is sought to compel testimony and procure
evidence in aid of a hearing in another court, the auxiliary court does
not determine for itself the relevance or competence of the evidence,
but only whether it is patently inadmissible. 23

Apparently in all federal statutes, administrative agencies may obtain
enforcement of subpoenas only by invoking the aid of a federal district
court, either directly or through the Attorney General. 24 Since orders of

18Compare Harriman v. Interstate Commerce Commission, 211 U. S. 407 (1908) with
See Miller, A Judge Looks at Judicial Review of Administrative Determinations, 1 Pike &
Fischer, Admin. Law (Articles and Reports) 223.

19Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285 (1922); Morgan v.
United States, 307 U. S. 183 (1939); United States Navigation Co. v. Cunard Steamship
Co., 284 U. S. 474 (1932); see Note (1942) THE GEORGETOWN LAW JOURNAL 545.

20Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939); Gray v. Powell, 314


23Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, 215 (C. C. A. 8th, 1906): "It is not
the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken
in a suit pending in the court of another district, to consider or determine the competency,
materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the
duty of such a court or judge to compel the production of the evidence, although the judge
deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it
clearly and affirmatively appears that the evidence cannot possibly be competent, material,
or relevant and that it would be an abuse of the process of the court to compel its
production."

24Federal Trade Commission Act, 38 STAT. 722 (1914), 15 U. S. C. §§ 49, 50 (1940); Fair
Labor Standards Act, 52 STAT. 1065 (1938), 29 U. S. C. § 209 (1940); Interstate Commerce
the agencies are generally subject to review only by Circuit Courts of Appeals, this situation appears to be "somewhat anomalous". However, the undisputed availability of judicial review by Circuit Courts of Appeals serves to emphasize the restricted nature of the function of the auxiliary court considering an application for enforcement of an administrative subpoena. Since, in case of an order by the agency, judicial review is assured, the district court should logically limit itself to considering issues which are "appropriate" to subpoena proceedings only.

Thus, the application may properly be resisted on the ground that a privilege of the witness, such as that against self-incrimination, would be violated; or that the subpoena is unduly vague or unreasonably burdensome; or that the hearing is not of the kind authorized by statute; or that the subpoena was not issued by the person solely vested with that power; or that it related only to a "fishing expedition"; or that the evidence sought is not germane to any lawful subject of in-


[25] Pike & Fischer, Admin. Law § 44g.3: "It must be admitted that this system is somewhat anomalous. In the first place, it allows interlocutory judicial review of preliminary matters of administration, although generally such matters may be reviewed only in connection with a 'final order'. In the second place, it permits interposition by the district court into proceedings the final outcome of which under most statutes may be reviewed only by a Circuit Court of Appeals. The first objection of course cannot be met as long as the present system is retained. The second, however, may be obviated by a proper exercise of judicial self-restraint on the part of the district judges, and a tendency toward such self-limitation is becoming evident in the decisions."

[26] See note 2 supra.


quiry in the administrative proceeding. These defenses, to a consideration of which the authority of the subpoena court undoubtedly extends, seem ample to protect individuals and corporations against any arbitrary use of the subpoena power.

There are two important considerations which militate against inclusion of the issue of coverage in this list of appropriate defenses:

(1) The administrative process would, in many instances, lose the flexibility and dispatch which have been described as its "salient virtues". Ordinarily an administrative investigation is directed at two issues—applicability of the statute to the person or company being investigated, and possible violations of the statutory provisions. The question of coverage is therefore one of the two major questions to be answered by the evidence sought. To require an investigation, administrative hearing, and judicial determination of the issue of coverage before there could be an investigation, administrative hearing, and judicial determination with respect to the alleged violation would defeat the efficient method which is the basis of the administrative process; and to require the administrator to prove coverage in a proceeding in which he seeks to obtain evidence on which to base his determination of coverage would not increase the "advantages of prompt and definite action" peculiar to administrative bodies.

(2) Coverage is a mixed issue of law and fact, the facts often requiring expert analysis of more or less technical considerations. Administrative experts "appointed by law and informed by experience" are qualified to pass on the trade customs, shipping practices, inter-company rela-

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33 Sunshine Coal Co. v. Adkins, 310 U. S. 381, 398 (1940).
34 John Foster Dulles, appearing before the Attorney General's Committee on Administrative Procedure (1940), stated: "The great complaint which I hear about most of these administrative bodies is that they are too legalistic, not that they are not legalistic enough. What people want is quick, efficient action. You go to a skilled surgeon and he finds a diseased spot. He takes a knife and cuts it out with expertness, sureness of touch, and a minimum of suffering. The body, relieved, goes on living. That is the kind of treatment which business and financial people, with whom I come in contact, expect of an administrative body. They do not want regulations which necessitate protracted and exhausting litigation. Yet if you compel these administrative bodies, in every move they take, to make a formal court record, if you plaster them with red tape, you are doing just that. You are going in the wrong direction." Quoted by Circuit Judge Frank at 128 F. (2d) 208, 218, n. 32 (C. C. A. 2d, 1942).
tionships, selling practices, and other questions of fact on which the issue of coverage is usually determined. This, in fact, is the administrator's raison d'être. It is established that a court shall not substitute its own for the administrative fact-finding, even after the administrative hearing has been terminated.\textsuperscript{38} Certainly the reasons for such judicial restraint are even more compelling where, as in a subpoena proceeding, the administrative proceedings are still interlocutory, for "Congress entrusted the Board, not the courts, with the power to draw inferences from facts."\textsuperscript{39} A judicial determination of coverage in a subpoena proceeding would contravene the express statutory provisions that findings of an administrator are to be conclusive,\textsuperscript{40} for, except under the highly impractical procedure outlined in the preceding paragraph, such judicial determination would be based not on review of the administrator's findings but on findings of the court itself. The process would be not judicial review but rather judicial preview, with the court passing on complicated questions of fact without "the benefit of special knowledge acquired through continuous experience in a difficult and complicated field."\textsuperscript{41}

That the Supreme Court has accepted this reasoning in refusing to permit a district court to consider the question of coverage in a proceeding to enforce an administrative subpoena seems apparent from the language used by Mr. Justice Jackson in writing the majority opinion in the \textit{Endicott Johnson case}.\textsuperscript{42} However, a study of the facts in the case indicates that the holding may be restricted to particular circumstances present in the case. Endicott Johnson Corporation entered into fifteen contracts with various executive agencies of the United States for the manufacture and furnishing of certain types of shoes and boots. Each contract included the representations and stipulations required by Section 1 of the Public Contracts Act\textsuperscript{43} that the contractor would pay his employees engaged in the manufacture or furnishing of the material not less than the minimum wages determined by the Secretary of Labor and

\textsuperscript{38}Gray v. Powell, 314 U. S. 402 (1941).
\textsuperscript{39}National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 597 (1941).
\textsuperscript{40}The Secretary "shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States." 49 Stat. 2036 (1936), 41 U. S. C. § 39 (1940).
\textsuperscript{42}This ruling [of the district court] would require the Secretary in order to get evidence of violation either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality." 63 Sup. Ct. 339, 343 (U. S. 1943).
that these employees would not be permitted to work more than the maximum number of hours established by the Secretary. Following an investigation instituted after completion of the contracts, the Secretary issued a complaint charging the corporation with having violated certain of the wage and hour representations and stipulations in eight of its twelve plants and departments, and executed subpoenas *duces tecum* requiring the production of books and records of all twelve departments. The issuance of the subpoenas was resisted by the corporation on the ground that the Act did not apply to the eight departments, the employees of which tanned most of the leather, cut most of the leather soles, manufactured all of the rubber heels and soles, and produced all of the cartons used by the company in the manufacture of the boots and shoes furnished under the contracts. Rejecting the arguments of the Secretary that the question of coverage was one for administrative determination and for review only by a Circuit Court of Appeals under the Act, the district court ruled that the Act did not apply to the employees in the eight disputed departments and denied the application for enforcement of the subpoenas.\(^{44}\)

The position of a public contractor in attacking investigations or regulation by Government agencies is inferior to that of private companies, even those affected with a public interest, for a contractor who has voluntarily entered into competition for Government awards does so on the Government’s own terms.\(^{45}\) That this truism had some influence on the Supreme Court seems to follow from a portion of the majority opinion:

"The Act directs the Secretary to administer its provisions. It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain Government business on terms of which they are fairly forewarned by inclusion in the contract."

And further:

"The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies\(^{47}\) are inapplicable and do not require consideration."\(^{48}\)

\(^{40}\) F. Supp. 254 (N. D. N. Y. 1941).

\(^{41}\) Atkin v. Kansas, 191 U. S. 207 (1903); cf. Note (1936) 5 Geo. Wash. L. Rev. 66.

\(^{42}\) 63 Sup. Ct. 339, 342 (U. S. 1943).


\(^{44}\) 63 Sup. Ct. 339, 344 (1943).
The relatively inferior standing of a public contractor in this respect may thus be a factor preventing use of the decision as a precedent for other cases arising under statutes of general applicability to industry—e.g., the Fair Labor Standards Act. However, other statements contained in the opinion point to the conclusion that its doctrine will be applied to administrative agencies other than those dealing with public contractors. For example, Mr. Justice Jackson states:

"Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the Act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions."

Furthermore, Mr. Justice Murphy, dissenting, criticized the doctrine in terms indicating that his interpretation of the decision was that it was meant to be applicable to all administrative organizations. Certainly, The legal propriety of instituting proceedings is a question which an agency is authorized if not obliged to determine, provisionally at least, before instituting the proceedings. But while the decision may be the agency's in the first place, it is not a decision which it is ordinarily more competent to make than the courts and judges, who (at least in theory) should be more qualified than administrative officers, many of whom are laymen, to determine whether a statute extends to a certain set of facts. If the preliminary determinations by an agency of the scope of its power and jurisdiction are sacrosanct, why did Congress subject their final determination to judicial scrutiny, as it has done in the Walsh-Healey Act with regard, at least, to the enforcement of the wage and hour requirements on behalf of the employees? And if the courts are qualified to pass final judgment on the quasi-judicial findings and conclusions of the administrators, which they are ordinarily permitted to do to a greater or lesser extent, they are no less qualified to determine whether the evidence which moved the administrator to enter a formal complaint is sufficient in law to show probable cause that the statute under which the administrator is proceeding covers the case. Without such a showing of probable cause, the district courts ought not to be required as a
counsel for the administrative agencies will adopt that interpretation in subsequent cases dealing with subpoenas issued by agencies other than the Public Contracts Division.

The chief argument which has been—and will be—presented in opposition to extension of the doctrine is, of course, the established principle that citizens are to be free from prying efforts of Government officials. However, this principle, like most others, is not an absolute; it must be reconciled with another accepted principle that undue complexity in, and prolongation of, litigation must be avoided. That reconciliation has been accomplished to an ever-increasing degree through the fifty years since the establishment of the "grandfather" of administrative agencies, the Interstate Commerce Commission, and there is no reason to believe that extension of the Endicott Johnson doctrine will operate to destroy that balance.

