1-1-1948

Notes

John M. Anderton
B. M. Apker
J. V. Wilcox
Leonard Boykin

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of the College of Law, former Procurator and Advocate of the Tribunal of the Apostolic Signatura and of the Sacred Roman Rota; Mr. Mortimer J. Adler, Professor of Philosophy of Law, University of Chicago; Mr. Harold R. McKinnon, of the San Francisco bar; and Mr. Ben W. Palmer, of the Minneapolis bar.

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CONSTITUTIONAL LAW—WHITE PRIMARIES AS A LEGAL DEVICE FOR DISFRANCHISING NEGROES IN THE SOUTH.—A crippling blow and, it is hoped, one that may be fatal was dealt to the "white primary"—the most effective modern device for disfranchising Negroes—by the decision of the U. S. District Court in the case of George Elmore v. Clay Rice et al.,1 which upheld the right of the plaintiff, a Negro, to vote in a Democratic primary in South Carolina. In his forceful and realistic opinion Judge J. Waties Waring pointed out that South Carolina is the only remaining state which now conducts a primary election solely for whites and stated that, "It is time for South Carolina to rejoin the union. It is time to fall in step with the other states and to adopt the American way of conducting elections."

In 1944, in a vain attempt to avoid just such a decision as was given in the Elmore case, the then governor of the state of South Carolina, Olin D. Johnson (now the United States Senator from this state), issued a proclamation calling for an extraordinary session of the legislature to repeal all the statutes relating to the state regulation of primaries, so that advocates of white supremacy in primaries could maintain that no Negro was deprived of his rights by any state action. Consequently the federal courts would have no jurisdiction. At this session of the legislature the governor stated:

The Attorney General's Office, with the assistance of the Solicitors of this State, have been working diligently for several days upon the matter of finding all primary laws upon the statute books that must be repealed so that we might have a free, white Democratic primary which can nominate its candidates free and untrammeled without legislative sanction.

After these statutes are repealed, in my opinion, we will have done everything within our power to guarantee white supremacy in our primaries of our state insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white suprem-

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acy in our primaries and to safeguard the homes and happiness of our people.

White supremacy will be maintained in our primaries. Let the chips fall where they may!  

This action on the part of the governor was prompted by a decision of the U. S. Supreme Court in the case of Smith v. Allwright 3 in which the petitioner, a Negro citizen of Texas, brought an action for damages against respondents, election and associate election judges of his precinct, because they deprived him of a ballot in the primary election held for the purpose of choosing Democratic candidates for the United States Senate and House of Representatives, as well as state officials. Relief was denied by the District Court and this decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit on the authority of Grovey v. Townsend. 4 Certiorari was granted by the Supreme Court to resolve questions raised as to inconsistency between the decisions in Grovey v. Townsend and United States v. Classic et al. 5 It was held that when primaries are a part of the machinery for choosing state and national officers, the same tests to determine the character of discrimination or abridgement should be applied to the primaries as are applied to the general election, and the citizen's participation in the primaries is protected from abridgement under the principle of the Fifteenth Amendment to the United States Constitution.

This was the fourth time that the Supreme Court had decided a case involving the question of Negro participation in the Texas Democratic primaries. In the first case 6 the court declared a statute unconstitutional which provided that “in no event shall a Negro be eligible to participate in a Democratic party primary election.” In the second case 7 the court (in a five to four decision) declared unconstitutional a subsequent statute which provided that “every political party” shall have the right to “prescribe the qualifications of its own members.” The third case, that of Grovey v. Townsend, 8 held that action taken barring Negroes from a Democratic primary was merely refusal of membership in a voluntary organization and could not be regarded as state action prohibited by the Fourteenth or Fifteenth Amendment. However, as was stated previously, this case was expressly overruled in the case of Smith v. Allwright.

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Following the case of Smith v. Allwright, Louisiana and Texas as well as South Carolina immediately repealed all their white primary provisions, whereas Florida, Alabama, and Georgia came to the same result by reason of further court rulings. But the voluntary repeal of these statutes was not in pursuance of securing civil liberties; rather it was done on the theory that by placing the primaries entirely outside the law and the structure of government the ruling in Smith v. Allwright would be rendered inapplicable.

Since the state of South Carolina had repealed all laws regulating primaries, counsel for the defense in the Elmore case argued in their briefs that:

It is universally established by all the authorities that this Court has jurisdiction only if he has been deprived of his right by some State action. He must show further, as was indicated in the Classic and in the Smith v. Allwright cases, that the defendants in the respects complained of, were acting "under color of" some State statute or law. The Federal Courts have no jurisdiction over the private controversies among citizens, or even over controversies by a Negro claiming discrimination against him by some private person or corporation, in the absence of some State statute authorizing such discrimination.

However, the court in the case summarily disposed of this argument of the defendants, holding:

It is true that the General Assembly of the State of South Carolina repealed all laws relating to and governing primaries, and the Democratic Party in this State is not under statutory control, but to say that there is any material difference in the governance of the Democratic Party in this State prior, and subsequent to 1944, is pure sophistry. The same membership was there before and after, the same method of organization of club meetings, of delegates to County Conventions, delegates to State Conventions, arranging for enrollment, preparation of ballots, and all the other details incident to a primary election.

The argument of the defendants in the Elmore case that the primaries constituted a voluntary association in the nature of a private club and as such had unlimited choice of membership, although utterly ridiculous, is by no means novel, since it was the basis of the opinion in the case of Grovey v. Townsend. Perhaps it is not too optimistic to hope that other courts will have the courage demonstrated by Judge Waring in the Elmore case to point out the fallacy of such an argument.

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9 The Report of the President's Committee on Civil Rights, To Secure These Rights, Pages 36-37.
The *Elmore* case is at present on appeal in the Fourth U. S. District Court of Appeals, where attorneys for the defense made the point that the defendants cannot be charged with discriminating against Negroes because some of the membership restrictions also exclude whites. A Washington newspaper which covered the appeal reported the following testimony:

"How do you manage to discriminate against the white people?" asked Judge Morris A. Soper.

"We wouldn't take any Republicans or Communists or any people like that," replied Belser.

"Could you exclude women, lawyers, soldiers, veterans, bowlegged men—anybody you want?" asked Judge Armistead Dobie at another point.

"That's right," said Belser.1

Perhaps the solution to this problem lies in acting upon one of the recommendations from President Truman's Committee on Civil Rights, which demands, "The enactment by Congress of a statute protecting the right to qualify for or participate in Federal or State primaries or elections against discriminatory action by state officers based on race or color or depending on any other unreasonable classification of persons for voting purposes."

*John M. Anderton*

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**Labor Law—The Effect of The Portal to Portal Act on The Fair Labor Standards Act.**—When the Eighth Congress enacted the so-called Portal to Portal Pay Act, it did so, presumably, to alleviate the monstrous burden suddenly thrust upon employers and the government by labor's land rush to stake out claims upon management under the decision of the now famous *Mt. Clemens Pottery* case.2 In his original decision,2 Judge Picard of the Federal District Court of Michigan held that certain "clocking-in" time prior to the stipulated hour of work commencement was compensable under the Fair Labor Standards Act of 1938.3 Upon appeal,4 the United States Supreme Court admitted that such claims could be compensable under the F. L. S. A., but pointed out the possible application of the *de minimus* doctrine. Judge Picard then felt "mandated" to dismiss the complaint of

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4 328 U. S. 690, 90 L. Ed. 1515, ... S. Ct. ... (1946).
the pottery workers, although he expressed sympathy for the original plaintiffs in that action.\textsuperscript{5} The door, however, stood ajar.\textsuperscript{6} Through it flooded the 1,913 portal to portal cases filed in the federal courts, with aggregated claims of some $6,000,000, between July 1, 1946, and January 31, 1947.\textsuperscript{7}

Apparently, under a cost-plus contract the government would be liable to make whole an employer subjected to such claims. Congress, viewing with alarm the possible results to its expenditure reduction program, and acting upon a request from President Truman, set out to rectify the situation. It was not impressed by a judicial application of the \textit{de minimus} rule. Some far more stringent regulatory measure was needed, and at once. Congress wanted to outlaw any possible claims brought under any sort of portal to portal activity. It felt that the portal to portal claims were a type of action which interfered with the free flow of interstate commerce; such suits would be a serious drain upon industry and the government at a time when full production was an absolute necessity to avoid further inroads by an incipient inflation.\textsuperscript{8}

Labor had opened the Pandora's Box presented to it by the Supreme Court. What came out of that box was a far more stringent measure than the portal to portal cases themselves would seem to have called for. The question, then, presents itself: "Was it the intent of Congress not merely to outlaw portal to portal pay suits, but to impair the operative effect of the entire F. L. S. A., by repealing by implication pertinent provisions thereof?" It seems that it may well have been.

Under Section 2 of the Portal to Portal Act, Congress provides, in effect, that no employer shall be subject to any liability under the F. L. S. A. on account of the failure of such employer to pay an employee minimum wages or overtime compensation for any activity engaged in prior to the enactment of the statute (Portal to Portal) except an activity which was compensable either by an express provision of a written or unwritten contract in effect at the time of such activity, or by a custom or practice in effect at the time of such activity at the establishment where the employee was employed, covering such activity, not inconsistent with a written or non-written contract then in effect. Furthermore, an activity shall be considered compensable under such

\textsuperscript{6} "It cannot be said that the \textit{Mt. Clemens} case did more than open additional doors for added compensation which neither party had contemplated ..." Burfeind v. Eagle-Picher Co. of Texas, 71 F. Supp. 929, 930 (N. D. Tex., 1947).
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a contract provision only when it was engaged in during the portion of the day with respect to which it was so made compensable.

These provisions clearly outlaw actions based upon "gate-walking" time. But they go much further than that. Suppose that an employer contracts with his employees that the employees shall be on the premises from 7:30 a.m. until 5:30 p.m. with an hour off for lunch, but it being also expressly provided that only the time from 8:00 a.m. on shall be compensable. Under the aforementioned provision, the employee cannot recover overtime compensation for the additional half-hour. Not only has he no contract by the terms of which he can recover, but he has an express contract by the terms of which he cannot. No custom or practice would be of assistance to him, because it would be inconsistent with the contract.

Such a situation is not inconceivable. This act affects not only the organized workers, who presumably have a modicum of bargaining power, but it also affects the millions of unorganized workers who must deal at arm's length with the employer. Economic coercion is far from being a thing of the past. Furthermore, if the employee must depend upon a custom or practice of the establishment, such custom or practice is the creature of the employer. A proposed amendment to make the provision read, "lawful custom or practice," introduced by Representative Kefauver (D. Tenn.) both in the committee and on the floor was both times defeated. It is possible to see how an unscrupulous employer who engages in unfair practices might have an advantage over an honest employer under these provisions of the Act.

10 "...there is one class of legitimate claims to which we have not yet given the immunity to which they are entitled, that is the case of the claim based upon custom and practice in the industry generally. We were given the instance of a case where some men moved from New York into northern Pennsylvania and started making shirts. The girls they employed to make the shirts were required to put in little piles the various cut-out parts of the shirts, the left arm, the front of the shirt, and the back, and the right arm, and the collar before they started sewing. The employer established the practice in a time of depression that he would not pay those girls for the time they were putting those items into separate piles but would start their pay only when they actually started their needles. This was contrary to the general custom and practice in the industry and it was contrary, it seems to me, to fundamental fairness and right. Such a situation, it seems to me, should not give an employer immunity. If this language were broadened to say also an action could be maintained in the case of a custom or practice in the industry, then we would give protection to an employee who was being overreached and at the same time would give protection to the vast bulk of honest, honorable employers who do not try that kind of abuse and are subject to unfair competition from those who do..." Rep. Keating (R., N.Y.) 93 Cong. Rec., Feb. 27, 1947, at 1566.

"...Another part of this bill which concerns me deeply is this definition of custom and practice. I understand the Supreme Court has defined work as "physical or mental exertion controlled or required by the employer and pursued
Section 3 of the Act provides that hereafter any cause of action under the F. L. S. A. may be compromised, if there exists a bona fide dispute as to the amount payable by the employer to his employee (in the absence of fraud or duress) except not to the extent that such compromise is based on an hourly wage rate less than the minimum provided by that Act. This provision likewise has dangerous implications. The employer, by compromising the issue of the number of hours worked, rather than the rate per hour, could settle for an amount in effect less than the amount required under present minimum wage provisions. For example, if the employee claimed that he was entitled to compensation for fifty hours overtime, worked at sixty cents per hour, or a total of thirty dollars, and the employer, who claimed that he had only worked thirty hours, finally settled with him for forty hours, or twenty-four dollars, it would amount to the same thing as paying an employee forty cents an hour for overtime. Here again, economic pressure could make the employee more prone to accept the compromise than to risk losing his employment. It would be difficult to prove coercion in a case like this.

Section 9 of the Act provides that as to claims arising prior to this Act no employer shall be subject to any liability for his failure to pay minimum wages or overtime compensation under the F. L. S. A., if he pleads and proves that he acted in good faith in conformity with and in reliance on any administrative regulation or ruling of any agency of the United States. This provision is so all inclusive that it absolves practically all employers who relied upon anybody at all, provided they can prove it, from any liability under the F. L. S. A. Congress could not have intended this provision to mean merely that they are exempted from liquidated damages provided for by the F. L. S. A., since there is a special provision in the Portal to Portal Act covering those damages.