The Endicott Johnson ruling follows logically from the decisions of the Supreme Court that premature attack on administrative proceedings will not be tolerated. For example, respondents in an administrative proceeding are not entitled to a district court order enjoining the proceeding on allegations that the agency is without jurisdiction and that to allow the proceeding to continue would put the respondents to needless expense. The Circuit Court of Appeals decision in the Endicott Johnson case compares these rulings with the contentions of the company in this fashion:

"Had the defendants in the case at bar sought an injunction against the administrative proceeding, they would have failed in their effort. . . . Yet if the trial court's position in the instant case were tenable, the same result could be accomplished by indirection: a respondent in an administrative hearing could refuse to respond to a subpoena and, in a suit in court to compel enforcement of the subpoena, the court could do what it is forbidden to do under Blair v.

matters of mere routine to lend their aid to the proceeding by compelling obedience to the subpoena." 63 Sup. Ct. 339, 346 (1943) (dissenting opinion).

6Cobbledick v. United States, 309 U. S. 323, 325 (1940): "To be effective, judicial administration must not be leaden-footed."

6Stone, The Common Law in the United States, (1936) 50 Harv. L. Rev. 4, 16: "Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts."

United States, supra. The doctrine of the Bethlehem, Schauffler and Edison cases would become frivolous and lack real substance; it would relate merely to one procedural device utilized by a respondent wishing to have the courts interfere with what the Supreme Court said, in those cases, was the 'exclusive initial power' of the administrative officials to investigate and determine their own jurisdiction. If defendants were to win here, they would have discovered a way of 'running around the end' when blocked at the center. We do not take so lightly those recent and as yet undisturbed Supreme Court decisions.65

Other courts have reached conclusions comparable to that of the Supreme Court in the Endicott Johnson case. The Eighth Circuit Court of Appeals has held that a subpoena would lie for the production of records relating to employees in a plant which was allegedly engaged wholly in intrastate commerce and therefore outside the jurisdiction of the administrator under the Fair Labor Standards Act.57 The Fifth Circuit Court of Appeals has ruled that the district court might require the production of records without any showing by the administrator that the company was engaged in interstate commerce.58 Another federal court has established the doctrine that a company alleging lack of jurisdiction is not entitled to an adjudication of that issue in a subpoena proceeding where the agency alleges that jurisdiction is one of the questions under investigation.59

The possibility that these decisions, enforced by the Endicott Johnson doctrine, will free the hands of over-zealous administrators to investigate any and all industries in an effort to increase "bureaucratic" control of the economy is negatived by four factors:

(1) Congressional control of appropriations and investigatory powers with respect to all administrative agencies;

(2) the ever-present sobering factor of judicial review of the power exercised by the agencies;

(3) the established presumption that administrative officials will act properly;60 and, perhaps most important,

(4) the defenses which are admittedly "appropriate" in subpoena cases.

Thus, an attempt by an administrator to exceed the limits of his statutory authority, where the action is obviously outside those limits, could be prevented in a subpoena proceeding by a finding that the evidence sought was not relevant to any lawful subject of inquiry, for subpoena courts are certainly authorized to pass on obvious questions of relevancy and materiality. Administrative determination of coverage, where the statute in question is not clearly applicable, would be limited to cases where, as in the Endicott Johnson case, a close question of fact was presented. In such cases, judicial self-restraint should be exercised in the subpoena court so that the reviewing court might have the advantage of expert findings by the administrative body on the disputed factual issues.

If, after preliminary investigation, an administrator has reasonable cause to believe that certain persons are covered by the act and that certain violations are present, no court should deny him access to the records needed to establish jurisdiction and violation, and the unnecessary burden that would be placed upon the relatively few companies subsequently found to be outside the administrator's jurisdiction would be less than substantial when compared with the advantages that would inure to the public by reason of a swift and effective administrative process. This increased collaboration of the courts and the administrative agencies will aid in the enforcement of legitimate administrative regulations, while in no way depriving private persons of their constitutional rights.

WILLIAM J. BARNHARD

FEDERAL LEGISLATION
FEDERAL LAND ACQUISITIONS

Recent acquisitions of land by the Federal Government for war and related purposes have presented to Congress an important issue. Since January 1, 1940, the War and Navy Departments have acquired approximately twenty million acres of land in the continental United States.¹

Each acquisition has placed before the state and community of its location at least one major problem. One such problem is that of disruption of the social and economic life of the community caused by a sudden and extreme increase in population and the resulting burden upon community services. It may be that the land taken was the main source of support for the entire community, while the community itself was left untouched. For example, the establishment of a bombing range on the public domain always necessitates the cancellation of existing grazing permits, upon which a stock-raising area is so dependent. In the absence of compensating benefits, the very existence of the community is threatened. Or it may be that the main source of revenue of a taxing district has been taken from the tax rolls, imperiling the ability to maintain schools, utilities or protection facilities. And, with depleted revenue, the community faces added expenses born of the emergency.

As the Supreme Court has interpreted the Federal Constitution, the states have no power to tax federal real property.² Still, where the net result of the taking of land by the government is a loss to the community, either through increased expenditures required to provide services for the project, or a decrease in tax revenue, it would appear that the United

¹Divided as follows: to the Navy Department from private owners, 813,382.59 acres, 89 Cong. Rec., Feb. 23, 1943, at 1261. To the War Department from the public domain, approximately 12,400,000 acres; to the War Department from private owners, approximately 6,786,618 acres. (Estimate of Col. J. J. O'Brien, Chief, Real Estate Branch, Office of the Chief of Engineers, War Department.)

²"... whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent." Van Brocklin v. State of Tennessee, 117 U. S. 151, 175 (1885). "National banks are... agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent." First National Bank v. Anderson, 269 U. S. 341, 347 (1925). The classic case is McCulloch v. Maryland, 4 Wheat. 316, 429 (1819): "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are... exempt from taxation." Congressional authority is an express delegation: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting... Property belonging to the United States;..." U. S. Const. Art. IV, § 3.
States is at least morally obligated to render assistance. In many instances in the past Congress has recognized this obligation by the enactment of remedial legislation.\(^3\)

As early as 1820 the Government recognized an obligation to the states from which public lands were withdrawn for private sale, and legislation was enacted requiring a percentage of the proceeds to be set aside for use by the states "for the purpose of education or of making public roads and improvements".\(^4\) Since that time the problem of dealing with federal acquisitions of land has arisen on numerous occasions and has been handled on a piecemeal basis. A view of the legislation providing the right to tax, or payments in lieu of taxes, thus far clearly shows the lack of any consistent policy. By treating the problems individually as they have arisen, a consistent policy was out of the question. However, three clearly defined categories have evolved into which these acts have fallen.

The first class is mainly composed of cases in which an instrumentality of the Government acquires land for a purpose more commercial than governmental, and frequently productive of income. In these instances direct taxation of the property has often been allowed by statute on the same basis as privately owned property in the same taxing district. For example, property used to carry out the purposes of the Bankhead-Jones Farm Tenant Act\(^5\) is taxable by states, territories and political subdivisions in the same manner and to the same extent as other similar property.\(^6\) Also falling in this category is all real property to which the Reconstruction Finance Corporation might obtain title.\(^7\) In most of the recent cases, the use of this property is primarily for war industry. A majority of the acts in question are included within this first category.

The second most important classification, from the standpoint of the number of specific acts passed, is the type of act that pays to the state or its subdivision, or both, a percentage of the proceeds of the activity for which the land was taken. The most striking example of this type is in the case of the Tennessee Valley Authority, in which the Congress provided that 5 per cent of the gross proceeds derived from the dams situated in Alabama and Tennessee were to be paid to the respective states.\(^8\) Other examples of this type are statutes requiring the Secretary of the Interior to pay to the states percentages of the proceeds, or royal-

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\(^3\)A brief digest of all such acts passed prior to June 30, 1937, is set forth in H. R. Doc. No. 111, 76th Cong., 1st Sess. (1939) 8-11.


ties, on oil, gas and mineral lands included within Indian reservations, and the provision requiring payment of part of the proceeds of the Boulder Canyon Project to the states of Arizona and Nevada.9

The third type of statute, which is a fairly recent development, authorized direct payments to the states and local taxing units in lieu of lost taxes. For example, the Farm Security Administration, in its acquisitions for resettlement and rural rehabilitation projects, has been directed to enter into agreements with the states and political subdivisions to pay annual sums in lieu of taxes. The sums paid

"shall be based upon the cost of the public or municipal services to be supplied for the benefit of such project . . ., but taking into consideration the benefits to be derived by such State or subdivision or other taxing unit from such project."10

Another example of this type, although somewhat different, is the act dealing with the problem in relation to the United States Housing Authority, where the payment is not to exceed the taxes that would be paid if the property were not exempt, and the element of off-setting gains to the community is not considered.11

In the early days of the present administration it was recognized that the adoption of a definite program with respect to the treatment of state and local tax losses would be essential in order to contend with the problems accompanying increased federal participation in public works and the consequent increased federal ownership of interests in land. At a meeting of the National Emergency Council held December 17, 1935, the President of the United States designated the Secretary of the Treasury, the Attorney General, and the Acting Director of the Bureau of the Budget to serve as a committee to make a study of federal ownership of real estate and of its bearing on state and local taxation. On October 14, 1938, the Committee, having completed its study, submitted its report to the President.12 It was disclosed that at that time the Federal Government owned more than twenty per cent of all land in the United States and that the extent of the holdings was approximately identical with the area of all states east of the Mississippi River, excepting Alabama, Florida, Georgia and Mississippi. The report further stated that "The present assessed value of all real estate in the continental United States now being taxed is $113,479,208,000. If the Government's holdings were as-

sessed for tax purposes on the same basis as other property, their value would be $3,282,914,000", or less than 3 percent of the whole.

As a result of the studies of this committee, the President, by Executive Order, on January 14, 1939, established the Federal Real Estate Board.\(^9\) The Board consists of members designated by the heads of the War Department, Departments of Agriculture, Commerce, Interior, Justice and Navy, the Tennessee Valley Authority and the Bureau of the Budget. The President imposed upon the Board the duty to "... make appropriate recommendations regarding the situation in different communities. ..." Its activities are described by the Board as follows:

"When executive departments or agencies contemplate the acquisition of additional real property, they are to ascertain from the Public Buildings Administration, Federal Works Agency, whether there is any real property in Federal ownership that may be available for the purpose contemplated, and, in all cases in which such action may appear desirable, to consult with the Federal Real Estate Board regarding the acquisition of such Federal property for the use of their own department or agency.

The Board studies and makes appropriate recommendations regarding the situation in communities adversely affected by the loss of tax revenue on land purchased or acquired by the Government."\(^14\)

Before the Board was prepared to submit a comprehensive program, its problem was drastically altered and complicated with the advent of war, and, although it has been reported that a recommendation will be made in the immediate future, none has been submitted to Congress as yet.

In the meantime, many Members of the 77th Congress, prodded by their constituent communities, their state fiscal directors and their beliefs that federal assistance should be given, introduced bills "Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes".\(^15\) One such bill, providing for taxation by designated taxing units on the basis of the assessed valuation at the time of acquisition, passed the Senate and was briefly heard by the House Committee on the Public Lands.\(^16\) Although the executive de-


\(^14\) U. S. Government Manual (Bureau of Public Inquiries, Office of War Information, Fall, 1942) 415.