As to future claims, Section 10 provides that employers will be exempted from having to pay claims arising under the F. L. S. A. if they can show that they relied upon or conformed with any order of the Administrator of the Wage and Hour Division. As to either past or future rulings the employer's exemption exists even though such rulings are later modified, rescinded, or determined by judicial author-
ity to be of no legal effect. No matter how unjust, or how uncon-
scionable such ruling might be, if an employer relied in good faith upon
the ruling, he would be exempted from paying claims which he would
have had to pay had he not so relied. No matter how worthy the
claim of an employee may be, these provisions in the Act could bar
his recovery of wages justly earned.

Section 11 provides that if the employer shows to the satisfaction
of the court that the act or omission giving rise to such claim was in
good faith, or that he had reasonable grounds for believing that it was
not a violation of the F. L. S. A., the court, in its discretion, might
award no liquidated damages or may award any amount thereof not to
exceed the amount specified in Section 16(b) of that Act.11 This pro-
vision does not require that the employer have acted in reliance upon
any administrative ruling. Of and by itself, without regard to pre-
viously noted sections, this section provides the forceps, if it does not
pull the teeth of the F. L. S. A.

Even if the provisions of Sections 9 and 10 were meant to refer only
to liquidated damages, and not to minimum wages and overtime com-
pensation, the liquidated damage provision of the F. L. S. A. is struck
down. This is an open invitation to an unscrupulous employer to at-
tempt to violate the F. L. S. A., since all he would be required to pay
is the minimum wage rates for which the services have actually been
rendered. These he can probably compromise, as indicated above.

Section 6 sets up a statute of limitations. Any cause of action
accruing on or after the date of this Act must be brought within two
years; any cause of action accruing prior to the enactment must be
brought within two years or within the period specified by the applicable
state statute, whichever is the shorter, or be forever barred. Here
again, the unorganized worker bears the brunt of the Act. The or-
ganized worker is usually informed of his rights, and can protect them,
but the unorganized worker is left in a defenseless position.12 The
unorganized worker has no knowledge of the complicated legal prob-
lems involved; he usually keeps no record of the hours worked, and
cannot compute the overtime to which he is entitled; he usually has no
knowledge of how his employer's business is conducted. Furthermore,
the burden of proof is upon the employee; even if he knew how to
gather sufficient evidence on which to base an action, it would take
him so long that the statute would have run against a portion, at least,
of his claim. There is no provision in the Act which prevents the

11 "16(b). Any employer who violates the provisions of Secs. 6 or 7 of this
act shall be liable to the employee or employees affected in the amount of their
unpaid minimum wages or their unpaid overtime compensation, as the case may
be, and in an additional equal amount as liquidated damages. . . ."

(Minority views).
statute from running while the employee is engaged in compromise negotia-
tions with his employer. The House bill carried a provision for a one-year statute. The House voted down amendments to change it to two or three years. But even some of the Republicans in the House supported the amendments. The Senate amended the bill to provide the two-year statute. But, as has been shown, this is still not long enough.

Section 5 of the Portal to Portal Act provides that the second sentence of Section 16(b) of the F. L. S. A. is amended to read as follows:

Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought.

This provision bans representative actions. It tightens the stricture of the section imposing a two-year statute of limitations by rendering it necessary to search for employees having possible claims who have left the employment involved. Under the F. L. S. A. representative actions were permitted. Here again, this Act goes beyond portal to portal actions and strikes down claims in no way related to those actions.

It is not beyond argument that Congress was unduly alarmed about the enormity of the portal to portal claims filed after the Mt. Clemens decision. Congress acted before the courts had applied the *de minimus* rule to those claims. *De minimus* might well have thrown out the unworthy claims. The worthy claims should in justice be protected. At any rate, Congress seems to have gone much further than merely to eliminate unjust portal to portal claims. The Act itself makes no distinction between portal and non-portal claims.

There has not yet been time for the Act to come fairly before the courts for interpretation. One federal court in Texas\(^\text{13}\) has upheld the constitutionality of the Act in its general import. It was there held that Congress could withdraw the right of the courts to proceed with suits based upon rights created by legislation. The claims under the F. L. S. A. are not "vested property rights," but are simply statutory rights that can be withdrawn by Congress at any time.

There are other serious considerations. As noted above, the employer is permitted to rely on administrative rulings even though a court later rules them invalid. The Supreme Court may consider this to be an invalid delegation of judicial power to an administrative agency. It may be that the Court will be unwilling to construe this Act as a cure-all for employers' lack of past compliance with the F. L.

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S. A. The Court may feel that if Congress had intended to destroy such a keystone of social legislation it would have said so. While as a general proposition, Congress may abrogate purely statutory rights, it may be that the relief afforded must have a reasonable relation to the legitimate end to which the legislation is directed. If the legitimate end of this Act is relief from outrageous portal to portal claims, many of its sweeping provisions affecting the F. L. S. A. may have no reasonable relation to the "legitimate end."

By way of preamble, Congress has set out a section entitled "Findings and Policy." After an enumeration of the abuses of unjust portal to portal claims and dire forebodings of more abuses to follow, Congress sets out its policy: It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils, 1) to relieve and protect interstate commerce from practices which burden and obstruct it; 2) to protect the right of collective bargaining; and 3) to define and limit the jurisdiction of the courts. (emphasis supplied).

The President, in his message approving the Act, voiced the hope that the F. L. S. A. would not suffer abrogation.

I am confident that the purpose of the main provisions of the Act is to eliminate the immense potential liabilities which have arisen as the result of the portal to portal claims. It is not the purpose of the Act to permit violations of our fundamental wage and hour standards, or to allow a lowering of those standards.

It is certainly to be hoped that the President's high note of optimism is not ill-founded. While it is still theoretically possible to maintain an action under the F. L. S. A., for a liability arising either upon an express contract or upon custom or practice of the establishment, certain provisions of the Act are shown to be such that they violate the

14 In Re Hall, 167 U. S. 38, 17 S. Ct. 723, 42 L. Ed. 69 (1897).
16 Part I, Sec. 1 (b).
spirit, if not the letter of the F. L. S. A. But the Court may look to
the cause of this legislation (the multitudinous portal to portal claims),
and, weighing the policy clause above quoted, find the intent of Con-
gress to be only to correct those evils, and not to destroy the F. L. S.
A., as might be done by a too literal interpretation of this Act.

B. M. Apker and J. V. Wilcox

Constitutional Law—The “Separate But Equal” Concept In
Education—A Legal Fallacy.—Several cases are now
pending in which a qualified Negro applicant is seeking to obtain admittance to a
state-supported graduate or professional school which is maintained ex-
clusively for white students.¹ Indirectly, the basic question of racial
segregation is involved in each of these cases, but it is only in the Texas
case of Sweatt v. Painter ² that segregation in education is attacked as
an illegality per se.³ That case presents the direct question of whether
or not segregation violates the Fourteenth Amendment to the Constitu-
tion of the United States, regardless of the provision of “equal” educa-
tional institutions for each of the two races.

The “separate but equal” theory had its national origin in the fam-
ous federal case of Plessy v. Ferguson.⁴ The majority of the court in
that case held that statutes requiring public carriers to separate their
passengers according to a racial classification did not violate the Four-

¹ Sweatt v. Painter, Case No. 9684, in the Court of Civil Appeals for the
Third Supreme Judicial Court of Texas; Sipuel v. University of Oklahoma,
Okl., 180 P. 2d 135 (1947); Wrighten v. University of South Carolina,

² Sweatt v. Painter, supra. This was an action for mandamus against the
authorities of the University of Texas to require them to admit the plaintiff, a
qualified applicant except as to race. The 126th District Court of Travis County
entered an order that the action of the defendants violated the Constitution of the
United States but gave the defendants six months in which to establish an equal
school for Negroes. In December, 1946, the lower court refused to issue the
writ of mandamus. On appeal the court set aside the ruling of the trial court
and remanded the cause. The trial court heard the case and entered final judg-
ment with costs against the plaintiff and the case is now pending appeal in the
Civil Court of Appeals for the Third Supreme District of Texas.

³ Sweatt v. Painter, supra note 1; Sipuel v. University of Oklahoma, Okla.,
180 P. (2d) 135, 137 (1947). “...it is not wholly clear whether petitioner
seeks to overturn the complete separate school policy of the state, or seeks to com-
pel equal facilities for the races by obtaining an extension of such facilities to
include a separate law school for negroes.”

Wrighten v. University of South Carolina, 72 F. Supp. 948 (E. D. S. C.,
1947). The issue was not raised in the pleadings and at the pre-trial conference
by agreement of the counsel the validity of segregation was omitted from the
issues.

⁴ 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).
teenth Amendment to the Federal Constitution so long as equal facilities were available to each race. Since that decision, which gave a judicial interpretation to a legal concept conceived in the era following the War Between the States, the courts have assumed, or tacitly admitted, that racial segregation in state-supported schools was not a violation of the Constitution of the United States. In that decision the court discussed the problem of segregation in schools but, since that was not the issue in the case, whatever may have been said would not be directly binding upon a court considering the specific issue of the validity of a state law requiring segregation in public schools. Upon the whole issue of segregation, the great southern judge, Mr. Justice Harlan, prophesied in his dissent: "In my opinion, the judgment this day rendered will, in time, prove quite as pernicious as the decision made in the Dred Scott case." Although this decision adopted the view that racial segregation on public carriers was not a denial of equal protection of the laws, the decision has since been qualified to exclude those public carriers engaged in interstate commerce.5

It is worthy of note that the question of segregation as raised in Plessy v. Ferguson, was based upon a demurrer to the pleadings. Factual evidence of the unreasonableness of segregation in actual practice was not in the record. In the Sweatt case, now pending appeal, evidence was offered concerning the historical and sociological results of the theory in actual practice in Texas. An expert witness was produced and his testimony as to the quality and quantity of the opportunities furnished under the segregated system was rejected as being irrelevant. The Court of Appeals will decide if the plaintiff can raise the issue of whether or not the education furnished is equal to that furnished in schools provided for white students. Thus the whole system of segregation 6 will be put in issue in a clear case which may

5 Morean v. Commonwealth of Virginia, 328 U. S. 373, 66 Sup. Ct. 1050, 90 L. Ed 1317 (1946). The court held that racial segregation imposed upon interstate carriers was an undue burden upon interstate commerce. See note in 22 Notre Dame Lawyer 32 (1946).

6 "Segregation and discrimination have had material and moral effect on whites, too. Booker T. Washington's famous remark that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white southern and northern observers. Throughout this book, we have been forced to notice the low economic, political, legal and moral standard of Southern whites — kept low because of discrimination against Negroes and because of obsession with the Negro problem." Gunnar Myrdal, An American Dilemma, Vol. I, 644 (1944).

"The laws prescribing racial segregation are based upon the assumption that racial minorities can be segregated under conditions that are legally valid if not discriminating. Theoretically, segregation is merely the separate but equal treatment of equals. In such a complex and open society as our own, this is, of course, neither possible nor intended; for whereas the general principle of social regulation and selection is based upon individual competition, special group segregation within the broad social framework must be effected artificially and by the im-
reach the United States Supreme Court. The question will then be whether the court will abolish or evade the Constitutional guarantees under the guise of legal technicality or whether it will hold that the Constitution of the United States meant what it said. The Plessy case did not decide that racial segregation was legal when applied to educational institutions supported by the public, but it did discuss the matter. There are many expressions of opinion, but few, if any, decisions in which the question of the validity of a state statute requiring segregation in public schools was the direct issue. A holding that such a statute was valid would not only seem to be a violation of the Fourteenth Amendment but it would appear to be out of harmony with the recent decisions rendered by the United States Supreme Court. It is true that a Massachusetts court held that racial segregation in schools was constitutional. Generally, however, classification of citizens upon a racial basis has been held to violate the Constitution of the United States. In Cummings v. Richmond County the court stated that

position of arbitrary restraints. The result is that there can be no group segregation without discrimination, and discrimination is neither democratic nor Christian." Charles S. Johnson, Patterns of Segregation 318 (1943).

7 In a recent federal case, Elmore v. Rice, 72 F. Supp. 516 (E. D. S. C., 1947) the court held that the attempt to deprive a citizen of the right to vote in a party primary by repealing all statutes regulating primaries and then having a party pass rules excluding Negroes was an ineffective attempt to evade the Fourteenth Amendment by the use of a legal technicality.

In Yick Wo v. Hopkins, 118 U. S. 356, 373, 6 Sup. Ct. 1064, 30 L. Ed 220 (1886) the court said: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

8 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).

9 In Hirabayashi v. United States, 320 U. S. 81, ..., Sup. Ct. ..., 87 L. Ed. 1774 (1943), Mr. Justice Murphy, in a concurring opinion, states that racial distinctions based upon ancestry "are utterly inconsistent with our traditions and ideals." 320 U. S. at 110.