\(^15\) The following bills were introduced in Congress providing for taxation, by the states and their subdivisions, of federal real property acquired for military purposes, or for direct payments in lieu of taxes: S. 2308, S. 2475, S. 2566, S. 2777, H. R. 2234, H. R. 3101, H. R. 5093, H. R. 6903, and H. R. 7711. Only one of these bills (S. 2308) was reported by the Committee of its reference for action by the House or Senate as a whole, and none was enacted into law.

\(^16\) S. 2308, 77th Cong., 2d Sess. (1942).
partments concerned were strenuously opposed to a policy of allowing direct taxation, and action on such legislation was deferred indefinitely, every indication was given that both the Committee members and the executive departments involved hoped to work out an equitable program of reimbursement as soon as practicable.

The War and Navy Departments vigorously opposed the bill, both by letter and by appearance at the hearing. Both departments, however, expressed a knowledge of numerous existing hardships and a desire to cooperate. All executive departments that addressed themselves to the merits of the bill expressed a knowledge of the seriousness of the problem and a desire to assist in its solution. They were equally emphatic in their opposition to any proposal such as S. 2308, which would allow direct taxation. They all, however, expressed the desire that legislative action of any kind be postponed until the study of the Federal Real Estate Board had been completed and its recommendations considered by the President and Congress.

In a letter signed by the Honorable Henry L. Stimson, Secretary of War, and addressed to the Chairman of the House Committee on the Public Lands, it was stated that the War Department had uniformly opposed all the bills on this subject presented to it for consideration "on the ground that the subject of loss of tax revenue due to Federal acquisition is too widespread and intricate a problem to be met by specific remedial legislation." It was the opinion of the Secretary that in the majority of cases the losses in taxes were more than offset by the increases in industry, commerce and population, and, further, that "the acquisition of land by the Federal Government often results in liquidating assets acquired by the taxing units for non-payment of taxes, from which the community had previously derived no revenue...."

Referring specifically to S. 2308, the letter went on:

"The bill under consideration represents by far the most drastic proposal which has been introduced in an effort to meet the foregoing situation. It is obvious that such a measure would do far more than alleviate the loss of tax revenue suffered by certain communities. There is no provision restricting the taxing authority to those projects whose establishment has resulted in hardship to the locality. On the contrary, those communities which have prospered greatly through federal installations will be able to tax federal property along with the few communities which are suffering marked reductions in tax revenue."

\[17\] Hearings before House Committee on the Public Lands on S. 2308, 77th Cong. 2d Sess. (1942). The letters referred to are a part of the unprinted record of the hearing in the files of the House Committee on the Public Lands.

\[18\] Ibid.

\[19\] Ibid.
The Secretary recognized, however, that the withdrawal of areas, large in number and in size, which were formerly subject to state and local taxation, had in many cases resulted in the diminution of tax revenues of local taxing authorities, and indicated a desire to cooperate in a program to reimburse losses which could reasonably be shown to be in excess of the community's gains because of the establishment.

The Navy Department was equally emphatic in its opposition.\(^{20}\) It pointed out the inability of local tax boards to make their assessments of railway and public utility properties with any predictable degree of uniformity. The Navy Department letter, signed by A. L. Gates, Acting Secretary of the Navy, foresaw a hopeless mass of litigation and administrative complexity, and the possibility of an attempted "sale of a great navy yard or air station by the local sheriff for non-payment of taxes". The letter went on to state:

"With a huge tax burden to carry in connection with land acquired for war purposes, the tendency would be to throw these extensive real estate holdings upon the market immediately after termination of the war, to save Federal tax expenditures. This would tend to depress real estate values throughout the entire country, with a consequent decrease in tax revenues for the States and their subdivisions."

At another point in the letter it was said:

"A fundamental distinction appears between the principle involved in the case of lands used for military purposes and those with respect to which concessions already have been made by the Congress, such as lands acquired for national housing projects. The lands and improvements contained in the former class are maintained for the general protection of all the people of the nation, and no local police, fire or other municipal service is required, for such lands are generally under the exclusive jurisdiction of the United States. These lands in the latter class need police, fire and other municipal benefits and services are maintained for a special class of persons."

Officially, the War and Navy Departments considered only the plan offered in S. 2308, and neither opposed nor fostered any other plan of reimbursement. Commander Chester C. Ward represented the Navy Department at the hearing. When it was pointed out to him by Congressman Anderson of New Mexico that nothing but detriment to the community attended the acquisition of grazing lands for use as a bombing range, he expressed his personal opinion that something in the nature of a direct payment should be made to alleviate this condition. However, in such a case, if the grazing land were withdrawn from tax exempt public domain, no benefits would accrue under a bill such as S. 2308.

Colonel J. J. O'Brien, a member of the Federal Real Estate Board,

\(^{20}\)Ibid.
testifying for the War Department at the hearing, said that to allow direct taxation by the taxing districts would create an impossible situation. He pointed out that in the city of Chicago alone the War Department deals with about forty different taxing boards. But, speaking of situations in which the land acquisition has been accompanied by a decrease in school district revenues, in the face of a tremendous increase in the number of school children to accommodate, Colonel O’Brien said: “That is an instance where perhaps we ought to have more authority to use our land acquisition funds for clearing up the bonds that are outstanding over the whole district and whereby we might be permitted to make some direct payment by the Government to the district”.

Later, speaking of the problem in general, he said: “But we do need legislation that would permit some sort of in-lieu-of-tax payments.”

The situation in the 78th Congress, thus far, is about where it stood at the close of the 77th. Interested Members wasted little time in reintroducing legislation on the subject, and, while H. R. 1288, one of several bills having provisions identical with those of S. 2308 of the 77th Congress, prompted the comment by the Navy Department that it “appears to be substantially as objectionable as any previously reported on”, another bill, H. R. 507, was greeted more favorably. H. R. 507, titled “A bill to allow payments in lieu of taxes on property taken by the United States Government”, seeks to provide that whenever real property has been taken by the Government since September 1, 1939, in any school, sewer, or water district, exceeding 10 percent of the total assessed valuation of such district, the Government shall assume and pay such percentage of the total indebtedness of that taxing district as the assessed valuation of the property taken bears to the total assessed valuation of the district.

Again, however, the request was made that the Committee postpone action, and, in the letter signed by James Forrestal as Acting Secretary of the Navy, the Navy Department said:

“Although H. R. 507 does not contain many of the undesirable features included in somewhat similar proposed legislation, such as H. R. 1288, the Navy Department is convinced of the merit of a single comprehensive and integrated program to cover the problems of all bureaus and agencies administering federal real estate, as will be proposed by the Federal Real Estate Board, instead of

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23Statement made in a letter addressed to the Chairman of the House Committee on the Public Lands, dated Feb. 22, 1943, signed by James Forrestal, Acting Secretary of the Navy, expressing the official views of the Navy Department on H. R. 1288.
somewhat fragmentary plans which deal with only one aspect of the problem, such as H. R. 507. 24

The letter went on to say that the report of the Board could be expected in the "immediate future".

In determining whether reimbursement beyond payment for the land proper should be made, reference might first be made to a classification of the land itself at the time of its conversion. From a constitutional standpoint, of course, the purpose for which the land was acquired is the most obvious criterion. A much stronger case for reimbursement of losses can be made out by the state if the use is not confined to strictly governmental functions, such as an army post, an office building or a veterans' hospital, but is for a revenue producing activity, such as a housing project, power plant, or national park.

The manner in which the property is acquired also determines in a large measure the equities involved in the state's claims. If the property was taken from the public domain, the situation is quite different from cases in which the acquisition was by purchase, gift or foreclosure.

Similarly, the previous status with respect to taxation is important in determining the justice of a state's claim. If the property was previously taxable and has been withdrawn from the rolls, a hardship may have been created. On the other hand, it may be, as it is in many cases, that new wealth has been created in the community and, even though property may have been removed from the tax rolls, the benefits to the community nullify the losses.

It cannot be disputed that a military purpose is necessarily a strict governmental purpose. It is evident, therefore, that no legal basis can be claimed for reimbursement and that any payment whatsoever must spring from the desire on the part of Congress to distribute the burden of war evenly throughout the Union. Because reimbursement is dependent upon the will of Congress, it would seem that the manner in which the property was acquired should be of only passing interest, and that the real question to be answered in the individual appeal for assistance relates principally to the third type of classification: namely, was the property an important source of revenue to the taxing area, or, did its acquisition by the Federal Government saddle the area with social and economic problems which represent more than the proper share of the burden of war which that local unit should be called upon to bear?

From the standpoint of the states and subordinate taxing areas, classi-

24Statement made in a letter addressed to the Chairman of the House Committee on Public Buildings and Grounds, dated Feb. 12, 1943, and signed by James Forrestal, Acting Secretary of the Navy, expressing the official views of the Navy Department on H. R. 507.
fication of land as to the projected use, the manner of its acquisition and its previous status with respect to taxation is relatively unimportant. To grant, deny, or allocate aid on the basis of any such classification is to ignore the fact that taxing areas are confronted with new problems which they are not prepared to meet. For example, it seems inequitable that payments should be made only to those taxing districts whose federal projects happen to be income-producing and not to those where the establishment is for purely a governmental function. The earning capacity of the project bears no relationship to its effect upon the fiscal and social problems of the area.

It is possible to make a few conclusions with respect to the type of solution to be anticipated.

What form of solution will be recommended by the Federal Real Estate Board is uncertain. Whatever form it takes, it is certain to be one designed not to solve the problems raised by military acquisitions alone, but to be a "cure-all" in the field of federal land acquisitions. A program of such a comprehensive nature may well be too broad to meet the immediate threats of the war program. It seems reasonable to expect a recommendation that an administrative agency, possibly the Federal Real Estate Board with increased authority, be directed to act as custodian of federal real estate and to hear and evaluate the claims of the states for reimbursement, making appropriate recommendations to Congress.

Members of Congress seem uniformly to favor immediate action, but want to see what the Federal Real Estate Board might have to offer first. Unless its plan proves too comprehensive, it seems quite probable that legislation of the type represented by H. R. 507 will be pushed to enactment.

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WOODROW S. WILSON
NOTES

THE PLEA NOLO CONTENDERE

From time to time the question has arisen concerning the power of a Court to accept a plea of nolo contendere in cases where the prosecution does not actively acquiesce, or perhaps even opposes, acceptance of the plea. The plea nolo has been used with great frequency in late years in anti-trust cases. The suits which have been instituted by the Anti-Trust Division of the Department of Justice have, in many instances, been settled by the granting of a plea of nolo contendere in the criminal suit and signing of a consent decree to close the civil action. It is not necessary at this time to detail the growth and development of the enforcement of the anti-trust laws. Previous articles have covered the subject fully.\(^1\)

Meaning, and Effect, of a Plea Nolo Contendere

Literally translated, nolo contendere means "I do not wish to contend," and Bishop states that this plea "is the defendant's declaration in court that he will not contend with the prosecuting power."\(^2\)

The courts occasionally refer to the plea as a compromise between the Government and the defendant.\(^3\)

The plea of nolo contendere is considered the equivalent of a plea of guilty for the purposes of the particular case, and there is no limit, other than statutory, upon the punishment which can be imposed under it. It is, however, an appeal to the mercy of the court and may result in lighter punishment because of the saving in time and expense of prosecution and because it is not a flat admission of guilt. The courts take the position that the plea is an admission of guilt solely for the purposes of the case in which it is filed.\(^4\)

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\(^1\) Hamilton & Till, Anti-Trust in Action, T. N. E. C. Monograph No. 16 (1940); for a brief summary of the field see Wood, Patents and Anti-Trust Law (1942) 25-28, Commerce Clearing House; see also Report of the Attorney General for the years 1940, 1941, 1942.