In Steele v. Louisiana & Nashville R. R. Co., 323 U. S. 192, 65 Sup. Ct. 226. 89 L. Ed. 173 (1944), Mr. Justice Murphy, in a concurring opinion, discussed racial discrimination by a labor union. "The cloak of racism surrounding the action of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreement discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States." 323 U. S. at 209

10 Roberts v. City of Boston, 5 Cush (Mass.) 198 (1849).

11 Strauder v. West Virginia, 100 U. S. 303, ..., Sup. Ct. ..., 25 L. Ed. 664 (1880). The exclusion of Negroes from jury service was held to violate the Fourteenth Amendment to the Constitution of the United States.

the validity of the requirement of separate schools for white and colored races was not in issue. Neither was that the direct issue in many of the recent cases in which there are general statements approving of segregation upon such a basis. An investigation of three of these cases shows that when the question had been discussed it was not essential to the decision. Many expressions can be found in which the courts have assumed that the Plessy doctrine would apply to racial segregation in public educational institutions. It seems, however, that the Supreme Court of the United States would not have to overrule the Plessy case to abolish segregation in public schools as established by law; instead it would only have to refuse to extend the doctrine after a complete consideration of a case squarely upon the merits of the "separate but equal" theory and a practical application of the doctrine. The attack would not be so much upon the legal doctrine as it would be upon factual fallacy upon which it is founded. However, if the Court should feel that there is judicial precedent for such a doctrine it should rid itself of such doctrine at the earliest opportunity.

The Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States." If that be the true purpose of the Amendment, not only must the question be considered from the point of view of judicial precedent, but the practical application of the theory must be investi-

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Pierre v. Louisiana, 306 U. S. 354, 59 Sup. Ct. 536, 83 L. Ed. 757 (1939). A conviction of murder was invalidated because Negroes were excluded from the venire from which the grand jurors were drawn.

12 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 (1889).

13 Gong Lum v. Rice, 275 U. S. 78, 48 Sup. Ct. 91, 72 L. Ed. 172 (1927) stated that the "question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored race and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black."

Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 (1908) held that a statute punishing a person, corporation or association who operated an institution for both races was valid as applied to a corporation, but the court indicated that "the statute is clearly separable and may be valid as to one class, while invalid to another."

Missouri ex rel Gaines v. Canada, 305 U. S. 337, 59 Sup. Ct. 232, 83 L. Ed. 203 (1938). The issue was such that any discussion the court may have made on this issue was superfluous.

14 Typical of the reasoning is that found in Wrighten v. University of South Carolina, 72 F. Supp. 948 (E. D. S. C., 1947): "Segregation in education may be considered as a necessity or a luxury, according to the geographical situs. Each community will have to decide whether it can or desires to sustain the financial burden of segregation and this must be treated as a political rather than as a judicial problem." The issue of segregation was not involved. 72 F. Supp. at 950.

gated. The courts must also consider whether or not there can be true equality in schools where segregation based upon ancestry is compelled by law.

In a recent case a California district court has repudiated the doctrine that "separate but equal" public schools would provide equal protection of the law. This time the segregation was practiced, not against Negroes, but against children of Mexican descent. The court pointed out that the theory of racial superiority was erroneous and refused to allow segregation.

The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, textbooks and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.

Such a ruling is sound from a legal as well as a sociological and moral point of view. In the *amicus curiae* brief, submitted by the National Association for the Advancement of Colored People in that case, it was pointed out that a state statute requiring the racial segregation in state-supported schools not only violated the Fourteenth Amendment but it violated the United Nations Charter (Article 55c) which has been adopted as a part of our law. The government pledged itself to promote "uniform respect for, and the observance of human rights and fundamental freedoms for all without distinction as to race ...." The Act of Chapultepec was signed by the United States with her Latin American neighbors whereby our government pledged its efforts to prevent racial and religious discrimination. Such international obligations are binding upon our Federal Government and upon the individual states.

The practical application of the doctrine of "separate but equal" theory in our public schools is one of the darkest blots upon the history of our nation. Even if we assume that two schools may be equal, it is a fact that in no manner are the colored schools in the south "equal" to those schools maintained by the state for white students. In South Carolina during 1939-40 the average salary per member of the instructional staff for whites was $953 while only $371 was spent for colored. In the same state the per capita cost for white pupils was greater than that per Negro child by 271.8% Such conditions are typical of those existing in all areas where the "separate but equal" theory is applied. To allow a minority group to be deprived of the

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17 Ibid.
fundamental rights guaranteed by the United States Constitution, because of a mere technicality, violates the fundamental principles upon which our nation was founded. The "separate but equal" theory results in a practical denial of equal rights.

Many courts have issued alternative injunctions on the question of separate but equal schools for Negroes. In *Wrighten v. the Trustees of the University of South Carolina*, the court ordered that either no legal education should be provided by the state, or that the plaintiff should be admitted to the law school maintained exclusively for white students, or the state must furnish a "separate but equal" school for Negroes. Needless to say, the state, pursuant to this decision, is attempting to establish a separate school. If we assume that the state officials act in good faith, is it possible for them to establish a professional school equal to one that has been in existence for several decades?

Equality in physical facilities does not make one professional school equal to another. The quality, training and experience of the faculty, the curriculum, the extra-curricular activities, the publications, the library, the quality and number of the student body, the standing of the school in the profession and in the judgment and opinions of the community as to its values, are all factors which must be weighed in judging the equality of two schools. To hold that any state could establish, within a short period, a professional school that would be substantially equal to one that has existed for many years is to ignore the recognized principles upon which professional schools are commonly rated. Individual differences among the faculty members as well as among the student body would make it impossible for any court to say that one school is equal to another for the purposes of excluding a whole race from one or the other.

Racial segregation creates and promotes a situation in which prejudices and hatreds will grow. It is a fact that the only basis for segregation is the mistaken theory of racial superiority. The psychological effect upon the segregated students of the "inferior" race in such a segregated school would make it impossible for the two schools to ever attain equality. No one doubts that the value of real estate is based upon the social standing of the occupants in many cases; such a factor can not be ignored in judging the equality of two schools. To the extent that segregation becomes a psychological burden it becomes a violation of equal protection of the laws. It can be argued that the law should not take affirmative action by attempting to remove existing social inequality but it is quite another thing to say that the law may transform social inequality into a form of legal inequality.

Recently the Supreme Court of the United States has been increasingly concerned with the rights of minorities. Civil rights have

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been protected against oppressive majority discrimination. Freedom and justice have become inseparable. If our form of government is to continue, some abuses in our nation must be corrected; otherwise our pledges to true democracy recently proclaimed by our delegates to the United Nations, will be considered to be echoes of our own hypocrisy. Because the conflicts will be great in a section of our nation which has deemed it advisable to deny equality and justice to a minority race is no reason to read into our Constitution a judicial interpretation that is foreign to the purpose for which it was adopted. As Mr. Justice Harlan protested in 1896: "There is no caste system here. Our Constitution is color-blind and neither knows nor tolerates classes among its citizens. In respect to civil rights, all citizens are equal before the law." 22 Neither true equality nor substantial equality will come under a system based upon racial segregation.

Leonard Boykin, Jr.

THE FUTURE OF THE MODEL CODE OF EVIDENCE.—Referring to the trial of Socrates, Plato, in his Apology, stated that the accusers of Socrates said he had the faculty for making the worse cause appear the better. This same criticism has been leveled at some of the modern day trial attorneys when they achieve the same result by the aid of outmoded and unrealistic exclusionary rules of evidence. To remedy this obvious injustice, the American Law Institute, with the aid of experienced judges, lawyers, and educators, formulated a model code of evidence in 1942. Professor Edmund Morgan of the Harvard Law School was chosen as Reporter and John Wigmore was selected as Chief Consultant.1 The purpose of the Code is stated by Professor Morgan in his forward to the Code:

The law of evidence is in such a confused and confusing condition that it is almost impossible to draft a rule which is universally accepted without qualification. On the other hand, many of the rules, if adopted, will make important changes

22 Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 1317 (1946).

1 Assisting as members of the Evidence Editorial group in compiling the Model Code were Wilbur H. Cherry, University of Minnesota Law School; William G. Hale, University of Southern California Law School; Augustus N. Hand, United States Circuit Court of Appeals, Second Circuit; Mason Ladd, University of Iowa, College of Law; Learned Hand, United States Circuit Court of Appeals, Second Circuit; Henry T. Lummus, Supreme Judicial Court of Massachusetts; John M. Maguire, Harvard Law School; Charles T. McCormick, University of Texas Law School; Robert P. Patterson, United States Circuit Court of Appeals, Second Circuit; and Charles E. Wyzanski, Jr., Boston, Massachusetts. Mr. Maguire also acted as an Assistant Reporter.
NOTES

in the common law. They call for serious consideration by the Bench and Bar; and in considering them the members of the profession should have constantly in mind the disturbing truth that more and more of the problems which are traditionally solved by lawyers and judges are being taken from the courts and handed over to private arbitrators or to official administrative tribunals. To what extent this phenomenon is due to the obstructions to the prompt and efficient investigation and determination of disputes which have been interposed by antique rules of procedure and the exclusionary rules of evidence is a question which deserves more than passing attention. Unless Bench and Bar institute a procedure for quickly disclosing the matters really in dispute between litigants and for a speedy, inexpensive, and sensible trial and final determination of those matters, potential litigants will justifiably resort to other tribunals, official and unofficial. To say that the courts have not and cannot get personnel competent to use such a procedure is to confess that our system of administration of justice has completely broken down.

It is important to emphasize that the Code is not a restatement of the law of evidence. The counsel of the American Law Institute, believing as they did that the present law of evidence needed clarification to make it workable and produce certainty in its application, decided to eliminate the numerous anachronistic rules. They admitted that a large part of the law of evidence should be preserved, since it is basically sound, but nevertheless they realized that outmoded rules suppressed rather than developed the truth, and they felt that a thorough revision of existing law, rather than a restatement, would accomplish their purposes. It was the view of Professor Morgan that many of the evils of the present rules are the result of too great particularization and that more flexibility would not only promote but also expedite justice for the litigants.

With the advent of the trial by jury, rules of evidence were evolved to regulate the conduct of the trial. The trial by jury supplanted outmoded methods of trial which had proven to be unsatisfactory as instruments of justice. These included trial by battle, ordeal, and compurgation, also known as wager of law. Although classified as trials, they were actually tests the parties were compelled to undergo to prove their claims. The wager of law often afforded a dishonest defendant a means of evading a just obligation and, as a result, it became obsolete in the royal courts, being supplanted by trial by jury. These earlier

2 Model Code of Evidence, Forward (1942). See also Stason, Cases and Other Materials on Administrative Tribunals, 419, Note 12 (1937) where it is said, "One wonders if the advent of administrative tribunals with their simplified procedure and their relaxation of technical rules of the common law will
forms of trial became obsolete because the litigants felt that they were being deprived of substantial justice because of the farcical nature of the proceedings which became increasingly irrational and which failed to keep abreast of changing times and conditions, and thus they turned to the trial by jury. This fact is of prime importance to us today when we observe the growing use of administrative tribunals in the settlement of legal controversies. There is a possibility, not too remote, that just as the trial by jury as we know it today supplanted the earlier methods of trial, it too, may be supplanted and its functions usurped by administrative tribunals.

The Code, representing, as it does, about three years of concerted, conscientious effort by the country's leading legal minds, purports to forestall such a possibility by shearing off the evidentiary barnacles that hinder rather than aid the true administration of expeditious justice.

The rules of evidence are greatly relaxed and, in some cases, entirely discarded by statutory provisions creating administrative tribunals themselves. This is typified by a provision of the National Labor Relations Act which states, "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."  

in the course of time have a liberalizing effect upon conventional judicial processes. Such a result is not out of the question, and at least a few observers have pronounced it a likelihood."

5 "The most common and popular medieval form of trial by oath was where the party swore with oath-helpers, and was called compurgation. It consisted in the producing, by the party adjudged to make the proof, of a specific number of persons to make oath in his favor; the requisite number varied with the rank of the parties and of the compurgators, the value of the property in dispute, and the nature of the suit. These persons were not witnesses, and they swore, not as to the facts, but as to the truthfulness of the party who produced them in his behalf. In small matters the oath taken was an informal one, but in serious criminal cases it was made so intricate that its words could only with great difficulty be repeated, and if the wrong word was used the oath burst and the adversary won.... From being a favored mode of trial, this 'law,' or, as it was commonly called 'wager of law' steadily tended to become a thing exceptional; not going beyond the line of the precedents, and within that line being a mere privilege alongside the growing ... trial by jury. In the newer forms of action it was allowed and finally it survived mainly in Detinue ad Debt. In 1833 it was abolished in England by Act of Parliament." P L U C K N E T T, A CONCISE HISTORY OF THE COMMON LAW, 108-111, 325 (2nd Ed., 1936). In the ordeal a hot iron was placed in the hand of the accused or he was compelled to plunge his hand into boiling water, then the hand was sealed and kept under seal for three nights. The bandages were removed, and if the hand was uninjured, he was deemed innocent. In trial by battle the suitors or their champions engaged in physical contests. There was a professional band of champions who undertook business all over the country; courts would arrange the dates of battle so that the champions could fit in their engagements conveniently. Since very great landowners were so constantly involved in litigation, they maintained their own fulltime champions. Naturally this method, which favored the rich, was never popular among the poor.