It was at one time believed that no sentence of imprisonment could be imposed if the court accepted the plea of nolo contendere. It was thought that the plea could not be accepted if the required penalty was imprisonment. Where the penalty was either fine or imprisonment, the plea could be accepted, but the court was limited to the imposition of a fine. This limitation was in effect discarded in Hudson v. United States, which held that a court may impose a prison sentence after acceptance of a plea of nolo contendere. This is now generally recognized and prison sentences are occasionally imposed where a plea nolo contendere has been entered.

There is apparently only one real advantage in pleading nolo contendere, beside the possible advantage that the court will be more apt to impose a light sentence. The plea or the fact of conviction thereon cannot be used against the defendant in subsequent civil proceedings as an admission or proof of guilt. The plea may be used in a subsequent proceeding merely for the purpose of establishing the fact of conviction, since a finding that the defendant has been "convicted" requires no preliminary or collateral finding that he has admitted guilt or that he is guilty. But, as has been indicated, the judgment does not act either as an estoppel between the parties in the criminal proceeding or as an admission by the defendant of the facts pleaded in the indictment.

The nature of a plea nolo contendere is well summed up in Hudson v. United States, as follows:

"The plea of nolo contendere was long known at common law. It was there regarded, not as a plea of right, but as a plea of grace, to be accepted or refused by the court in its discretion. This was because the plea was neither one of guilty nor one of not guilty, but rather an appeal for mercy. Being in form a declaration by the accused that 'he will not contend with the' prosecuting authority under the charge, it was not, in the strict sense of that term in the criminal law, a plea at all. It was, however, treated as a plea and its effect, when entered, was that of confession of guilt, and on a record thus made sentence could validly be imposed; but the confession, implicit in the plea, could not be used against the

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6 272 U. S. 451 (1926), affirining 9 F. (2d) 825.
7 See also Farnsworth v. Sanford, 33 F. Supp. 400 (D. C. Ga. 1940); Dillon v. United States, 113 F. (2d) 334 (C. C. A. 8th, 1940).
8 People v. Edison, 100 Colo. 574, 69 P. (2d) 246 (1937); In re Smith, 365 Ill. 11, 5 N. E. (2d) 227 (1936); White v. Creamer, 175 Mass. 567, 56 N. E. 832 (1900); State v. LaRose, 71 N. H. 435, 52 Atl. 943 (1902); Wright v. Wright, 98 N. J. Eq. 528, 131 Atl. 94 (1925); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. C. Minn. 1939); Barnsdall Refining Corp. v. Birnam Wood Oil Co., 32 F. Supp. 308 (D. C. Wis. 1940).
10 Supra note 2 at 825.
defendant in any civil suit for the same act. This, briefly, was the common-law understanding of the plea of nolo contendere, and, in the absence of federal statutes providing for its use or varying its meaning, this also is the nature of the plea in federal jurisprudence."

Such a judgment, however, though not available against the defendant in subsequent proceedings, may be used by him upon a plea of double jeopardy. In United States v. Glidden Co.,11 the Court held that conviction and punishment on a plea of nolo contendere operated for the protection of the defendant against subsequent proceedings as fully as a former conviction or acquittal. This holding was followed in United States v. United States Industrial Alcohol Co.12

Once the defendant makes this plea, he is without right to change it. The court, itself, can set it aside without any request from the defendant.13

The defendant may, of course, apply for leave to withdraw a plea of nolo contendere, but the plea can be withdrawn only by leave of the court.14 Not only must the defendant ask for leave to withdraw his plea, but under the construction of Rule 2 (4), 28 U. S. C. A. § 723 (a) in Farnsworth v. Zerbst,15 the application must be made within ten days after the plea has been entered, and before sentence has been imposed.16

This section (Rule 2 (4) of the Rules of Criminal Procedure) provides:

"A motion to withdraw plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed."

If a defendant has pleaded not guilty and wishes to switch to nolo contendere, he can probably do so at any time before trial.17

**Discretion of the Court in Accepting the Plea**

Nolo contendere may not be pleaded as a matter of right. It can only be pleaded by leave of court, which has the entire discretion to accept or reject the plea.18

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1598 F. (2d) 541 (1938).
16See also Farrington v. King, 128 F. (2d) 785, 786 (C. C. A. 8th, 1942).
18See Barnsdall Refining Corp. v. Birnam Wood Oil Co., 32 F. Supp. 308 (D. C. Wis. 1940);
In *Twin Ports Oil Co. v. Pure Oil Co.*, the court said:

"After a considerable period of negotiations with the government, and upon its recommendation and with the consent of the court, the pleas of nolo contendere were entered. It is true that a plea of nolo contendere can only be filed with the court's consent, and often is in the nature of a compromise between the government and the defendants. *The acceptance or rejection thereof rests wholly within the discretion of the trial judge.*" (Italics supplied.)

A recent treatise has this statement regarding the acceptance of the plea in the discretion of the court:

"A 'consent decree' in anti-trust proceedings can only be entered with the consent of the government, whereas a plea of nolo contendere can be accepted by the court over the protestations of the prosecutor."20

From the many statements in the cases to the effect that the plea of *nolo contendere* can only be filed with the court's consent and that its acceptance or rejection rests wholly within the discretion of the trial judge, it may be inferred that the government has no control over the court's acceptance. Statements in the *Twin Ports* and *Hocking Valley* cases, *supra*, to the effect that the plea is a compromise between the Government and the defendant indicate that the court will be influenced by such an agreement between the parties. Such negotiations cannot, in any event, conclude the court. The exercise of the discretion is "the solemn responsibility of the Court, one which cannot be shared or delegated."21

JEROME DOHERTY

**RIGHT OF REPRESENTATION BY COUNSEL**

It is intended to orient the discussion herein around the following three cases, decided fairly recently in the United States Court of Appeals for the District of Columbia: (1) *Evans v. Rives;*1 (2) *Bostic v. Rives;*2 (3) *Howard v. Overholser.*


In all three cases writs of *habeas corpus* were sought. The application in the first listed case was in aid of a defendant convicted of a misdemeanor, who had not been informed of his constitutional right to the assistance of counsel. The second was an attack on the jurisdiction of the court by a condemned murderer, the ground being the alleged incompetence of assigned counsel. The third did not involve a criminal prosecution; it concerned the right of a person adjudged insane to be represented by counsel in *habeas corpus* proceedings.

**NECESSITY OF REPRESENTATION BY COUNSEL IN FEDERAL JURISDICTIONS**

The three above-mentioned cases, originating in the District of Columbia, lend themselves to a discussion of the right of representation by counsel in federal jurisdictions. There is a sharp difference between the scope of the right in federal and state jurisdictions.

In federal jurisdictions representation by counsel in criminal proceedings is a matter of express Constitutional guarantee under the Sixth Amendment. By construction it has been extended to require appointment of counsel where a defendant is unable to retain counsel, and where he has not intelligently and competently waived said personal right.

*Evans v. Rives* involved a District of Columbia statute which gave the Juvenile Court concurrent jurisdiction with the District Court of the United States for the District of Columbia in cases involving non-support of minor children. Evans was a thirty-nine year old tile-setter's helper, working six days a week, weather permitting, for day-wages of $4.50. He was summoned the night of July 1, 1941 to appear in the Juvenile Court the following morning. On appeal it was claimed that, in court, a paper was read to him, part of which he did not understand. After the paper was read he was asked if he pleaded guilty. He said he was guilty of not paying for support, by which he contended on appeal he merely meant to indicate that he was not supporting his minor child. A plea of guilty was entered, and Evans was convicted, the court, in lieu of sen-

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4 U. S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."


6 D. C. Code (1940) tit. 22, § 902. This statute provides, *inter alia*, that upon a defendant's conviction of non-support of a minor child, the Juvenile Court may impose a fine, or imprisonment up to one year, or both. Alternatively, it may order the defendant to make weekly payments for a year to the child's guardian. If the court is satisfied on information and due proof that the defendant has violated the terms of the order, it may forthwith sentence him under the original conviction.
tencing him to jail, ordering him to pay five dollars a week to the child's guardian. Five months later, being in arrears, Evans was sentenced under the original conviction to a year's imprisonment.

The Court of Appeals, after reviewing the authorities and describing the right to counsel in general, relied upon Johnson v. Zerbst,7 stating that the "Supreme Court held . . . (in Johnson v. Zerbst) . . . that the denial during trial of a criminal case of the constitutional right to the assistance of counsel would occasion loss of jurisdiction to convict, and that the conviction might be attacked in a *habeas corpus* proceeding in which an examination of the facts outside of but not inconsistent with the record of the criminal proceeding might be made."8

To the contention that Johnson v. Zerbst applies only where there has been a plea of not guilty, the Court of Appeals answered that it is equally important that an accused have the assistance of counsel in the preliminary stages before a plea is entered, whether he eventually pleads guilty or not.9 The other contention relied on was that the doctrine only applies to "serious offenses." This, the court said, had no merit.

The opinion ends with a strongly-worded observation to the Juvenile Court that the designed informality of its procedure should not blind it to the necessity of protecting the constitutional rights of defendants. In Johnson v. Zerbst it was stated that "The constitutional right of an accused to be represented by counsel . . . imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."10

It is of interest to note that Evans v. Rives was cited by counsel in the later case of O'Keith v. Johnston11 as supporting the proposition that the burden is on the government to show by affirmative evidence an intelligent waiver of counsel. The court said that Evans v. Rives was not in point, because "There was no finding there, as there is here, that counsel was intelligently waived."12 The petitioner had been formerly convicted of other crimes and had a bad record. Therefore he knew something about criminal procedure. While in jail he wrote letters to friends discussing whether or not he would retain counsel. He made no request, while in jail, that counsel be assigned. At the trial he conducted his own defense. The court intimated that even had the facts been similar, it would not have felt constrained to follow the rule of Evans v. Rives.

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9Id. at 641.
11129 F. (2d) 889 (C. C. A. 9th, 1942).
12Id. at 891.
Bostic v. Rives came into the Court of Appeals on appeal from denial of a writ of habeas corpus to Bostic, who had been convicted of a very brutal murder and condemned to death. The first allegation, which does not concern us here, was ruled out as not challenging the jurisdiction of the court. The second allegation in the petition was incompetency of assigned counsel, by reason of his youth and inexperience. Counsel had been for two years a member of the bar, and was twenty-three years old. The Court quoted Johnson v. Zerbst:

"... a judgment can not be lightly set aside by collateral attack, even on habeas corpus ... where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel."

It was held the petitioner had not sustained the burden of proof necessary to support the allegation of incompetency of assigned counsel. The court nevertheless searched the record, expressly because it involved a capital crime, but could find no evidence of incompetency on the part of counsel in his conduct of the case.

Howard v. Overholser presents a situation where a petitioner for habeas corpus, who had been adjudged insane, was allowed by the court to represent himself in the proceedings. Here the basis of appeal on denial of the writ was not violation of the Sixth Amendment, which has reference to criminal proceedings, but of the Fifth Amendment. Counsel on appeal sought to make out a denial of due process, basing his attack on the lack of an adequate hearing on the ground that petitioner was incapable of representing himself. The Court of Appeals stated that an insane person has sufficient legal capacity merely to set the court machinery in motion. It then becomes incumbent upon the court to appoint counsel or guardian ad litem to conduct proceedings on behalf of the insane petitioner.

The petitioner (a paranoiac who had slain his mother) relied originally on two grounds: (1) that he was entitled to removal, under District law, to his home state, Colorado; (2) that he was entitled to discharge, because he was no longer insane. He later waived his right to a hearing on the question of his sanity. The court did not reverse the decision remanding him to custody because no "cause of action" as to his right of removal was made out, the evidence tending to show Colorado had refused to accept him and such acceptance being a condition to the right of removal.

15U. S. Const. Amend. V.
"Since the petition did not state a cause of action in this respect, it is not apparent how petitioner could have been prejudiced by the inadequacy of the hearing, except in a procedural sense, which we think is not sufficient in the circumstances to require another hearing. It would be futile to send the case back for correction of the defect and the legal errors, only to reach the same result on the merits."17

The waiver by the petitioner of his right to a hearing on the question of his sanity in the court below was held insufficient by the Court of Appeals. However, as he was adequately represented by counsel on appeal, the court held that counsel's admission upon argument that the petitioner was insane constituted a waiver of the petitioner's right to a hearing on the issue of sanity.

Does the Sixth Amendment apply only to criminal prosecutions, or does it extend to cases involving personal restraints, not in the nature of criminal sanctions? Despite expressions to the contrary, the Sixth Amendment would seem to apply only to criminal proceedings. Necessity for representation by counsel in other cases must be premised on the Fifth Amendment.

In Powell v. Alabama the Supreme Court said:

"In Ex Parte Chin Loy You, 223 Fed. 833, . . . a deportation case, the district judge held that under the particular circumstances of the case the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the Judge said ' . . . but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner'.18

Though in Powell v. Alabama19 both the Sixth and the Fourteenth Amendments20 are applied, the later case of Johnson v. Zerbst21 states that the Sixth Amendment refers to criminal prosecutions in federal courts.

The Court says in Powell v. Alabama that the right to representation by counsel in a criminal case stems from one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . The right to the aid of counsel is of this fundamental character."22 The Court cushions the right on both the Sixth and the Fourteenth Amendments, perhaps placing, by sheer weight of quotation and qualification, more emphasis on the latter, e.g., "What does a hearing include? Historically and in practice, it has always included the

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19Id. at 67, 68.
right to the aid of counsel when desired and provided by the party asserting the right.”23 Again, “If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.”24

Betts v. Brady25 also deals at length with the history of the right to the aid of counsel in criminal proceedings and demonstrates that the harsh common law rule still exerts a strong influence in the states. At common law, it will be seen, assistance of counsel was only denied in criminal cases, the rule in others, including misdemeanors and civil suits like trespass, being much more liberal.26

Representation by Counsel in State Jurisdictions

Powell v. Alabama leads logically into a discussion of the extent of the right in state jurisdictions. Of course, much of the discussion under the previous heading of the necessity of the aid of counsel in criminal proceedings applies equally in state jurisdictions where it is well settled today that a defendant is entitled to the aid of counsel. It is not true to say of the states, however, that this necessarily includes appointment of counsel.

The lines of demarcation between the federal and state jurisdictions in this regard are most sharply etched when a set of facts involves assignment of counsel for indigents. It is here that the limitation of the right in state courts becomes apparent, and the explanation is found in the historical background of the subject. Representation by counsel in criminal proceedings was actually denied at common law in England, and in the very recent case of Betts v. Brady the Supreme Court stated that there was reasonable basis for the interpretation that state legislators merely intended to dissolve this common law disability, but not to give a defendant a right to aid of counsel whether or not he could afford to pay. Some state courts have interpreted provisions in their constitutions, a few even worded identically with the Sixth Amendment of the Federal Constitution, as not requiring that counsel be appointed. Such interpretations of state constitutions, of course, do not present a federal question. It is only when due process is considered to be invaded that the federal question emerges.

23Id. at 68.
24Id. at 69.
26For a valuable compilation of cases, see “Annotation—Accused’s constitutional right to assistance of counsel”, 84 L. ed. 383.
At common law in England in a criminal case "the privilege of a full defense did not exist in trials for treason until after 1688, and in the trial of other felonies until 1836." Lord Coke defended this by the assertion that the court was the defendant's advocate. Of course this contention was subject to the criticism that such advocacy was not a judicial function. And this was at a time when representation by counsel was permitted in the case of misdemeanors and certain civil cases, e.g., trespass. The defendant in a criminal proceeding could enlist the aid of counsel only as to legal points which the defendant himself raised.

"The early English common-law rule . . . (as stated in Powell v. Alabama) was never accepted by the American colonies prior to the Declaration of Independence; in at least twelve of the thirteen original colonies the right of an accused to counsel in a trial of any criminal charge was fully recognized . . . although in one or two instances the right of persons accused of crime to be heard and to have the assistance of counsel for their defense was (and still is) conferred in capital cases only."  

As to appointment, it is stated in Betts v. Brady: "In eighteen States the statutes now require the court to appoint in all cases where defendants are unable to procure counsel. But this has not always been the statutory requirement in some of those states. . . . This material demonstrates that, in the great majority of the States, . . . the matter has generally been deemed one of legislative policy."  

Not of itself a denial of due process, failure to appoint counsel is a circumstance to be considered along with all other circumstances, and if from all the circumstances it appears that the prisoner has been denied the substance of a fair trial, he is entitled to release on habeas corpus.  

"To decide a rule binding upon the States . . . would be to impose . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. . . . If we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property."  

Denial of the right to the aid of counsel is a ground frequently advanced in criminal appeals. Whether suits originate in federal or state jurisdictions, there is a constantly reiterated emphasis in the opinions on the paramount importance of factual situations. This emphasis on circum-

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27Id. at 383.
28Id. at 384.
29316 U. S. 455, 470 (1942).
stances should insure that the subject will continue to be a fruitful source of litigation.\textsuperscript{32}

\textbf{JOHN D. LANE}

\footnotesize\textsuperscript{32}The Supreme Court recently held that a defendant, charged with a felony, has the power to waive jury trial, without the aid of counsel. The majority opinion referred to the right to the assistance of counsel and the right to jury trial as not being “legal formalisms.” The dissenting opinion argued the need of an objective standard for the trial court to utilize where attempts are made to waive constitutional rights. United States \textit{ex rel.} McCann v. Adams, 317 U. S. 269 (1942).
RECENT DECISIONS

CONSTITUTIONAL LAW—Is the “Death-sentence” Clause of the Holding Company Act Constitutional?

The North American Company, a public-utility holding company registered with the Securities and Exchange Commission, was ordered by that agency, pursuant to its authority under the Public Utility Holding Company Act, 49 Stat. 803 (1935), 15 U. S. C. §§79-79z-6 (1940), to select the operating subsidiary which North American wished to consider its principal system and to dispose of its other, unrelated systems. When the Company refused to make a choice, the Securities and Exchange Commission selected the St. Louis system for retention and ordered the Company to dispose of the others. The Company appealed the order to the Circuit Court. Held, that Section 30 of the Act, 15 U. S. C. § 79z-4 (1940), does not require the Commission to publish economic studies as a prerequisite to ordering divestment of holdings; that the action of the Securities and Exchange Commission in restricting North American holdings to a single, integrated system in the St. Louis area was not arbitrary or unreasonable; that the Act is a valid exercise of the federal power to regulate interstate commerce; and that Section 11 (b) (1), 15 U. S. C. § 79k (b) (1) (1940), does not violate the Fifth Amendment. North American Co. v. Securities and Exchange Commission, 133 F. (2d) 148 (C. C. A. 2d, 1943). The Supreme Court has granted certiorari.

The powers of the Commission under the “death-sentence” clause and other sections of the Act, contested by the North American Co., are, briefly: to require by order, after notice and opportunity for hearing, that each registered holding company take such action as the Commission shall find necessary to limit the operations of the holding company to a single integrated public-utility system and other reasonably incidental businesses, provided, that the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems if after notice and opportunity for hearing it finds (1) that the additional system cannot be operated separately without the loss of substantial economies; (2) that all the systems are located in reasonably contiguous areas; and (3) that the combination “is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.” 49 Stat. 820 (1935), 15 U. S. C. § 79k (b) (1) (1940).

The Commission is authorized and directed to make studies of public-utility companies, and to determine the sizes, types, and location of companies which can operate most efficiently in the public interest. Upon the basis of these investigations the Commission shall make public from time to time its recommendations. 49 Stat. 837 (1935), 15 U. S. C. § 79z-4 (1940).

The contention that the Securities and Exchange Commission is required to publish its studies authorized by Section 30 of the Act as a condition precedent to an order of divestment under Section 11 (b) (1) is specious. The statute
clearly indicates that the publishing of recommendations is an independent matter. Similarly, the argument that the Commission exceeded its authority and was arbitrary and unreasonable in selecting the St. Louis system as the "principal system" is contrary to the facts of the case. The statute provides that after notice and opportunity for hearing, the Commission shall require each registered holding company to limit its operations to a single integrated public utility system. It does not specify who shall decide which system is to be retained. In accordance with good administrative procedure, the Commission gave North American ample opportunity to choose its principal system. When they refused to make a choice the Commission acted. The Company cannot now argue that they were denied "due process" in the procedure leading to the selection. The Securities and Exchange Commission found that none of the subsidiaries of the Company met the standards set up for exemption from the operation of the Act. Of this the court said, "Whether economy is achieved by centralized control is always a doubtful question and one peculiarly fitted for decision by an administrative agency staffed by experts. On such an issue a court cannot review or reweigh the evidence." 

*North American Co. v. Securities Commission, supra* at 152.

The North American Company alleges that the Act exceeds the federal power to regulate interstate commerce. They contend that mere ownership of stock in other companies should not subject them to federal regulation. True, "ownership of stock . . . and its power to control . . . did not destroy the distinct corporate identity" of the subsidiary company nor subject the holding company's activities to regulation as interstate commerce. *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 144 (1930). But the power to control and the rendering of financial advice and financial assistance, as existed in the present case, is sufficient influence upon interstate commerce, if the subsidiaries are engaged in interstate commerce, to be regulated as activities affecting interstate commerce.

"That they conduct transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise." *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 440 (1938). Public utilities, even though their activities are confined to one state, are so integrally related to interstate commerce as to constitute an inseparable part of the web. See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938). Therefore, since utilities "affect" interstate commerce, and the holding company "affects" the utilities, the holding company is subject to federal regulation as having a "substantial" effect upon interstate commerce. Although North American objected to this reasoning, it is hardly open to question. In *Electric Bond and Share Co. v. Securities and Exchange Commission, supra*, the Court held that a public-utility holding company was subject to federal regulation under the commerce power, so that it must register with the Securities and Exchange Commission. Inasmuch as the North American is a
public-utility holding company, it is subject to federal regulation under the doctrine of Electric Bond and Share Co. v. Securities and Exchange Commission.