The popular appeal of the administrative tribunal is well illustrated by the following statement of Robert H. Jackson, Associate Justice of the Supreme Court of the United States:

Most lawyers like court procedure, which is somewhat ceremonial and moves according to a prescribed ritual. Administrative bodies on the other hand, generally sit informally. Their procedure is not rigid, and many of them admit laymen to practice. The court receives evidence only according to technical rules of presentation, competence and relevance. None but the lawyers understand these rules, and they are generally in disagreement about their application, which makes a trial something of a drama of objections and exceptions, with lawyers playing all speaking roles. The administrative tribunal is non-technical about the receipt of evidence, its procedure is flexible, and even mistakes are easily amended. A layman may actually understand what one of these administrative tribunals is doing. Such a tribunal may have a better knowledge of the problems at issue than the lawyer who presents the case. It may have its own corps of experts to advise and assist it. Such a tribunal is not as dependent as the ordinary court upon the arguments of partisan counsel to get at the truth. Skilled advocacy is neither so necessary to keep such a body informed nor is stupid or cute advocacy so apt to blur the merits of a controversy.5

Professor Maguire concurs with Mr. Jackson's opinion that there is a real danger that administrative tribunals may usurp the functions of the courts unless constructive changes are instituted. He believes the easier administrative practice is pleasing to the litigant.6

In our discussion thus far of the Model Code of Evidence, we have attempted to present the obvious need for an improvement of the

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present day system of trial by jury, and we have pointed out that it was the intention of the compilers of the Code, in part at least, to satisfy this need. The prime question then is: Does the Code improve the everyday jury trial? If not yet, then will it in the future improve practical methods of obtaining justice for the litigants? Unless the Code does actually aid the judge, jury, counsel and litigants to arrive at truth, its contribution to legal knowledge is purely academic. It would be well, then, to consider the recognition the Code has received among its prospective users, the bench and bar.

It is rather obvious that the greatest part of the Model Code conforms to the universally necessary and accepted regulations now in effect as rules of evidence. These standards are not questioned in any jurisdiction and are admittedly productive of justice in jury trials. It is the practices prevalent in many jurisdictions which the makers of the Code feel do not expedite justice, that form the vortex of discussion.

Because the Model Code does not conform, in certain instances to the existing rules of evidence, it has been branded as too radical. It is questionable that this is a legitimate objection. If worthless rules exist, to reject their change is illogical. It would seem that a more advantageous evaluation of the Model Code would be found in an examination of the existing situation under the old rule and then the performance of a theoretical investigation under the Code regulation. From a comparison of the two results, the practice most likely to bring justice to the parties should be chosen. This, of course, would entail a thorough familiarization by each jurisdiction with the tenets of the Model Code. This has been undertaken in many jurisdictions.7

To date, the Model Code has not been extensively cited as authority by courts. Indeed, it would be amazing, if it had been since the Code has been in existence for only five years.

Courts' mention of the Code has generally been restricted to little more than comment. In the cases in which it has been cited as author-

7 MaGuire, Evidence, 164-165 (1947, says "Men who sound like good prophets warn us that if the judiciary continues to carry only outmoded stock of procedural goods, it may find itself without customers. Once change over the fashion from judicial litigation to administrative litigation, and it will be cold comfort for the legal profession to speculate upon the likelihood that the inherent vices of administrative procedure may grow with the debilitating ease of firm establishment and the fading of early crusading fervor. Destruction of business or professional good-will, the habit of coming back to the old stand for more, is a matter of long-term regret. If before popular revulsion comes, the courts as we now know them have lost their hold, resuscitation of their fine qualities and influence will be a slow, hard job. Wisdom demands timely renovation of features like the hearsay rule which impair the competitive position of judges as against administrators, arbitrators, and their kin. Any extensive triumph at this time of calculated obstructionism, mentioned in our second chapter as the essence of the law of evidence, will indeed be a Pyrrhic Victory."
ity, the holding was in accord with the pre-existing general rule of the jurisdiction. And usually, in addition, cases were cited to substantiate the general rule. The Code under these conditions, is no more than declaratory of the accepted general rule.\(^8\)

The Model Code represents a practical guidepost for the future, but whether it will be utilized depends upon a number of factors. Times change, popular thinking changes, and unless the laws and rules adapt themselves to meet present day conditions, they will be relegated to the oblivion that they justly deserve. Many feel the Code is too radical. If their contention is correct then it will be read, discussed, and filed away in the library as a fine theoretical dissertation to be cited and referred to by students and educators. The law is a changing force and it is always in a continual process of growth. A study of the growth of the law reveals that any new change or development contrary to solidified precedents has been labeled "radical." If, however, the Code is to have a practical application, it is necessary that it be used in the determination of litigation by the courts and be adopted by the legislatures of the various states.

Codes are not new. From the most ancient Codes of Hammurabi, King of Babylon, promulgated about 2100 B.C., through the Justinian Code, the New York Field Act Code, to the present Federal Administrative Act of 1946, codification has attempted to introduce certainty and rationality into the law. The Model Code of Evidence, possessing, as it does, certainty and rationality, represents, it would seem, the best available touchstone by which the courts can extricate themselves from slavish obedience to rigid formalism which has no place in our fast-moving, high-tempo, modern society. It is a complete coverage of the entire subject of evidence formulated on the theory that since ascertainment of truth is the prime requisite of the court, all relevant evidence should be admitted and exclusionary rules curtailed.

Although the Code fulfills a long felt need in the law of evidence, nevertheless, at the present time, we see only faint glimmerings of its

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\(^8\) Very great weight was accorded a Model Code of Evidence rule in The C.G.R.-180, 70 F. Supp. 975 (1946).

Other cases which do little more than acknowledge that the Model Code of Evidence presents a rule similar to that always in existence in their jurisdictions are: Pennsylvania R. R. Co. v. Rochinski, 158 F. (2d) 325 (1946); Wright v. Wilson. 154 F. (2) 616 (1946); United States v. Angelo, 153 F. (2d) 247 (1945); People v. One Mercury Sedan, 74 Cal. App. (2d) 304, 168 P. (2d) 443 (1946); Knox v. Knox, 22 Minn. 477, 25 N. W. (2d) 225 (1946); In re Forsythe's Estate, 221 Minn. 318, 22 N. W. (2d) 19 (1946); Stella Cheese Co. v. Chicago St. P., M. & O. Ry. Co., 248 Wis. 202, 21 N. W. (2d) 655 (1946); Meeks Motor Freight v. Ham's Adm'r., 302 Ky. 71, 193 S. W. (2d) 745 (1945); State v. Scott et al., Idaho, 175 F. (2d) 1016 (1947); Vanadium Corporation of America v. Fidelity & Deposit Co. of Maryland et al., 159 F. (2d) 105 (1947); Brasher v. State, Idaho, 30 So. (2d) 26 (1946), 30 So. (2d) 31 (1947); and Bloch v. Brown, Mississippi, 29 So. (2d) 665 (1947).
recognition by the courts. But it is our opinion that when the true worth of this monumental effort is realized generally by the members of the bench and bar, it will be accepted and integrated into the American system of jurisprudence and exert a tremendous influence on the courts of the future.\(^9\)

*John J. Broderick, Jr.*

*Thomas F. Broden*

**BLACKFORD’S REPORTS.**—The broad highway of adequate present day legal reporting often narrows to a backwoods trail or a frontier path for those who make the journey to our legal yester-years. Such would be the case for the State of Indiana were it not for the life and work of one of her adopted sons, Isaac Blackford.

He was born in Bound Brook, New Jersey, November 6, 1786, the same year of Shay’s Rebellion in Massachusetts. During his pre-school years, a constitution for the United States was written and a government was set in operation. Before his high school years, a westward movement was active; Vermont, Kentucky, and Tennessee had been admitted to the Union; St. Clair had been defeated by the Indians; and Wayne had regained control of a portion of the Northwest Territory from the Indians. President Washington’s terms had given place to the term of John Adams. During Blackford’s high school years, President Washington had died at Mount Vernon, the federal capital had been moved to Washington, D. C., and Jefferson had been inaugurated president.

Blackford’s early love for books and learning was evident, and his scholastic ability was soon proved after he enrolled in Princeton in 1802 at the age of sixteen years. He was at the same time one of the youngest and strongest of a class containing many men who were later to be governors and judges of their respective states.\(^1\) His studies led him in his junior year into Civil Law, and in his senior year into

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*Professor of Law, University of Notre Dame.*

\(^9\) In the 1947 revised edition of the Federal Rules of Civil Procedure there appears a note to Rule 43, Evidence, on p. 44, which infers very strongly that the Model Code of Evidence will definitely influence future rules. “While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute.” (Italics ours.)


Blackstone's Commentaries. The next short step in his legal training was into the law office of Colonel George McDonald of Middlebrook, a hamlet adjoining Bound Brook, shortly after his graduation from Princeton in 1806. During his college years the current events included the statehood of Ohio, the Louisiana Purchase, the Burr-Hamilton duel, and the Lewis and Clark Expedition. After a year's study with Colonel McDonald, he moved to the law office of Judge Gabriel Ford of Morristown. He was admitted to the New Jersey bar in 1810, having completed three years of study in the office of Judge Ford. He then faced the inevitable question for all lawyers: where to practice. It is difficult to determine why he heard the call of the west. He was a shy, quiet, soft-spoken scholar with a natural inclination toward study and contemplation. What charm did the rigors of a frontier western life offer such a citizen? Why would he leave the office of a successful and outstanding citizen of New Jersey, Judge Ford?

Benjamin Parke, an excellent lawyer, had moved from New Jersey to Indiana in 1801. Jonathan Jennings, later to be Indiana's first governor, was born a few miles from Bound Brook. It is not known whether they corresponded directly or indirectly with young Blackford, but they both did much to help him later in Indiana. In any event, in 1811, the young Princeton graduate and member of the New Jersey bar walked to a tributary of the Ohio River and flatboated down to Lawrenceburg, Indiana, to see Isaac Dunn, a friend of Judge Ford. He traveled on to Cincinnati and Dayton, Ohio, but came back to Indiana to make Brookville his first residence in this state.2

He was aware of his severest handicap, a lack of speaking ability. He knew also and would regret later his ineptness at trial practice.

Other frontier activities claimed his attention and at various times in the next five years he served as a bank cashier, a newspaper editor, Salem County clerk, clerk of the territorial legislature, and territorial judge.3

Knox County elected him in 1816 as its representative to the first legislature of the state and that body elected him its speaker. His kind friendliness and eminent fairness, as well as his demonstrated ability, impressed all those who observed his work in the legislature. He was marked to rise in law or government.

The judicial system soon organized provided for a three-member supreme court. Those appointments reflected the powerful political forces of that day headed by Jennings, Noble, and Hendricks. Legend has it that they were not personal friends, but they did agree to harmonize their political actions. Jennings became governor; Noble, a

3 Woolen, BIOGRAPHICAL AND HISTORICAL SKETCHES OF EARLY INDIANA 344 (1883).
United States senator; and Hendricks, a congressman. These three men chose the members of the "Old Supreme Court." Jennings chose his friend and neighbor, James Scott. Noble chose his friend and neighbor, Jesse L. Holman. Hendricks, through political consideration, chose John Johnson of Vincennes.

Johnson died after one term of the court and at the funeral Governor Jennings informed Blackford that he was considering appointing him to the supreme court vacancy. Such offer was consistent with the help Jennings had heretofore given his fellow New Jersey emigrant. They had also found friendship and common ground in their openly antagonistic attitude toward Territorial Governor Harrison's consent to evasions of the anti-slavery restrictions of the Ordinance of 1787. Able and powerful supporters of Harrison were attempting to introduce slavery into this state, and Harrison was turning a sympathetic political ear. Blackford read Article VI of the Ordinance of 1787, "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." To Blackford this was plain and capable of only one interpretation, and from this conflict grew a continuing personal animosity toward Harrison.

At the offer of the supreme court appointment, Blackford is said to have pleaded his youth and inexperience. He knew that such lawyers as Parke, Dewey, Noble, and Lane would be practicing before the court. Jennings, however, had confidence in Blackford's ability and made the appointment in 1817. Indiana was to have cause for appreciating the choice.

Thus the stage was set for the important part of Blackford's life work in growing with Indiana's judicial system and helping it to mature. It is somewhat difficult now to appreciate the problems of a newly organized supreme court in a pioneer society. Indiana in 1816 was the nineteenth state in a federal government which had been organized only twenty-seven years before. The common law and constitutional provisions as interpreted by the new supreme court would be the anchor of government until modifications by legislative enactments could come with time and social needs. Into this picture Blackford fitted perfectly. When, thirty-six years later, Indiana wrote a new constitution and the constitutional convention composed of many lawyers laughed at the common law form of action of ejectment and similar seeming legal monstrosities, it might be well to consider whether Blackford or the reformers were to be desired in 1816. Blackford came to his new task with a fine education and an excellent knowledge of the common law. He seemed also to find pleasure in the isolation and lonesomeness of legal research. Once he had investigated a subject, his fellow judges felt that that section of the field was exhausted.