There remains only the question whether the statute contravenes the Fifth Amendment of the Constitution—that one may not be deprived of liberty or property without due process of law.

The Securities and Exchange Commission was given no broad discretionary power by Section 11 (b) (1). The Act was unequivocal in stating that public-utility holding companies should confine their holdings to a single integrated system. The Commission was given the duty of ascertaining, after notice and hearing, whether a company was a holding company within the meaning of the Act and what in the specific instance comprised a single integrated system. The Commission was authorized to allow exemption from the effect of the Act when a holding company could show that a subsidiary though not a part of the single integrated system could not be economically operated separately. This is no undefined delegation of authority.

The lack of due process, if there is such a lack, must lie in the substantive provisions of the Act. "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." United States v. Rock Royal Co-operative, 307 U. S. 533, 569 (1939). It has long been the rule that confiscation or destruction of property by state action can be justified only by public necessity. Conceivably, disposal of subsidiary property might be so difficult as to result in substantial impairment of the value of shares in the hands of the shareholders. But the Commission has ruled that "under the standards of the Act, difficulties of disposition have no bearing at all on whether any particular interest is retainable." In re North American Co. (1942) 10 U. S. L. Week 2660. The Commission has also stated that if the Company is unable to dispose of the properties within the year, "we may grant an additional year;" and further, "if at the expiration of the additional period, the same or similar facts continue to obtain, the Commission would not apply to a court for enforcement of its order." In re Driscoll, Trustees, Associated Gas and Electric Corp., C. C. H. Fed. Securities Law Serv. ¶ 75, 343 (1942). It is undoubtedly consoling to stockholders to know that if enforcement of an order amounts to confiscation, the Securities and Exchange Commission probably will not initiate court proceedings.

The Court has declared, "... whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." Florida v. United States, 282 U. S. 194, 211 (1931). This justification is set out by the Act as follows: "... it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—... (4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and co-ordination of related operating companies." 49 Stat. 803 (1935), 15 U. S. C. § 79a (b) (1940). In Electric
Bond and Share Co. v. Securities and Exchange Commission, supra, the Court emphasized that the sections of the Act are separable. It may be inferred that the Court felt that some of the sections of the Act were justifiable regulation and that others were not.

Nevertheless, the tendency appears to be to limit the right under the Fifth Amendment of the Constitution to one of due process in procedure. "The wisdom of the legislation and the appropriateness of the remedy is not the concern of the courts," North American Co. v. Securities and Exchange Commission, supra at 154. In the consideration of such legislation, "... the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." United States v. Darby, 312 U. S. 100, 120, 121 (1941).

If the Supreme Court chooses to follow this line of thought, the legal, political and economic consequences will be tremendous. All economic activity can be shown to have some effect upon interstate commerce. In the latest example, a farmer growing a few acres of wheat for home consumption could be regulated because the market for wheat is interstate. Wickard v. Filburn, 317 U. S. 111 (1942). If the Court will not question the purpose of the legislation, then the scope of federal power over all economic activity is unlimited.

The Securities and Exchange Commission believes there is a good chance that the Act will be sustained. The Court has upon occasion made rather sweeping "economic" decisions. "To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy ... " Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 395, 396 (1940).

The Securities and Exchange Commission has every reason to be confident.

EUGENE E. THREADGILL

EVIDENCE—Admissibility in Federal Courts of Statements Made in the Regular Course of Business.

An action for personal injuries and for the death of plaintiff's wife grew out of an accident which occurred at a grade crossing of the railroad of which the defendants are trustees in reorganization. Two days after the accident, the locomotive engineer who was driving the engine at the time of the accident signed a statement in question and answer form, which represented a stenographic transcript of an interview between the engineer and an assistant superintendent of the railroad.

The engineer having died before the time of the trial, which was held in a federal court by reason of diversity of citizenship, the defendants offered his signed statement as a statement made in the "regular course of business" under the statutory provision which renders admissible "any writing or record ... if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record."
49 Stat. 1561 (1936), 28 U. S. C. § 695 (1940). Defendants' offer to prove that the statement was made in the regular course of business was rejected, and the statement was excluded. On appeal, held, the statute was not intended to change the common law to the extent of making admissible such self-serving documents having no guarantee of trustworthiness. Palmer v. Hoffman, 63 Sup. Ct. 477 (1943).

There is little doubt that the engineer's statement would be inadmissible under the common law. Conner v. Seattle, R. & S. Ry., 56 Wash. 310, 105 Pac. 634 (1909). But see Sullivan v. Minneapolis Street Ry., 161 Minn. 45, 200 N. W. 922 (1924). Such a self-serving document, obviously made in anticipation of litigation, was almost uniformly excluded on the theory that it failed to meet the basic requirement that there be no motive to falsify, or at least that if such motive existed, it be clearly counterbalanced by circumstances indicative of general trustworthiness. In re Fennerstein's Champagne, 3 Wall. 145 (U. S. 1865); Poole v. Dicas, 1 Bing. N. C. 649, 131 Eng. Rep. 1267 (1835); Polini v. Gray, L. R. 12 Ch. D. 411 (1879); Lassone v. Boston & L. R. R., 66 N. H. 345, 24 A. 902 (1890); Wigmore, Evidence (3d ed. 1940) §§ 1422, 1522.

The primary question facing the Court was, therefore, whether the words "regular course of business" as used in the statute were words of art carrying with them their common law meaning or were to be read colloquially as denoting any course of conduct occurring with some degree of regularity in connection with the operation of any business. The practice of using common law definitions to explain statutory terms is commonly recognized. Case v. Los Angeles Lumber Co., 308 U. S. 106 (1939) ("fair and equitable" under the Bankruptcy Act); Keck v. United States, 172 U. S. 434 (1899) ("smuggling" under a federal statute); American Medical Ass'n v. United States, 72 App. D. C. 12, 110 F. (2d) 703 (1940) ("restraint of trade" under the Sherman Act); State v. Berryman, 8 Nev. 262 (1873) ("larceny" under a state statute). Opposed to adoption of this practice with regard to the term "regular course of business", however, is the current trend towards greater liberality in the admissibility of such evidence, as indicated primarily in the most recent proposals for revision of the code of evidence. Morgan, et al., Law of Evidence (1927) 63; American Law Institute, Code of Evidence (1942) Rule 514. Referring to this trend, with particular reference to the model act from which the statute in question was derived, one commentator has stated, with respect to the opinion of the Circuit Court of Appeals in the instant case: "Transgressors tread no harder way than do those who seek to liberalize the law of evidence." Note (1942) 56 Harv. L. Rev. 458.

The nub of the criticism directed at the decisions is that the issue of a motive to misrepresent—like other factors considered under the common law, such as death of the entrant, duty to a third person, knowledge on the part of the entrant—now is intended to affect only the weight, not the admissibility, of statements in the regular course of business. Clark, C.J., dissenting in Hoffman v. Palmer, 129 F. (2d) 976, 1001 (C. C. A. 2d, 1942); Note (1942) 56 Harv. L. Rev. 458, 467. However, the circumstantial guarantee of trust-
worthiness attaching to routine business documents is not merely a requirement under the common law; rather, it is the very essence of this exception to the hearsay rule. Dying declarations are admissible because the solemnity of approaching death is said to free the mind of all motives to misrepresent, *McCredie v. Commercial Casualty Ins. Co.*, 142 Ore. 229, 20 P. (2d) 232 (1933); statements that are part of the res gestae, because of their spontaneity, *Heg v. Mullen*, 115 Wash. 252, 197 Pac. 51 (1921); statements as to pedigree, because of the close family relationship, *Aalholm v. People*, 211 N. Y. 406, 105 N. E. 647 (1914). Inherent in all these exceptions are the required circumstantial guarantees of truth arising from the very nature of the statement. So, also, with respect to statements made in the regular course of business, the *sine qua non* of their admissibility is not the regularity with which they are made or the fact that they are made in connection with the operation of a business, but rather the fact that a routine recording of daily and customary business transactions gives rise to a strong presumption of trustworthiness.

The fact that reports such as that made by the engineer in the instant case are made to railroad officials after every accident and are therefore within the "regular course of business" as that term is popularly construed, does not bring it within the meaning of that phrase as used in law. The recording of such transactions is casual, rather than regular, and its prime purpose is not in railroading, but in litigating. As construed by the Supreme Court, the statute facilitated the admissibility of business entries by deleting some of the common law requirements without changing the fundamental nature of documents so admissible.

WILLIAM J. BARNHARD

FEDERAL PROCEDURE—Applicability of Statute of Limitations to Contempt Actions.

The Federal District Court of Missouri was custodian of a fund of almost $10,000,000 comprising the proceeds of a contested increase in insurance rates. Influenced by an offer of bribes totaling $750,000, Pendergast and others, by fraud and deceit and through misrepresentations by attorneys, induced the court to issue a decree effectuating a corrupt settlement of litigation. Three years after the decree was issued and while it was still executory, the plot was discovered and two of the petitioners were convicted of evasion of income taxes. After the lapse of another year, an information was filed charging the petitioners with contempt of court. The defense of the statute of limitations was overruled and petitioners were convicted. Upon appeal to the Circuit Court of Appeals, the conviction was affirmed. The case reached the Supreme Court on certiorari. *Held*, the three-year statute of limitations applies to contempts committed in the presence of the court and begins to run upon the completion of the last act which can properly be called "misbehavior" in the "presence" of the court, *Pendergast v. United States*, 63 Sup. Ct. 268 (1943).

The Supreme Court, reversing the lower courts, in effect declared their decision
to be but another example of the old maxim that "hard cases make bad law." The righteous indignation of the lower courts at the corrupt manner in which the District Court had been hoodwinked carried them a little beyond the limits of their statutory authority to punish for contempt.

The power of the federal courts to punish for contempt is derived from Section 268 of the Judicial Code, 36 STAT. 1163 (1911), 28 U. S. C. § 385 (1940), which provides that "the said courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. . ." Whether a contempt within the meaning of Section 268 was committed in this case is not decided by the majority, although Mr. Justice Jackson, in an earnest dissent, takes the position that the conduct of the petitioners was "misbehavior" in the "presence" of the court and hence was punishable as contempt. The opinion of the court is limited to two questions: (1) Is the statute of limitations which is prescribed for crimes, applicable in the case of a contempt committed in the presence of the court? and if so, (2) When did the limitation begin to run in this case?

Assuming, as did the court, that a contempt had been committed, there can be no doubt but that it was a criminal contempt rather than a civil contempt. The Supreme Court has recently said, in McCrone v. United States, 307 U. S. 61, 64 (1939), ". . . a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." In this case the government itself is the complainant and the punishment meted out is for the sole purpose of vindicating the authority of the court.

Section 1044 of the Revised Statutes, 45 STAT. 51 (1927), 18 U. S. C. § 582 (1940), provides that "No person shall be prosecuted, tried, or punished for any offense, not capital . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed." A contempt committed in the presence of the court is certainly such an "offense". Mr. Justice Holmes, speaking of a violation of an injunction order, which is likewise punishable as a contempt under Section 268 of the Judicial Code, said, "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Gompers v. United States, 233 U. S. 604, 610 (1914). Stating that "the power to punish for contempt must have some limit in time . . .", Mr. Justice Holmes then adopted without reserve the language of Chief Justice Marshall in Adams v. Woods, 2 Cranch 336, 340 (U. S. 1804) to the effect that any theory upon which actions might be brought at any distance of time " . . . would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

The applicability of the statute of limitations having been determined, there remained the problem as to when the statute began to run. The key ques-
tion here was whether the contempt continued as long as there remained acts to be done under the fraudulently obtained decree—in which case the prosecution would not be barred, or whether the offense was complete when the false representations were made, which, in this case, was more than three years before the information was filed. A strong argument was made by the prosecution to show that the acts of Pendergast and his co-conspirators in concealing their fraud while the distribution was being carried out and in receiving payments of the bribe, were sufficiently "misbehavior" in the "presence" of the court to bring them under Section 268 and therefore prevent the running of the statute. The court, however, properly distinguishes a prosecution for contempt of court on the one hand and a criminal prosecution, under Section 135 of the Criminal Code, 35 Stat. 1113 (1909), 18 U. S. C. § 241 (1940), for "corruptly" obstructing "the due administration of justice" on the other hand. In the latter case the position of the prosecution would be more tenable, since the offense described in Section 135 is not limited to acts committed in the "presence" of the court and so might logically be said to continue until the conspiracy was discovered or its purpose achieved. The statutory power of a court to punish for contempt does not allow this latitude. Here the only acts properly constituting "misbehavior" in the "presence" of the court were those acts of misrepresentation which were culminated in the decree of distribution entered by the court in February of 1936. The information by which this prosecution was instituted was not filed until July of 1940. By that time the prosecution was barred by the statute of limitations.

This case represents the first definite statement by the Supreme Court that the three-year statute of limitations applies to cases of contempt committed in the presence of the court. The rule has been settled that the statute did apply to contempts committed out of the presence of the court, Gompers v. United States, supra, cited and approved in United States v. Goldman, 277 U. S. 229 (1928), but the rule with respect to contempts committed in the "presence" of the court had always been more flexible. The great majority of the courts have adhered to the "reasonable time" doctrine which made laches rather than limitation the available defense. True, there were a few state decisions holding statutes of limitations applicable. Pate v. Toler, 190 Ark. 465 (1935); State v. Phipps, 174 Wash. 443 (1933), but such decisions were definitely in the minority. The laches rule tended toward substantial justice since prosecution could not be unreasonably delayed, and yet where, as here, the offense itself was concealed by the fraud of the actor for three or four years, the court had the right to institute contempt proceedings if it did so within a reasonable time after discovery of the misbehavior.

The rule announced in this case will undoubtedly allow criminals to escape justice, but, as the court points out in its opinion, so does any application of the theory of limitation to criminal prosecutions. As long as it is the policy of the United States as a sovereign to forbear prosecuting crimes after the expiration of three years, justice requires that such limitation be applied uniformly to all offenses.

DON A. TURNER
LABOR LAW—Materiality of Evidence Before the National Labor Relations Board.

Local B-9 of the International Brotherhood of Electrical Workers filed a complaint with the National Labor Relations Board charging the Indiana and Michigan Electric Company with unfair labor practices. The Board made intermediate findings against the Company. During pendency and progress of the proceeding before the trial examiner and the Board, a series of dynamitings of Company property occurred. Several of the witnesses at the hearing, members of Local B-9, later were arrested and gave confessions. The Company petitioned the Board to reopen the proceeding and receive evidence of a conspiracy by Local B-9 to destroy the Company property, to influence the case, and to compel the Company to require its employees to join the union. The Board held that such matters were immaterial to the issue of unfair labor practice by the Company and entered final findings generally against the Company. The Board petitioned the Circuit Court of Appeals to enforce its order, and the Company petitioned to have the case remanded, alleging that in the interim two of the witnesses were convicted and sentenced for the dynamitings. The Circuit Court of Appeals held that the tendered evidence was material for the purpose of impeaching the credibility of the witnesses before the trial board and that the subsequent criminal trial gave new evidence of such character on the issue that its consideration by the Board would probably produce a different result. The Court of Appeals was of the opinion that the evidence might throw some light on the issue of employer domination and might also show that the union, in view of the circumstances, was not qualified to complain under the National Labor Relations Act. National Labor Relations Board v. Indiana & Michigan Electric Co., 124 F. (2d) 50 (C. C. A. 6th, 1941). On certiorari, the Supreme Court held that an order remanding the case for further evidence of dynamitings, allegedly committed by the union during pendency of the case, is not arbitrary or unreasonable or an abuse of discretion when such evidence is material to impeach the credibility of witnesses on whom the Board relied. National Labor Relations Board v. Indiana & Michigan Electric Co., 63 Sup. Ct. 394 (1943).

The National Labor Relations Act provides that “The findings of the Board as to the facts, if supported by evidence, shall be conclusive.” 49 STAT. 457 (1935), 29 U. S. C. § 160(e) (1940). The credibility of witnesses is also a question for the Board. National Labor Relations Board v. Wallace Mfg. Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); Oughton v. National Labor Relations Board, 118 F. (2d) 486 (C. C. A. 3d, 1940); National Labor Relations Board v. Burry Biscuit Corp., 123 F. (2d) 540 (C. C. A. 7th, 1941); American Smelting and Refining Co. v. National Labor Relations Board, 128 F. (2d) 345 (C. C. A. 5th, 1942). The evidence required to support the findings of the Board must be substantial. In Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938), the Supreme Court said that it is more than a scintilla, it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must have rational probative force. To
discard positive, credible testimony in favor of inferences drawn from tenuous circumstances is not due process. *National Labor Relations Board v. Sheboygan Chair Co.*, 125 F. (2d) 436 (C. C. A. 7th, 1942); Note, *National Labor Relations Board, Sufficiency of Evidence to Sustain Findings* (1940) 29 GEo. L. J. 179.

The function of the Court of Appeals is merely to modify and reverse findings where there is not sufficient evidence to support them and which are clearly improper. *National Labor Relations Board v. Washington, Virginia and Maryland Coach Co.*, 85 F. (2d) 990 (C. C. A. 4th, 1936). That the court disagrees with the Board’s conclusions does not warrant a disregard of the National Labor Relations Act giving the Board exclusive jurisdiction to find facts. *National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206 (1940). Yet the National Labor Relations Act provides adequate protection against arbitrary actions, and on appeal, the court determines whether the Board’s procedure complied with due process of law. If there is no substantial evidence to support the findings of the Board, or if a fair and impartial hearing has not been granted, a reviewable question of law is involved. *National Labor Relations Board v. Baldwin Locomotive Works*, 128 F. (2d) 39 (C. C. A. 3d, 1942); *National Labor Relations Board v. Lion Shoe Co.*, 97 F. (2d) 448 (C. C. A. 1st, 1938). A fair trial includes a complete hearing as to all the evidence material to the issue. In *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. (2d) 215 (C. C. A. 8th, 1941), it was stated that a controversy tried before a court or administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. Section 10 (e) of the National Labor Relations Act authorizes the Circuit Court of Appeals to order the acceptance of additional evidence when it is shown to be material and there was reasonable ground for failure to adduce the evidence at the hearing before the Board. 49 STAT. 457 (1935), 29 U. S. C. § 160(e) (1940). The court will not remand where the petitioner has had his day in court, or the evidence is immaterial or used for purposes of delay. The question of remand is addressed to the sound judicial discretion of the court. *National Labor Relations Board v. Amwelt Shoe Mfg. Co.*, 93 F. (2d) 367 (C. C. A. 1st, 1937); *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100 (1941).

In the present case, the Circuit Court of Appeals refrained from passing on the sufficiency of the evidence before the Board, but exercised its discretion to see to it that the Board’s hearing did not cut off a party’s right to be fairly heard on all the material evidence. The whole record in this case, the Supreme Court decided, sustained the lower court’s exercise of discretion in ordering the taking of new evidence by the National Labor Relations Board. Here there was a course of violence and lawlessness concurrent with the Board’s proceedings, participated in by parties and witnesses, evidence of which might well be material to the issues of the case. Finality should not be given to the Board’s findings when such evidence has been excluded from the record. While denying that the evil character of the complainant deprives the Board of jurisdiction, the Supreme Court pointed out that section 10 (b) of the National Labor
Relations Act enables, but does not compel, the Board to issue complaints. 49 Stat. 457 (1935), 29 U. S. C. § 160 (b) (1940). The Board might, said the Court, properly withhold or dismiss its own complaint if it should appear that the charges made are so related to a course of violence and destruction that to do otherwise would constitute an abuse of the Board’s process. “But the process of presenting cases to it must be kept free from forces generating bias or intimidation. Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry.” National Labor Relations Board v. Indiana and Michigan Electric Co., supra at 366.

THOMAS F. SWEENEY
BOOK REVIEWS


This volume reprints twenty-one recent addresses by Colonel McGuire, delivered between 1937 and 1941, on the general theme of the preservation of the democratic spirit of our institutions. He speaks with authority on the legal work of the Government, for he has a long record of service as law clerk, attorney and counsel for the Comptroller-General during nearly twenty years, until 1939, when he resigned from the Government service to resume the practice of law in Washington, D. C. Colonel McGuire has collaborated with the late James M. Beck in The Vanishing Rights of the States (1926) and in Our Wonderland of Bureaucracy (1932). He was one of the first to point out the growing danger of uncontrolled bureaucracy, especially in the field of administrative law. In fact, he has been described as "one of the most conspicuous and conscientious spokesmen for the American Bar Association" in this field, and "an indefatigable student of administrative activity."

The twenty-one addresses may be grouped around three major themes:


These addresses were delivered on such occasions as the meeting of the Oregon, New York, West Virginia, Virginia, Georgia, Missouri and Cali-

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‡President and Editor, American Good Government Society.
§Dean Emeritus, The Law School, Harvard University.
3Gellhorn, Administrative Law—Cases and Comments (1940) 2.
fornia Bar Associations; the American Bar Association meeting; the meeting of the Northwest Good Roads Association. One of the addresses: "Sanctions and International Peace," was published in the May, 1926, number of the Georgetown Law Journal.2

All these addresses breathe patriotic fervor and genuine admiration for our institutions and the fathers who created them. Colonel McGuire, a Kentuckian, has inherited much of the eloquence no less than the political principles of the Revolutionary patriot-lawyers. The speeches, while many of them are general in tone, are concrete and detailed in reference to statistics, when necessary. For example, in one address, "Have We a Government of Laws", he explains in detail the statistics of cases decided by administrative tribunals. It is regrettable to find, here and there, a few repetitions of old errors of assumed historical facts from the Middle Ages.

We have been warned that the fight for constitutional liberty is a warfare, to be continually carried on; that it is never won, finally and for all time. Addresses such as those of Colonel McGuire are valuable for their patriotic purpose.

HUGH J. FEGAN*


Mr. Bonnet is not only Special Adviser to the World Citizens Association but is also Director of the International Institute of Intellectual Cooperation, Secretary-General of the International Studies Conference, and Professor at the Ecole Libre des Hautes Etudes, New York. He was also a member of the League of Nations Secretariat in Geneva from its inception in 1920 until 1931, and Vice-President of the Studies Center of Foreign Politics in Paris. This book follows another entitled The United Nations—What They Are—What They May Become, in which the existing means of inter-Allied cooperation were reviewed and proposals were made for giving the United Nations permanent reality.