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He took his place upon the supreme bench at thirty-one years of age. James Iredell, a Princeton classmate, had been similarly honored in North Carolina at that early age. Judge Story had been appointed to the Supreme Court of the United States at the age of thirty-two. Some older lawyers were to wonder at such youthful appointees but in each case the choice proved sound.

In 1819 he returned to visit the McDonald family in Middlebrook, New Jersey, and to fall in love with their sixteen-year-old daughter. The McDonald family moved to Vincennes that fall, and the next year the thirty-four-year-old supreme court judge married the vivacious seventeen-year-old daughter of the McDonalds. There were some noticeable discords as the two personalities attempted to harmonize, but tragedy interrupted when the wife died with the birth of a son, George, in 1821. Blackford resolved not to marry again and his life of a hermit and recluse began. He was driven farther down his lonesome road when his son died before maturity. The supreme court headquarters had been a room in the governor's mansion on the circle in Indianapolis, and this came to be Blackford's home, library, and world. Fate conspired to narrow his vision. The admonition to an English Chancellor, "Go out and talk with the people" could have been profitably heard by Blackford.

As early as 1822 he became conscious of a growing need to have the Indiana Supreme Court decisions reported. No provisions had been made for such reports when the government was organized. His plan called for a study of punctuation and writing style as well as the study of all the latest law reports. The publications would be at his own expense for whatever profit they could earn. He would select, rewrite, and discard decisions so that his reports would best represent principles of common law in varied jurisdictions. Perhaps they might be cited and used beyond the borders of Indiana. As the work developed, a powerful desire also developed in Blackford to have everything absolutely correct, and he spared neither his time, labor, nor money. He carried on correspondence with Webster concerning doubtful words. Progress seemed slow, but his first volume was ready for publication in 1830. He had one thousand copies made of that edition. It took its place beside the Massachusetts and New York reports and found its way into English legal libraries.

Chancellor Kent commended it for its extensive and accurate law learning and its valuable annotations. Washington Irving, then secretary to the American Legation at the Court of St. James, wrote, "I meet with it frequently, and I am often asked as to the antecedents of its author, whose name is already quite familiar at Westminster."

Volume II was published in 1834, and, since several copies of Volume I were on hand, Blackford ordered only seven hundred fifty copies

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of that printing. One thousand copies of Volume III were published in 1836, the same number of Volume IV in 1840, the same again for Volume V in 1844.

Since sales were increasing by this time, fifteen hundred copies of Volume VI were published in 1845, and the same number of Volume VII in 1847. Twelve hundred fifty copies of Volume VIII were published in 1850. Volume IX was in preparation when, to Blackford's surprise, Thomas L. Smith, a fellow supreme court judge, published a volume covering the same decisions. Blackford decided to cease publishing reports. Thus came to a close thirty years of hard, faithful work and excellent accomplishments. The name Blackford was an Indiana household word. He was considered more of a lawmaker than the state legislature. Chancellor Kent again commented, "It is an interesting fact to find not only the lex mercatoria of the English common law, but the refinements of the English equity system, adopted and enforced in the State of Indiana as early as 1820, when we consider how recently that country had then risen from a wilderness into a cultivated and civilized community."

Several facts attest to Blackford's long continuing popularity. Several times he was a strong anti-machine political candidate even though he was no orator, no glad-hander, nor in any sense a political planner. In 1835 a law professorship was created at Indiana University and Judge Blackford was elected to the chair, but he declined the offer. In 1838 the state legislature approved the organization of a new county and Blackford's name was given to it. His popular appeal vanished with the advent of Jacksonian Democracy with the spreading of the demand for legal reform, and with the calling of a second Indiana Constitutional Convention in 1850. The story might well end when Judge Isaac Blackford, the senior judge of the Supreme Court of Indiana, administered the oath to the convention delegates on Monday, October 7.

The convention debates, however, reveal the reason for and the nature of the change which came in the judiciary. Some delegates were of the opinion that the supreme court reorganization was one of the chief reasons for calling a convention. Others noticed that some cases had been before the court from five to seven years awaiting a decision. Another complained that he had a suit for ten thousand dollars before the court for two years and no decision was forthcoming yet. Still others defended the court because of the increased litigation in an increasing population, and suggested a five-member supreme court be organized. The convention resolved the question by providing for a five-member supreme court to be elected instead of appointed. The convention also wrote a protest into Article 7, Section 6: "The General Assembly shall provide by law, for the speedy publication of decisions

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of the Supreme Court, made under this Constitution; but no judge shall be allowed to report such decisions." (Italics supplied).

Blackford was unable to win an election for a place on the “New Supreme Court” in 1852. He was later defeated in convention for a position of supreme court reporter. Thomas A. Hendricks defeated him in a Democratic congressional convention. It was difficult for Blackford to find himself with little to do, even though his fortune in Indianapolis real estate had grown into a quarter of a million dollars in value. He made an unsuccessful attempt to practice law before being appointed to the Court of Claims at Washington by President Pierce. He served there until he died December 31, 1859.

Lawyers today, even as his contemporaries, appreciate his contribution. O. H. Smith, himself a leader in Indiana law in Blackford’s day, said, “Judge Johnson lived but a short time and Isaac Blackford, of Vincennes, a young lawyer from New Jersey, a graduate of Princeton, was appointed to the vacancy. Like Judge Story, he looked too young for that high judicial station, but, to say the least, he came fully up to the expectations of his friends, as his decisions and reports conclusively show. He is now one of the judges of the United States Court of Claims, sitting in Washington. The principal characteristic of the mind of Judge Blackford is caution. He never guesses. Declamation with him is nothing, precedent and good authority everything.”

The Southern Law Review in 1881 stated that Blackford “was preeminently a common-law lawyer and contributed more than any other man of his time to the high character of Indiana’s judicial reputation.”

The Green Bag in 1890 called the reports “Blackford’s monument; and no better example of reporting can be produced in America or England.”

On Blackford’s monument in Crown Hill Cemetery in Indianapolis is a list of his achievements with the closing line, “The honors thus conferred were the just reward of an industry that never wearied, of an integrity that was never questioned.”

Robert F. Burns

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7 Thornton, Isaac Blackford, the Indiana Blackstone, INDIANA HISTORY BULLETIN Vol. VIII, 327 (1931).
8 Smith, EARLY INDIANA TRIALS AND SKETCHES 85 (1858).
9 6 So. L. Rev. (N. S.) 907 (1881).
10 THE GREEN BAG Vol. IV (1892).
LAWRENCE J. REID

Labor Law—Comment on the Taft-Hartley Act, Title I.—Of all the statutes enacted by the Eightieth Congress, in its first session, the Labor Management Relations Act, 19471 seems destined to have the most far-reaching effect. The Taft-Hartley Act, as it is more popularly designated, is a hurried attempt to deal with the most complex and crucial domestic problem of our society, the relationship of labor, capital and government. Prior to this legislation, the common law of labor relations had evolved from juridical concepts manifest both in legislation2 and in rulings3 whereby mutual aid among workers was considered an indictable conspiracy. The long sought-for day had at last been reached when collective bargaining was recognized as a right to be protected by government. This recognition was crystalized in the 1935 Wagner Act.4 The impact of the Taft-Hartley Act is of such moment as to be a matter of consequence to every citizen, since it is based on an old hypothesis, which, nevertheless, had not been seen in this century’s legislation—a hypothesis as to the very purpose of labor law. Upon the validity of this theory, which itself will appear in the study of the statute, rests the validity of the enactment.

Following veto by the President of the joint Senate-House conference bill, the House of Representatives overrode the veto by a vote of 331-83. Three days later, on June 23, 1947, the Senate followed suit by a vote of 68-25. Provisions of the Act went into effect at various times—some at the date of passage and some awaiting operation until one year thereafter.5 In the first three months following passage of the Act there were only two adjudications6 relevant to its provisions. Although it is too soon to determine the implications and validity of the various provisions under the x-ray of judicial interpretation and analysis, the tests will not be long pending. Both major associations of labor organizations, the Congress of Industrial Organizations

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2 2 & 3 Edw. 6, c. 15.
3 Rex v. Eccles, 1 Leach 274, Eng. Reprints 240 (1783).
5 Secs. 102, 103, 104. Unless otherwise indicated all references to sections, hereinafter, refer to P. L. 101.
and the American Federation of Labor, are preparing test cases on the
different provisions. Of the Taft-Hartley Act’s five Titles or main divi-
sions, only Title I may be studied, prior to judicial action, relative to
previous law, with any hope of reasonably accurate comment. A
glance at the others will suffice. Title II is entitled “Conciliation of
Labor Disputes In Industries Affecting Interstate Commerce; National
Emergencies.” Suits by and against labor unions are provided for in
Title III. By Title IV, the joint study board on the problem of labor
relations, recommended by President Truman is established. The final
portion, Title V, merely provides definitions, saving provisions and sep-
arability. Immediately after passage of the Act there began a flow of
arguments for and against it. Many constructive criticisms and analyt-
cal studies have emerged from the arguments, as to these four Titles.

Title I is the portion most susceptible of concrete analysis prior to
judical determination of its provisions because it consists of a series of
amendments of, and additions to, the often-tested National Labor Re-
lations Act. Generally, it may be said, most of the employer activities
prohibited by the 1935 statute are, by the 1947 statute, made prohibited
employee activities. In addition, certain specific functions of labor
unions are drastically curtailed. A more detailed study of the provi-
sions of this portion of the enactment would be incomprehensible with-
out noting at least briefly, the economic and political factors which
were, collectively, its proximate cause.

Many political scientists conclude that the character of the Congress
passing this Act was primarily the reaction of the electorate to years of
wartime controls necessarily imposed by the preceding legislative ma-
majority and its party’s administrations. True, a solution to the problem
of labor-management relations was a matter of public concern but
there was clearly no mandate for any action like the statute in ques-
tion. This view is substantiated by the campaign history wherein both
parties promised a study of the problem but neither committed itself
to any appreciable number of the restrictions finally enacted. Rightly
or wrongly the voters were more interested in freedom from restrictions
than in adequate legislative solutions. However, this Act is the culmi-
nation rather than the initiation of American legislation restricting la-
br practices. Beginning in 1943 with the passage in twelve states of
what we may call “restrictive” statutes, the trend has become even
more pronounced. At this writing some thirty states have such re-
strictive laws on their books. Some of these outlaw union security
agreements, and others impose mandatory arbitration. Certain of the
legislatures have even attempted to outlaw the basic right to strike. In
North Carolina, Arizona, Nebraska, Tennessee and Florida, the Ameri-

7 The Notre Dame Lawyer contemplates commenting on other Titles
of the Act in subsequent issues.
8 See bibliography in 22 Journal of the State Bar of California 407.
can Federation of Labor is testing the constitutionality of various phases of the anti-closed shop acts.\textsuperscript{9} Probably these test cases will be appealed to the Supreme Court of the United States. Thus it is apparent that the federal government is not alone in its attempt to find the answer to the overall problem.

All this legislation cannot reasonably be ascribed to the work of any clique or combination of interests. It is rather an attempt to solve such an apparent dilemma such as that dramatically met in the \textit{Lewis contempt} case,\textsuperscript{10} wherein the right to strike appeared to conflict with the public welfare. Some solution was mandatory. The President suggested a thorough Congressional study of the problem in order that adequate legislative action might follow. Nevertheless the most ardent proponents of the Taft-Hartley Act deny that its purpose is to solve the basic problem. These men explain that the hope is merely to equalize bargaining positions. But the enactment of this statute had other roots also, such as the abuse, by a few unions, of racial equality rights,\textsuperscript{11} the jurisdictional strike, alleged mishandling of union funds and demands for pay of unneeded help. Another reason for the act—and an obvious and important one—was the toleration of Communists and persons of the lunatic political fringe in some positions of union authority. There are compelling domestic and international reasons why such a situation must be corrected (witness the strife in France and Italy during the fall and winter of 1947). That the unions themselves had begun to correct some of these abuses was insufficient to overcome the realization that positive governmental action was required, even though the abuses were the exception and not the rule. The most obvious cause underlying the enactment, (but only partially responsible for it), was the pressure of such groups as the National Association of Manufacturers, who, for more than ten years had fought the Wagner Act and all that it guaranteed. Such organizations, with their vast financial resources, engaged in extensive political activity to insure passage of this Act.

These, then, were the major factors contributing to the atmosphere in which the Taft-Hartley Bill became the Taft-Hartley Act. Opposition to passage was almost exclusively that of Democrats from western, northern and eastern states.

In any study of Title I it is essential that the policy and aims of the Wagner Act, which it revises, be kept in mind. The extent to which the problems at which the 1935 statute was directed are solved, and

\textsuperscript{9} Address of Joseph A. Padway, General Counsel of the A. F. L. to the 1947 convention.


\textsuperscript{11} The by-laws of the C. I. O. provide against any racial discrimination by members.
the problems which have arisen in the interim, gives us the means for evaluating the Act.

The Act states its purpose to be:

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

In view of the changes made in the Wagner Act it was necessary to broaden the declaration of policy to include an expression of intent to control more strictly the activities of labor organizations as they affect interstate commerce. This is another long step in extending the Commerce Clause of the Constitution. It is likewise a recognition that not all strikes are the result of the employer's inequitable conduct.

Any detailed study of Title I must assume a working knowledge of the Wagner Act. Title I will be noted primarily insofar as it has altered, or added to, the earlier statute.

Among the "findings" of Congress set forth as the basis of Title I, the only addition listed to the findings of the Wagner Act is the one upon which the main premises of the Act must stand or fall: namely that unions, their officers and members, engage in activities intentionally or necessarily impeding the flow of commerce, and that such activities are therefore subject to elimination. The challenge to these premises and their conclusion will, quite obviously, be to the effect that the Commerce Clause is limited by those constitutional provisions guaranteeing the rights of citizens.

Certain "definitions" as used in the Wagner Act are altered. Labor organizations are now "persons" for purposes of the statute. Due to subsequent provisions affecting union practices this broadening of definitions was required. The meaning of "employer" is contracted to exclude the government and its corporations, thus relieving them from the prohibition against unfair practices. Likewise the synonyms for "employees" are reduced to the exclusion of independent contractors, supervisors and workers subject to the Railway Labor Act. The exclusion of supervisory employees is clarified by subsequent definition. The Ellender amendment to the Case bill, in 1946, sought to

12 Sec. 1(b).
13 Sec. 1.
14 U. S. Const. Art. XIII, Sec. 1, "Neither slavery nor involuntary servitude... shall exist within the United States..."
15 Sec. 2.
16 Sec. 2 (1).
17 Secs. 8 and 10.
18 Sec. 2 (2).
19 Sec. 2 (3).
20 Sec. 2 (11).
broaden the meaning of the term, and the result is finally obtained here. By this definition, (which includes even foremen) when coupled with a later section of the Title 21 supervisors cannot be included in any bargaining unit, mixed or separate. (Prior to this enactment supervisors were, of course, held to be employees.22) This latter section is one of the few which have as yet received judicial application. A decision of a lower court ruling, under the 1935 National Labor Relations Act, recognizing supervisors as within the Wagner Act, was reversed in Young Spring and Wire Corporation v. N. L. R. B.,23 since the decision's operation would necessarily be in futuro and contrary to the statute. The National Labor Relations Board has ruled similarly on this section.24 Under Title I, and the entire statute, a supervisor is now stripped of all statutory rights as an employee and of all the legal protection of his natural, moral right to organize. These sections show too tender a regard for the common good and a failure to properly regard the supervisor's individual right. Another exception from operation of this law is found in a re-enactment of the Labor-Federal Security Appropriation Act 25 section excluding agricultural laborers. Yet another added definition is that 26 of "professional employees" who, when the definition is read with regard to a later provision,27 are required to be in bargaining units separate from those of non-professional workers, unless a majority of such professional workers votes for inclusion in the unit. Neither reason nor the Congressional Record supply any grounds for such a distinction. Also excepted from operation of the Act are employees of Federal Reserve banks and charitable hospitals. The last of the definitions is a clear abrogation of the common law and as such must, fortunately, be strictly construed. Its importance merits a full reading:

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (Italics supplied.)

Under a literal interpretation of this sub-section a union might be made liable for wildcat strikes or other actions beyond its real power to control. Only a well disciplined union could avoid such a liability and

21 Sec. 14 (a).
24 Eastern Gas and Fuel Association v. N. L. R. B., .... F 2 (d) ...., (C. C. A.-6, 1947), 13 Labor Cases C. C. H.
26 Sec. 2 (12).
27 Sec. 9.
yet, as one authority has observed, in subsequent provisions the Act drastically curtails the union’s right to discipline its members by threat of discharge, in union shops, “for engaging in wildcat strikes or dual unionism or other disruptive activity.” It will now be necessary for unions to contract a barrier to such liability. This provision is a plain indication that the Act is a compromise between those who would control and those who would destroy organized labor. In the light of subsequent sections which would make coercion or restraint regarding the exercise of certain “rights,” by “a labor organization or its agents,” an unfair labor practice and which gives a cause of action to anyone injured by boycotts and certain strikes—thus abrogating a large part of the Norris-La Guardia Act—the purpose appears to place labor in a position of absolute liability. An employer’s liability for the acts of his agents is in no way comparable in view of his infinitely greater control of his vicarious actors. Was such a fantastic result as is patent in this definition really the intent of Congress, taking into consideration its expressed goal of industrial peace? Probably not. Senator Taft himself has asserted, “I can see no legitimate objection to a limitation of liability by unions for acts of others which it cannot restrain.”

The next section of Title I provides for a revision of the functions and structure of the National Labor Relations Board and for a General Counsel of unprecedented peacetime administrative power. Composition of the Board is increased from three to five members with a wage boost from $10,000 to $12,000 annually per member. Outstanding among the Board’s new tasks, by way of controlling the conduct of labor organizations, are those of holding elections for union-shop determination, settling unfair labor practices as to jurisdictional disputes and seeking injunctions from the judiciary. By detailed codification of its functions and scope the Congress is attempting to limit the possibility of decisions which were truly unjust but most of which were, as General Counsel Denham has admitted, “... one by one... corrected as the cases came before the Courts...” The implications of these sections are so numerous as to prohibit study in this

28 Bull. No. 4, of International Brotherhood of Teamsters, explaining the Taft-Hartley Act.
29 Sec. 8 (b) (1).
30 Sec. 7.
31 Sec. 303 (b).
33 Explanation of the Taft-Hartley Act, by Senator Taft.
34 Secs. 3-6.
35 Sec. 3 (a).
36 Sec. 4 (a).
37 Sec. 9 (e).
38 Sec. 10 (k).
39 Sec. 10 (1).
treatment. Suffice it to note that the over-all effect is to give the Board, which is a quasi-judicial body, even wider jurisdiction and more limited investigating duties. Although it is established as law that the principle of due process received full support under the operations of the Wagner Act Board, the new statute separates the investigation from the hearing. To this end, among others, the office of General Counsel was created.

Creation of the General Counsel and assignment of his duties constitutes the greatest extension of bureaucracy, by a single legislative mandate, ever attempted without the use of war powers. "He shall have final authority . . . in respect to the investigation of charges and issuance of complaints . . ." under the section providing for the prevention of "unfair labor practices," 41 " . . . and in respect of the prosecution of such complaints before the Board." 42 Read in conjunction with the prescribed application of these duties it is at once plain that there is an unprecedented degree of power, in this appointee, regarding the course of labor relations. Of the officer's authority the General Counsel himself realized that, "Viewed from one standpoint, his powers are broad and absolute and his authority final to an outstanding degree seldom accorded a single officer in a peacetime agency." 43 It is difficult to ascribe the centralizing of such authority, on so vital a matter, to a high purpose. "He is the final authority as to whether such charges shall be dismissed, or whether complaints shall be issued and the cases prosecuted." 44 It can only be hoped that this partially independent administrator is well versed in the social and economic ends sought, by enlightened public policy, to be attained.

These sections, reforming the Board's function, have restricted it, procedurally, far more than other agencies within the Administrative Procedure Act. 45 The whole plan of the Title would seem to be the effecting of a horizontal increase and a vertical decrease in the Board's jurisdiction.

The section following is a description of certain rights of employees. The only "right" added to those acknowledged by the Wagner Act is the "right" to refrain from any activity tending to the advantages of collective bargaining, except, of course, in a union shop. 47 For

40 N. L. R. B. v. Jones and Laughlin Steel Corporation, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).
41 Sec. 10.
42 Sec. 3 (d).
43 Address to American Bar Association, Cleveland, Ohio.
44 Remarks of General Counsel Denham before St. Louis Bar Association, Nov. 3, 1947.
45 P. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946); Note 96 U. of Pa. L. Rev. 67 (1947)
46 Sec. 7.
47 Sec. 8 (a) (3).
the first time since the judicial repudiation of the yellow-dog contract, the scab is given a legal grounds for his conduct.

Perhaps the most important portion of Title I is that prohibiting and re-defining "unfair labor practices." Here again appears the attempt to mix the balm-like oils of social justice with the cold, black ink of the pen of Adam Smith. Those acts of the employer which the 1935 statute prohibited as unfair are essentially unchanged. By the 1947 Act certain activities of labor organizations are declared unfair. Provision is made for the negotiation of union security by a union-shop agreement (whereby a thirty-day non-membership is permitted), if the Board first certifies that "at least a majority of the employees eligible to vote" (italic supplied) so authorize. Before such a union security election, however, an election must be held, as provided elsewhere, to determine the workers' bargaining agent; if the union should fail to win the authorization vote, another election cannot be held for one year. Under the prescribed rules those who fail to vote are, in effect, voting "no." Where the possibility of employer domination (more subtle now than in the days of the Mohawk Valley formula) is present, such a situation might keep many from the polls. Apply this procedure to a public election and volcanic political possibilities are apparent. To date, however, the response of workers to election calls has been encouraging. Of fifty-eight collective bargaining elections conducted in October, 1947, presumably a representative month, ninety-two percent of the 2,649 eligible employees exercised the voting right. Incidentally, seventy percent of the valid votes were in favor of collective bargaining representation. Of the thirty-one union-shop authorization polls ninety-three percent voted, all but two percent favoring the union security. The net result of the voting provisions will depend largely upon the result of other provisions.

Among the new unfair labor practices of employers is discrimination by them against an employee who has been barred or ousted from union membership for reasons not of catholic application or for reasons other than non-payment of dues. In the following sub-section, however, it is specified that the union may establish the rules for "acquisition or retention" of membership. If there is a conflict in these provisions it will, very likely, first appear as regards expulsion and discharge of Communists, spies and strike-breakers. As the law stands, the refusal of union men to work in the same plant with Communists is an unfair labor practice. Of this situation the General Counsel has said,

48 Sec. 8.
40 Sec. 8 (a) (1), (2), (3).
50 Sec. 8 (b) (1)-(6).
51 Sec. 8 (a) (3).
52 Sec. 8 (b).
"... good or bad ... it is the law and it must be administered as long as it remains on the books in its present form." The section is not, however, without substantial merit. For example if the employee is a colored man, in a union shop, where the bargaining union is one which admits only white men, he would, nevertheless, keep his job. Perhaps the most legitimate objection to the section lies in the fact many employments are such that a thirty-day period of non-membership is sufficient to finish the job. General Counsel Denham has expressed the belief, with regard to this section, that "... even failure to pay assessments or fines levied by the union would not justify ... discharge." 54

Other unfair labor practices by unions are listed as:

1. Restraining or coercing an employee in the exercise of his non-membership rights;
2. To refuse to bargain collectively if the union is the employees' majority representative;
3. To engage in certain strikes and boycotts;
4. To charge excessive or discriminatory initiation fees in a union shop;
5. To force the employer to pay for work not expected to be performed.

Protection of the refusal of an employee to join the union is based upon the theory that the union's advantages should be sold to him on its merits and not as a matter of necessity. If an employee disapproves of a strike, even if by a certified union, he is now free to return to work. An analogous statute would be one allowing a citizen exemption from taxes if he did not see the need for fire and police protection.

As explained by the General Counsel of the Board, the duty to bargain is "... mutual and both must honestly strive to accomplish a meeting of the minds ...." But nowhere is there a requirement that any concessions must be made by either. The secondary boycott provision makes no distinction between those boycotts for justifiable cause and those not for justifiable cause but provides a blanket prohibition. This strikes a body blow at the very institution of unionism. Also forbidden as unfair is the jurisdictional strike, which is at root a friction between industry unionism and craft unionism. There can be little practical justification for such stoppages, and their end, like that of the sit-down strike, will be little lamented. The final unfair practice, featherbedding, is forcing an employer to pay for work which no one expects to see performed. The prohibition of such a practice is justifiable on obvious moral grounds. Although featherbedding was not without good reason in its origin, it had degenerated, in many instances,

54 Remarks before St. Louis Bar Association, Nov. 3, 1947.
to little less than extortion. Fortunately the restriction is only against paying for services "not performed or not to be performed." Under an interpretation viewing the intent of the statute this section can only balance the scales of justice. Nothing indicates a purpose of depriving a worker of his pay while "on call" or to regulate the number of employees on a job. The unfair practice consists of demanding pay "in the nature of an exaction." Even the National Association of Manufacturers has been quoted as saying that it is "fairly clear" that "... Congress, by using the words 'in the nature of an exaction', intended to reach only practices bordering on extortion ...."

Perhaps the most clear and yet drastic, peacetime restriction on labor lies in the specifying of a procedure for settlement where collective bargaining has failed, disregard of which is an unfair practice. Briefly the stipulations are that modification or termination of existing contracts or working conditions is "unfair" unless: (a) sixty days notice is given the employer; (b) an offer to meet for bargaining is made; (c) within thirty days after the notice to the employer, like notice is given to federal and state mediation services, and (d) the union refrain from striking for sixty days after the first termination notice.