This study is concerned rather with the policies of the United Nations as made manifest in recent treaties and agreements, resolutions of official gatherings and declarations by responsible leaders. It is an attempt to give form to the very nebulous peace aims which the United Nations have indicated. The Fourteen Points were clarity itself. Nothing comparable has issued from the present conflict. The task of the author, therefore, has been rather to present the problems than to give the answers to them. This he has done with great clarity and understanding.

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Already the course of events has affected the significance of some of the author's data. Thus it has been said recently that the rising prestige of Russia has tended to weaken the Polish-Czechoslovak Agreement of January 25, 1942 providing for a Confederation of the two States. The United Nations are on their way but what that way is nobody knows. If it is the way of World War I, then World War II will have been fought in vain. If it is the way of tackling and finding some solution for the problems so ably analyzed in this book, then future generations may look back on World War II and think of it not as the terrible holocaust it was but as the beginning of better things.

This book is one of a number of recent publications of the World Citizens Association. World citizenship implies a world order and something more than the suppression of war. Mere negation will never succeed; mere prohibition is likely to intensify the desire to drink. But if world citizenship is made to mean something, if the United Nations can raise the standard of living and secure due process of law to every individual, then something positive has been created to which men can be attached and this attachment to the world order will temper the extreme nationalism of the present, and almost imperceptibly the incitements to war will fade into the background. May the way of the United Nations be the way of federalism and world citizenship!

PERCY BORDWELL*


This is another book reviewing judicial review. There have already been written so many books on this subject that there would be little excuse for another book except for the fact that this book has a new approach to the subject, a political instead of a legal approach.

The goal of the law, both fundamental law and all other law, is the creation of a good society, and in the United States at least this means a democratic society. This is a goal which the law has in common with education and religion. They are all striving for the same goal, but in different ways.

Has law in the United States been accomplishing this goal? The answer to this question will have to be "yes" and "no." Sometimes the law has seemed to be accomplishing the goal for its existence and other

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times it has seemed to be failing. All the time some of the law has seemed to be a success and other law has seemed to be a failure.

Why has there been this kind of a result? Primarily it has been because there has been a government of men and not of laws, and the men of the government have not always drawn the line where it should be drawn between liberty and law, and even where they have drawn the line in the right place they have not always made the right kind of law where there should be some law. However, even if this had been a government of laws and not of men, as so many glibly say it has been, the situation would not have been any better. In that case we should have had certainty rather than uncertainty, but there would have been no more likelihood that the line between law and liberty would have been drawn in the right place or that we should have the right kind of laws or that we should have any law. In order to have a government of laws that would accomplish the goal of law, it would be necessary to start with a perfect system of law. This is something which is unthinkable.

The men who have made either a success or a failure of our law have been the men connected either with our federal government or with our state governments, or men connected with the legislative or the executive or the judicial branches of both the federal and state governments, the lawyers, the dominant governing class and various pressure groups which have brought their influence to bear upon legislators, executives, judges and other officers of both our federal and state governments. Between the officers of the federal and state governments there has been an overlapping of functions and often there has been a conflict between the policies of the two governments. The line between the functions of legislators, executives and judges has not been carefully drawn, and even if it had been, the scheme of checks and balances in our Federal Constitution so commingles functions of the members of these various branches of government that, of course, there are constant clashes between them. What kind of social control any of these officers of government should undertake to establish is constantly influenced by the dominant class in society and various other pressure groups and especially by lawyers of great ability and prominence who have had tremendous influence upon the judges.

Because of these conflicts between the various agencies of government and because there is danger that any or all of these agencies may violate express limitations on their powers found in our written constitution, it has been necessary to have some umpire or referee to decide the disputes, resolve the conflicts and uphold the provisions of the Constitution. The United States Supreme Court has rightfully taken to itself this position of umpire. In doing so it has removed some of the uncertainties which would otherwise exist, but it has created another uncertainty and that is
found in the difference of opinion between the justices of the Supreme Court itself. They have not all agreed as to what is or should be our United States Constitution or how it should be applied to the problems of our society, but of one thing we may be sure, and that is that in spite of all the uncertainties of this situation the United States Supreme Court has been making more of our Constitution in the more than one hundred and fifty years of its existence than was ever made in the Constitutional Convention and by the process of amendment put together.

The fundamentals of a democratic society are sovereignty of the people, liberty of thought, expression, and action and social control for the common good. All of these fundamentals of democracy are found in the United States Constitution and are protected by it. Not every provision of the Constitution protects all of the democratic fundamentals, some provisions protect one fundamental and other provisions protect other fundamentals. For example, there are provisions in the Constitution protecting the fundamental of liberty. These provisions are symbols of restraint on governmental action. Among these provisions may be named our dual form of government including especially the commerce clause, the separation of powers and the bill of rights. Other provisions of the Constitution protect the fundamental of social control for the common good. They are instruments of social control. Singularly, the interstate commerce clause has been used as an instrument of social control as well as a symbol of restraint, but the great instruments of social control have been the police power, power of taxation and power of eminent domain, which are not denied the government by even the due process clause.

These provisions, both the symbols of restraint and the instruments of social control, have received different interpretation according as the personnel of the Supreme Court has changed. Sometimes the Court has made the commerce clause more of an instrument of social control than it has been a symbol of restraint, and at other times more of a symbol of restraint. Sometimes the due process clause has been made more of a symbol of restraint and at other times it has been used as an instrument of social control. For example the Supreme Court at one time held that the commerce power did not give Congress authority to forbid the shipment in interstate commerce of goods manufactured by child labor or to prevent the business of the sugar trust, but at another time held that Congress did have power to prohibit the shipment in interstate commerce of lottery tickets, impure food, white slaves or stolen automobiles. The Court held in the Stafford case\(^\text{1}\) that there was such a thing as a current of commerce, but "another Court" in the Schechter case\(^\text{2}\) held that there

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\(^{1}\)Stafford v. Wallace, 258 U. S. 495 (1922).

was no such thing as a flow of commerce. At one time the Supreme Court gave Congress almost complete power over intrastate commerce on the doctrine of interblending or obstruction. This was done in the Shreveport case and the Jones-Laughlin case. At another time it denied Congress this amount of power. This was done in the Schechter case and the Carter-Coal case. At the present time the Supreme Court recognizes both the flow of goods doctrine and the obstruction doctrine.

Prior to the Civil War, in a period dominated by Chief Justice Marshall, the restraining functions of the Constitution were largely confined to the contract clause and the Constitution as a whole became an instrument of federal power. From the Civil War to the Eighties, when the Court was dominated by Chief Justice Taney, Chief Justice Waite and Justice Miller, the Court was inclined to protect personal liberty less and social control more. It was in this period that the law of public utilities was developed, and the contract clause was made subject to the police power. From the Eighties to 1910, when the Supreme Court was dominated by Justice Field, Chief Justice Fuller and Justice Peckham, personal liberty bulked larger in the mind of the Court than did social control for the common good, and almost any clause in the Constitution was used for this purpose. The commerce clause was used to deny power both to the federal government and to the states and to create sort of a no man's land where no government had any power. The due process clause was extended to protect the personal liberty of corporations as well as natural persons, in matters of substance as well as in matters of procedure. Corporation magnates succeeded in bringing great pressure to bear on the Court, chiefly through their high powered attorneys, and this resulted in a protection of the liberty of corporations even to the extent of giving them liberty to destroy all liberty. From 1910 to 1922, when the wisdom of Justices Holmes, Brandeis and Hughes for the most part prevailed, personal liberty, especially of corporations, was not protected so much, but social control for the common good was given more protection; but when from 1922 to 1936 the Supreme Court was again dominated by such reactionary justices as Butler, McReynolds, Sutherland and Van Devanter, the Court returned to the same position which it had had under Justices Field and Peckham and Chief Justice Fuller. Hours of labor legislation for workers in bakeries was declared a violation of freedom of contract by the Field, Fuller, Peckham court and minimum wage laws were de-

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1Houston, East & West Texas R. Co. v. United States, 234 U. S. 342 (1914).
3Supra note 2.
clared unconstitutional by the Butler, McReynolds, Sutherland, Van Devanter court. Hours of labor legislation was upheld by the Holmes, Brandeis, Hughes court, and minimum wage legislation again was upheld by the present court under the leadership of Justices Cardozo and Brandeis and Chief Justice Stone. Price fixing had been upheld in the period of Taney, Miller and Waite, but only so far as concerned public utilities. Now at last the Supreme Court permits price fixing wherever it is a proper exercise of the police power. In the economic field liberals generally have favored social control, but when it came to civil liberties and the procedural guaranties the liberals were more likely to favor the protection of personal liberty. On the whole it is probably safe to say that the liberals have had their way. That is, throughout the whole of United States history the Constitution has grown in the direction for which the liberals contended it ought to grow. But there have been alternating periods when the Constitution had just the opposite growth and tended in the direction desired by the conservatives. Both of these tendencies could not possibly be right. The fundamental law of the Constitution could not have been accomplishing the goal of law at both times. At one time the fundamental law was a success and at another time a failure. Hence even judicial review has not solved the problem of making law accomplish the goal of its existence, but undoubtedly it has been a much better instrument than any other we might have had, and has had a fair measure of success. Yet it is amazing on what a slender basis it rests, because Congress, now subject to judicial review by the Supreme Court, could destroy both this and much more of it through its control over the appellate jurisdiction of the Supreme Court.

The author of the book under review has either developed the ideas given above or has provoked their development by the reviewer. It may be hard to tell which of the ideas given above are those of the author and which are those of the reviewer. The author has given the history of the doctrine of judicial review. He has traced the work of the Supreme Court under the interstate commerce clause and the due process clause. He has drawn a distinction between the provisions in the Constitution which act as a symbol and those which act as an instrument. Perhaps most of the other ideas are almost implicit in what he has said.

Is judicial review one of the fundamentals of democracy? In the United States it probably should be answered "yes." It is an indirect fundamental of democracy. The true fundamentals of democracy given above have direct protection from various provisions in the Constitution, but these provisions protecting the fundamentals of democracy are themselves also protected indirectly by the doctrine of judicial review, and, therefore, judicial review may in the United States be called one of the fundamentals
of democracy. The doctrine of separation of powers and the doctrine of a dual form of government, although characteristics of the United States government, cannot be said, even in the United States, to be fundamentals of democracy. Judicial review operates not only on the doctrine of separation of powers and a dual form of government but upon all the other constitutional provisions and guaranties. Professor Carr has not discussed this question and the reviewer is sorry he has not had the benefit of Professor Carr's opinion on it.

Has judicial review worked well? On the whole the answer will have to be "yes." As we have already discovered, although this was not expressly put into the original Constitution, it was necessary for the successful operation of the whole Constitution and when the right judges have sat upon the United States Supreme Court bench the doctrine of judicial review has worked well. This shows the importance of choosing the right personnel for the bench. When it becomes plain that this is a government of men and not laws it also becomes plain that it is important to select the right men for government. The reviewer is inclined to think that this is the position of Professor Carr.

Hence the reviewer will conclude that Professor Carr has rendered a fine service to the teaching profession in giving us this new book on judicial review to bring out the political theories of our Constitution.

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