Following, in Title I, the enumeration of unfair labor practices by workers and their representatives, there is provision for the determining of those representatives, under the heading, "Representatives and Elections." By its stipulations the representation, as earlier noted, of professional and other employees by the same unit is prohibited if the voluntary consent of most of the former is not forthcoming. But as regards representation of company property guards by a mixed union, even their majority desire will not avoid the prohibition. An application of this section has already been made by the Board. Discretion is delegated to the Board to decide whether the appropriate bargaining unit shall be the employer unit, plant unit, or a subdivision thereof. The day of nationwide bargaining has apparently not yet arrived. Upon the filing of a petition for election, the Board will investigate and hold hearings. The union seeking to gain representative recognition must file an allegation of thirty percent of employee support, after which, if substantiated, the Board will conduct a secret balloting and will certify the results to all interested parties. Likewise a thirty percent opinion for rescinding of the union's bargaining certification will be grounds for a new election. One of the effects of this section will be to facilitate the separation of crafts from the prevailing industry-wide bargaining unit. To lessen the chances of embezzling by union officers and to control internal union business, it is required that a report, stating the names and compensation of all officers and of agents earning over $5,000 annually, the manner of their election or appoint-

55 Sec. 8 (b) (6) d.
56 Sec. 9.
ment, initiation fees and dues and almost every phase of activity, be filed with the Secretary of Labor by each union and its national or international affiliate before the Board may investigate its complaints. In other words Congress has said in effect: "File these reports or function without the aid of the Board." If the union fails to file, the Board is without power to process a petition for election of representatives or to entertain a petition for union-shop referendum, from the union. In its first ruling on the filing requirement the Board ruled that a non-complying intervening union could not even appear on the ballot in an election sought by a complying union. Even where majority votes had been obtained those failing of compliance were not certified. The reasons for compliance are compelling.

It is also necessary, in order that the mechanism of the Board may be utilized, that the officers of each union and of any "national or international labor organization of which it is an affiliate or constituent unit ..." file affidavits disavowing belief or membership in, or support of, the Communist party or similar revolutionary organizations. Criminal penalties attach for untruth. Although this idea is not original, having been adopted at Canadian government insistence by the Canadian Seamans Union, it at once aroused bitter opposition, including much from quarters of unimpeachably democratic character. The immediate reluctance of labor leaders is as understandable as is their reversal of opinion upon due consideration of the worthy purpose of the affidavit. The executive boards of the great associations of unions, the American Federation of Labor and the Congress of Industrial Organizations, since they usually require unanimity of action, were slower to respond. A ruling by the General Counsel that all such officers must sign the affidavit was, fortunately, overruled by the Board which noted that such associations are not "national or international" labor organizations within the purview of the Act. As Senator Taft commented, this ruling was "certainly not in conflict with the intention of Congress." These non-Communist affidavits having been judicially declared constitutional as within the power of Congress to guarantee republican form of government, and 19,306 having been filed by the deadline, it would seem that their validity is established before the courts and their acceptance by labor is general. However, one may not say that further tests and strong opposition to the requirement of affidavits will not be forthcoming. Although this is one of the few truly worthy provisions of the statue, Senator Taft exhibits a lack of understanding of human nature when he pontificates that, "the opposi-

59 Sec. 35A, Criml. Code.
tion of union leaders to the filing of such affidavits raises a serious ques-
tion in the good faith of their protests against Communist-controlled
unions." It would be better, as the late Mr. Joseph A. Padway, Gen-
eral Counsel of the American Federation of Labor, suggested, for
Congress to eliminate Communist influence in unions by establishing
anti-Communist conditions for union membership.

The final section of Title I, of appreciable significance, is that deal-
ing with the prevention of the unfair labor practices aforementioned. Although empowering the Board to prevent unfair practices, provision is
made for it to cede jurisdiction to any appropriate state agency oper-
ating under a statute with Title I, where the industry involved is pri-
marily of a local character. Chairman Herzog of the Board expressed his, "... hope that this can be accomplished without imposing Federal
policy too rigidly, lest we discourage 'the making of social experiments
... in the insulated compartments afforded by the several states';" quoting Mr. Justice Holmes' dissent in *Truax v. Corrigan*. Under the
section in question the Board, before any hearing or trying of the
case, may pray an injunction. This discretion of the Board is relevant
to the practice of both employers and unions. A sub-section providing
for mandatory injunctions, as in a secondary boycott, applies only to
unions. By its terms the Act sets a six month statute of limitations for
the filing of a complaint resulting from an unfair practice. Should a
discharged employee be ordered reinstated, the union or the employer,
whichever was responsible for the discrimination, is liable for his lost
pay. One of the most profound changes in the entire Title I is that re-
lating to evidence. The norm of the Wagner Act, "upon all the evi-
dence," is changed to the criterion of the "preponderance" of evidence.
The relation of the Act to the Administrative Procedure Act has been
noted before. The most pronounced regression in labor relations is
accomplished by the semi-abrogation of the Norris-La Guardia Act.
The restoration of the reign of the injunction seems now almost com-
plete. True there is the saving clause that a preliminary injunction
"shall be effective for no longer than five days," but this is often enough
to break a legitimate effort by workers.

To provide a starting mechanism for its Frankenstein, Title I pre-
scribes investigatory powers for the Board. Its sole deviation from
the 1935 model is a stipulation that subpoenas *duces tecum* may be
revoked after five days.

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63 Address to A. F. L. convention at San Francisco, Oct. 8, 1947.
64 Sec. 10.
68 22 NOTRE DAME LAWYER 200 (1947).
69 Sec. 11.
Ironically, the "limitations" of Title I are that nothing shall be construed to limit or qualify the right to strike, "except as specifically provided for herein."\(^{70}\) The customary saving clause of separability against the judicial declaration of invalidity of a certain section, is provided and never more appropriately.

It is apparent from a study of Title I that there is little agreement, even among its supporters, as to just what it commands. Obviously there was a serious effort on the part of some to extend the processes of collective bargaining and to eliminate certain union abuses. Perhaps, to a degree, this latter goal will be reached. But the Taft-Hartley Act unfortunately, is an omnibus bill in which the fare of many of the riders was paid by those opposed to the basic idea of collective bargaining by free labor with free capital. This law is the product of haste and undue compromise, concerned with a complex problem and providing only in the Act itself for a thorough study of the problem, a study which should have preceded the action. The inevitable effect of this mistake will be to seriously endanger the economic security of our economy's most insecure citizen, the worker. There is the distinct possibility that the conflict envisaged by President Truman, in his veto message, will occur. In part the President wrote:

This bill would go far toward weakening our trade union movement. And it would go far toward destroying our national unity. By raising barriers between labor and management and by injecting political considerations into normal economic decisions, it would invite them to gain their ends through direct political action. I think it would be exceedingly dangerous to our country to develop a class basis for political action.

The integrity and purpose of many of the statute's supporters is above question but we must be alert "... that in striking at union abuses we do not destroy the contribution which unions make to our democratic strength."\(^{71}\) The chief legal problem, the simultaneous control and protection of labor, remains unsolved. As the General Counsel of the National Labor Relations Board has said,\(^{72}\) an effort has been made "to coordinate two sets of rights and responsibilities." Only judicial determination can finally judge the degree of the Act's failure. The interpretation, necessarily preceding adjudication, will be based, partially, upon the Congressional intent. What was this intent as regards Title I? The motive is unimportant. If the particular provision is constitutional, only the legislative intent is determinative. From a study of the debates\(^{73}\) it appears that the compromise intent was threefold: (1) to strengthen the bargaining position of capital by

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\(^{70}\) Sec. 13.

\(^{71}\) Veto message of President Truman, June 20, 1947.
eliminating what was considered its handicap and by lessening the opportunity for large-scale collective bargaining by labor; (2) to control union activities in their administration and expansion though increasing their civil liability and criminal responsibility and thus eliminating certain of the more prevalent abuses; and (3) to institute governmental control of the labor-management relationship by expanding the operational and jurisdictional scope of the Board and thus more certainly to govern the results of bargaining.

The immediate reaction of organized labor, which had opposed passage of the bill, was militant, yet cautious. The legal departments are advising the membership as to the possibilities of the Act. Some of the Act's provisions 74 will almost certainly be declared unconstitutional but there is little likelihood of such an occurrence within Title I, or, extensively, in the other Titles. Therefore the unions are bargaining for contract provisions: 75 (1) reserving always the right to strike (Senator Taft has indicated that such provisions do not violate the Act, but his co-author Representative Hartley has disagreed); (2) that refusal to work with non-union workers is not a breach; (3) that limit breach responsibility to strikes either really caused or actually ratified by the union; (4) limiting breach to exclude failure to cross picket lines, unless such violates the Act's "no boycott" provision; 76 (5) stipulating liquidated damages for a breach and providing for an impartial arbiter; and (6) delineating the actual authority of all "agents." Many new contracts incorporating certain of these provisions are already in operation. They await court test. 77

Whether the Act is workable will soon appear. When most provisions of Title I became effective, August 22, 1947, there were 3,937 cases pending under the National Labor Relations Act; 78 this is one indication of the scope of the problem. Without the cooperation of all concerned Title I is likely to defeat its purpose because of the unique problem with which it attempts to deal. As was said 79 by Chairman

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74 Sec. 304, prohibiting certain union political expenditures. A proposed state law similar to the Act, was held repugnant by a state supreme court. Howe v. Secretary of the Commonwealth, ... Mass. ... , 62 N. E. (2d) 115 (1946).
75 Bull. No. 4 by International Brotherhood of Teamsters, explaining the Taft-Hartley Act.
76 Sec. 303 (a).
78 Address of Paul M. Herzog, Chairman of the N. L. R. B., before the American Management Association, Oct. 2, 1947.
79 Address of Paul M. Herzog, Chairman of the N. L. R. B., before the American Management Association, Oct. 2, 1947.
Herzog of the Board, "Man-made law can never serve as a substitute for good labor relations." Or, as it was phrased by General Counsel Denham, "You simply cannot legislate labor-management agreements into existence." Organized labor, for obvious reasons, is not prepared to operate under this statute any longer than necessary. Every convention of workers since the Act became law has called for its repeal within the shortest possible time. Representative of those who will lead the fight for repeal is Senator Wagner, whose long-standing principles were incorporated in the 1935 Act. It is unlikely that the Act will soon be repealed although major amendments cannot be long in forthcoming.

This, then, is Title I of the Labor Management Relations Act, its background, major amendments of the National Labor Relations Act and the immediate reaction to it. This is the major portion of the Taft-Hartley Act aimed at the total problem of this economic-social relationship. Although some of the abuses will be eliminated by this Act, its chief effect will be to injure the efficacy of labor unions. To this apparent dilemma, the pragmatist can offer no solution.

There is one school of philosophy which presents the only solution which is conceivably consistent with our system of democracy. As a group it has, through its spokesmen, condemned the Taft-Hartley Act as an attempted solution because "... basic prerogatives... were unduly curtailed..." by this "... measure of expediency... [which] stands as a barrier to that mutual cooperation which should be fostered between management and organized labor." The applied teachings of this school are well stated by one of its leaders:

Those of us who condemn fascism and communism because they enslave the spirit of freemen, should be just as ready to condemn a system which makes man the slave of a machine. Machines—and that means factories, coal mines, steel furnaces, etc.—exist "for" the workingman and not the workingman for the machine.

This philosophy is that of the Catholic Church, which has 2,000 years experience in ruling on the morality of practices by various social

82 Senator Wagner, whose N. L. R. A. did so much to implement Rerum Novarum, is a recent convert to Catholicism.
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Upon such matters the Church has not only a right but a duty to speak, since the social and economic orders cannot be divorced from the moral." What is the moral solution submitted by the Church? In the encyclical "On The Reconstruction of the Social Order" (1931) Pope Pius XI suggested that "... the wage contract should, when possible, be modified somewhat by a contract of partnership ..." to the end that "... wage-earners are made sharers in some sort in the ownership, or the management, or the profits." Such a program would go much farther in solving the basic problem than does the Taft-Hartley Act. If, as democracy believes, man is essentially good and correct in most of his decisions, then a solution will be found.

John E. Cosgrove

JUDICIAL REVIEW—EFFECT OF THE ADMINISTRATIVE PROCEDURE ACT, SECTION 10.—Prior to the adoption of the Administrative Procedure Act in 1946, the law was well settled that the right to judicial review of decisions of administrative agencies was governed exclusively by specific legislation either expressly or impliedly granting or denying the right in the case of each particular agency. The issue, whether or not the legislation impliedly did grant the right to review, was a source of much confusion and litigation; some kind of congressional action was necessary. In a recent decision, a district court said: "There is no doubt that the Administrative Procedure Act reflected a deep-seated dissatisfaction on the part of some towards the present operation of administrative agencies." Just what the Act did to make certain when review is to be granted, and what it did to the scope of review, are questions being hotly contested in the courts today. The purpose of this writing is to present the pertinent decisions and statements since the enactment of the Administrative Procedure Act and to arrive at a conclusion as to what the final outcome will be.

In a Report of the House Judiciary Committee it is stated:

To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.

86 The Condition of Labor, Pope Leo XIII; Reconstruction of the Social Order, Pope Pius XI.
87 Address of Pope Pius XII to American Delegates to convention of the International Labor Organization.

The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.\(^4\) Many courts undoubtedly will entertain jurisdiction to review decisions of administrative agencies on this ground. However, although section 10 may give the courts a new basis for decision, it does not alter the fact that a court in all likelihood could have rightly assumed jurisdiction over these shadowland cases all along, as did the Supreme Court two years before the Act.\(^5\)

It has been held that no change was effected in the law governing deportation proceedings since review was precluded by the Act under which the agency came into being and that only where no provision affecting review is present in the legislation governing the particular agency, does the Administrative Procedure Act have any bearing on the question.\(^6\)

Another case,\(^7\) involving the National Labor Relations Act, holds that section 10 of the Administrative Procedure Act is merely declaratory of existing law on judicial review; that it neither conferred jurisdiction upon the court above and beyond that which it already had, nor granted to aggrieved parties any rights they did not have under the Labor Relations Act.

Where an attempt was made to bring a case which was pending before the Federal Communications Commission into a federal court, it was held that the established rule of exhausting administrative remedies must be followed before the federal court could take jurisdiction, because there was provision for review in the Federal Communications Act but that the Administrative Procedure Act, section 10, was not intended to enlarge the scope of judicial review in agency actions.\(^8\)

A decision of the Tax Court came under review in a circuit court.\(^9\) The opinion contained dicta to the effect that section 10 had enlarged the scope of review. The assumption of jurisdiction in this case was founded on other grounds, however, and the court did not commit itself as to how, when, or where its scope would be enlarged, and the dicta were non-essential to the decision.

So far as it has been determined by decisions to date, the Administrative Procedure Act has not affected matters of procedure. On a motion

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to change the place of hearing of a case pending before the Securities
and Exchange Commission, the circuit court said that no new power to
review procedural matters before final administrative determination was
granted by the Administrative Procedure Act.10 A district court held
that it had no power to grant interim relief by way of injunction prior
to the final determination of complainant's proceeding before the Secre-
try of Agriculture and that the Administrative Procedure Act did
not give it any new power in this respect.11

There remains the contention that the "substantial evidence" rule
in section 10(e) has enlarged the scope of review. The dictum in U. S.
ex rel. Lindenau v. Watkins12 is to the effect that whereas at one time
"any evidence" substantiating an administrative agency's decision was
sufficient to preclude reversal, today "substantial" evidence is necessary.
The usual case cited by the courts in holding "any evidence" used to
be enough is U. S. ex rel. Vajtauer v. Commissioner of Immigration.13
Upon close examination of that and related cases, it appears that it was
based on what the courts are calling "substantial evidence" today, and
that the decision was an erroneous one. A leading case on the "sub-
stantial evidence" rule is cited as a basis for the section dealing with
evidence in the Administrative Procedure Act itself.14 The Supreme
Court had repeatedly held before the Act that "substantial evidence
was" necessary.15

In a statement before the Senate Committee16 the Attorney Gen-
el said: "Section 10 as to judicial review does not, in my view, make
any real changes in existing law. This section in general declares the
existing law concerning judicial review . . . merely a restatement of ex-
isting law . . ." Although there is important comment17 contrary to that
made by the Attorney General, the adjudicated cases since the Act are
in support of the latter. If the Supreme Court decides in accord with
the line of decisions in the lower courts, the Administrative Procedure
Act will need to be amended with stronger and more clear-cut direc-
tions to the courts if the apparent purpose of the Act is to be carried
out.

James K. Sugnet

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10 See: Eastern Utilities v. Securities and Exchange Commission, 162 F. (2d)
385 (C. C. A. 1st, 1947).
14 Consolidated Edison v. N. L. R. B., 305 U. S. 197, 229, 83 L. Ed. 126,
59 Sup. Ct. 206 (1938).
(1945).
17 The Judicial Review Provisions of the Federal Administrative Procedure
Act (Section 10) Background and Effect, John Dickinson, New York School of
Racial Restrictive Covenants.—Much has been spoken and written in the course of the past decade concerning democracy and the American principles of liberty and equality. It will be the purpose of this paper to examine a glaring defect which nevertheless persists in American social life today: namely, the existence of racial restrictive covenants. An examination of the law upon this subject will be followed by arguments which, if accepted, should lead to a complete repudiation of such prohibitive agreements.

To date, covenants or conditions in conveyances of real property, or contracts for the sale of land, forbidding the occupancy of the land by, or its subsequent conveyance to, persons of a certain race, color or religion or restricting its occupancy or ownership to persons of the Caucasian race, have generally been sustained by the courts. The only exception to this general doctrine has been in cases where covenants restricting subsequent sales of land have been considered a restraint upon alienation. It might be noted, in passing, that a very recent case involving the eviction of twenty-five Negro tenants from a building was upheld on the basis of a restrictive covenant even though the court stated that it regarded such covenants as "illegal" and "un-American" by their very nature. This action, which arose in the city of Chicago, was the first Illinois decision on a restrictive covenant since the Supreme Court of that state upheld restrictive covenants more than ten years ago. Being bound by previous rulings of the same court, the judge felt unable to declare the racial covenant void and unconstitutional. Thus, in this case, stare decisis ruled over principle.

In the consideration of whether restrictive covenants or conditions discriminating against persons on account of race, color, or religion violate the rule forbidding restraint upon alienation, a tenuous and seemingly illogical distinction has been drawn between a covenant or condition which binds the grantee not to transfer or convey the property to certain classes of individuals and one which binds him not to permit the property to be occupied by them. All courts thus far have agreed that a condition or covenant that property shall not be occupied by persons of certain races is not invalid as a restraint upon the alienation of the property, while there is no unanimity of opinion as to whether or not the restrictions as to sale constitute a void restraint upon alienation.

An expression of the legality of restrictive covenants is found in the case of Hurd v. Hodge. The general rule is again given voice, but this

3 See Note, 114 A. L. R. 1237 (1938); White v. White, 108 W. Va. 128, 150 S. E. 531 (1929).
case is of special importance in that it will be heard in the immediate future by the United States Supreme Court. That hearing will mark the first time that the question of the constitutionality of restrictive covenants will be presented squarely before the nation's highest court of law. Additional interest is attached to this case since the Department of Justice is appearing in the case as *amicus curiae* to argue that the enforcement of such covenants is contrary to the Constitution and the laws of the United States. According to recent notice received from the Solicitor General of the United States, the brief for the government was in the process of preparation and was to be filed early in December.

Popular opinion regarding one type of restrictive covenants was evidenced recently in Bannockburn Heights, a Maryland suburban area adjacent to Washington, D.C. A newspaper account reveals that in this situation one Aaron Tuskin, an attorney of Jewish extraction, had purchased a house, the deed to which contained a clause to the effect that the property was never to be occupied by Negroes, Jews, Persians, or Syrians. Public attention became focused on the subsequent developments when nine residents of the area sought to enforce the covenant through court action. Community resentment against the suit mounted until it was dropped, and with it another opportunity which might have been presented to the courts as a present day test of the validity of racial restrictive covenants.

To obtain an insight into the origins of racial restrictive covenants a review of recent history would be of special benefit. According to Loren Miller, the immediate circumstance that led to the creation and judicial validation of racial restrictive agreements was the migration of Negroes toward cities, which migration began in the early years of the first World War. These American citizens flocked to the urban centers at the same time, and for the same reasons, that other Americans began to swell city populations. The net result was the development of an acute housing shortage; Negroes began to overflow the formerly-defined Negro quarters and as they did they came into competition with the home-seeking whites. To combat this migration, cities passed racial zoning ordinances which later were held unconstitutional as violating the Fourteenth Amendment to our Federal Constitution. Present-day race restriction, then, had its origin in the neighborhood agreements embodied in "private contracts" so as to avoid the equal protection clause of the Fourteenth Amendment. Mr. Miller gives another interesting comment on race covenants when he states that the classic

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case of wholesale residential segregation on the basis of race is the reservation system for Indians which, while not altogether compulsory, has served very well to limit Indian ownership of land except on these reservations. He states that the common and vulgar justification for this trend in American land policy is summed up in the phrase that "this is a white man's country." Would too great foresight be required to see in this policy the same problems and the same troubles that segregation in urban areas has fostered today?

Recognizing the background and the origins of the race covenants which blot our economic and political life, it is easy to realize that today we are faced with the anomalous situation in which neither the legislative nor executive branches of government may require or enforce racial residential segregation, but in which another branch of government, the judiciary, may accomplish the same result through the pleasant fiction that when a judge issues an injunction restraining a citizen from owning, using, or occupying his property, solely on the basis of his race or color—violation of which may subject the offender to a jail or prison sentence—his action is not state action at all, but only a proper exercise of judicial power to enforce a private contract. Illogical, perhaps, but true.

It need not be affirmed that the Constitution and the treaties of the United States constitute the supreme law of the land which binds all judges both federal and state, since such a statement is a truth of general acceptance and knowledge. By the Act of Chapultepec, made in conjunction with other nations of the Western Hemisphere, our government pledged itself to "prevent with all means in our power all that may provoke discrimination among individuals because of racial or religious reasons." Does the enforcement of racial restrictive covenants aid in the prevention of discrimination among individuals because of racial reasons? If not, such enforcement is contrary to the supreme law of our country and is therefore unconstitutional. A further example of an international commitment to which our nation is a party is given in the United Nations Charter. Do covenants for race segregation promote "... universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race..."?

The current case of Hurd v. Hodge is of a special value because of the scholarly arguments advanced in the dissenting opinion of Justice Edgerton against the enforcement of racial covenants concerning the use and sale of land. He argues that such agreements are un-

7 U. S. Const. Art. VI.
8 Act of Chapultepec (March 1945) Dept. of State Bulletin, March 4, 9-1945
9 U. N. Charter Art 55c, 56.
enforceable for five independent reasons. An examination of them reveals the following points: such covenants are void because they are contrary to public policy; they are void as an unreasonable restraint on alienation; they are void because forbidden by the Constitution; they are void because they violate the Civil Rights Act; and they are void because of principles of equity.

With reference to the first point, that of public policy, he says that any contention that public welfare is promoted by preventing Negroes from purchasing homes in white neighborhoods has been refuted as a matter of law by Buchanan v. Warley. Since racial restrictive covenants are directed to the same end, it necessarily follows that they also do not promote the general welfare. Enforced housing increases crowding, squalor, and prices in the areas where the Negroes are compelled to live. The result is the destruction of home life, mounting juvenile delinquency, and other indications of social pathology which are bound to have their contagious influence upon adjoining white areas.

Examining the analysis of the American Law Institute in the field of restraints on alienation and the factors which, if present, could make such restraints reasonable and valid, Judge Edgerton finds that none of the favorable factors can justify the enforcement of racial restrictive covenants.

The arguments concerning unconstitutionality include the application of the Fourteenth Amendment—specifically, the due process clause. Justice Edgerton states that such covenants are in direct violation of the clause which prevents state interference with property rights except by due process of law. Both this amendment and those statutes enacted in furtherance of its purpose operate to qualify and to entitle a colored person to hold and to acquire property.

Upholding the restrictive covenants violates not only the due process clause but also the Civil Rights Act, which expressly provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." A statute which declares or confers a right means, if it means anything, that courts shall recognize and protect the right of all citizens, regardless of color. "The Constitution and the Civil Rights Act," says Justice Edgerton, "have foreclosed the matter. The right to buy and use anything that whites may buy and use is conferred upon Negroes implicitly by the due process clauses of the Fifth and Fourteenth Amend-

13 Restatement, Property pp. 2379-80 (1944).
ments and explicitly by the Civil Rights Act. Of the civil rights so conferred, none is clearer and few are more vital than the right to buy a home and live in it."

The fifth argument, and the final one, is based upon the familiar principle of "balancing equities." Because of the present housing shortage and overcrowding, the extreme hardship which enforcement of the covenants through injunctions would bring, greatly outweighs the benefits which the enforcement of the covenants would give the appellants.

Just how much force such legal arguments will have upon the decision of this case in the Supreme Court remains to be seen. If heeded, they will bring a reversal of a long trend of decisions upholding racial segregation. Coupled with additional factors, such as the following statement made by the President of the United States, the tide may well be turned:

More and more we are learning, and in no small measure through the medium of the press, how closely our democracy is under observation. We are learning what loud echoes both our successes and our failures have in every corner of the world. That is one of the pressing reasons why we cannot afford failures. When we fail to live together in peace, the failure touches not us, as Americans, alone, but the cause of democracy itself. That we must never forget.15

Furthermore, we have the duty to fulfill, in this class of actions, the purpose of government as given in the Declaration of Independence: "We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights . . . That to secure these rights, Governments are instituted among men, . . ."

Beyond and above these arguments based upon our national law are those touching the natural law. Recognizing the spiritual equality of men and accepting the doctrine of the brotherhood of men, our democratic civilization must, of necessity, presuppose and admit of a prior belief in the essential truth of the Fatherhood of God. This follows since there can be no relationship of brotherhood that does not stem from mutuality of fatherhood. "Men are brothers," states Bishop Bernard J. Sheil, "not because of some mystic unity growing out of emotionalism, but because they proceed from a common origin—God." 16 If men are to strip from the brotherhood of man the doctrine of the Fatherhood of God, there is left but a meaningless husk. Bishop

15 Address made by President Truman upon presenting the Wendell Willkie Awards for Journalism, Associated Press Release, Feb. 28, 1947.