NOTES

ENFORCEMENT OF PRIORITY AND RATIONING REGULATIONS

Priority and rationing are controls used to bring order into the tangle of a wartime economy; techniques for their enforcement have importance, therefore, in preventing breakdowns in the intricate machinery of regulation. The number of violations need not be large to constitute a serious problem. Evasion of a ruling by one firm puts strong pressure on all competitors to retaliate in an effort to hold peacetime customers, while the tendency toward violation and counter-violation is aggravated by the large amount of consumer income seeking outlets in restricted civilian goods. Upon adequate enforcement, as well as upon modes of regulation which take account of these pressures, rests the successful direction of war production.

The powers of Congress are broad, and are enhanced in war. Congress can authorize the use of priority, of preference ratings, of material allocation and compulsory orders, and of production and inventory controls.0

1. Priority assigns preference ratings to government and civilian orders in an effort to coordinate production in terms of time. Baruch, American Industry in the War (1941) 47. Rationing is concerned with the allocation of scarce materials, and is therefore a coordination of production in terms of supply. Id. at 59. The methods are complementary with rationing growing in importance as all materials become "scarce." See N. Y. Times, Nov. 8, 1941, p. 1, col. 3.

2. "Surveys of 3500 firms for priority violations have been made by the Compliance Branch of the War Production Board since it was established last June, the WPB announced last week . . . "About 1600 of the 3500 completed reports reveal no violations of priority orders and about the same number reveal violations of a minor nature, largely through misunderstanding. Of the small number found to have violated the orders, punitive action will probably be recommended in the more serious cases." (1942) 10 U. S. L. Week 2659.

For an account of the widespread bootlegging of tires in contravention of rationing orders, see Time, May 4, 1942, p. 73.


6. Such controls were not used in World War I, and their validity has not been adjudicated. They would seem constitutionally sound under the broad sweep of the war power. See United States v. Macintosh, 283 U. S. 605, 622 (1931).
This authority has been delegated to the President by three acts, and he, in turn, has delegated such powers to administrative boards and officials.

Complaints as to violations of the regulations which stem from these powers come mainly from the public, complemented by results of investigations carried on by the various industry branches within the agency. These complaints are sifted by officials of the compliance branch before proceedings are begun.

A variety of enforcement methods exists here, of which two are available without resort to the courts: suspension of production and commandeering. Suspension of production was the chief tool in the hands of the War Industries Board in World War I. Since its priority orders had no statutory basis, the Board was unable to enforce them through the injunctive process, and therefore used the threat of exercising its statutory power to withhold fuel and transportation facilities from recalcitrant producers. After the railroads were taken over by the government, the threat was sufficiently impressive to make priority violations rare. The comparable weapon in the hands of the War Production Board today is a ban on the offender's supply, production or assembly of the good for a period of time. The Office of Price Administration has also used this method for punishing tire rationing violations. Although the method of proceeding is summary, the procedural protections provided in other governmental agencies were afforded the Central Pattern and Foundry Company of Chicago before its aluminum operations were suspended. Provision for notice, hearing, representation by counsel,


11. See note 8 supra note 1, at 24.

12. See note 8 supra.
and intra-administrative appeal appears to be a general policy in these cases. Although the statutes in question are open to attack for failure to provide for notice expressly, courts are more likely to find "notice by implication" in such statutes and can indulge in the presumption that a public officer will act lawfully.

Prior to the passage of the Second War Powers Act, this use of priority to punish its own violators was one of the two weapons most suited to deal with deliberate and open transgressions. With criminal penalties now provided by that Act, suspension will probably be less used, because its scope is limited. Severe, and ill-suited to minor infractions, it is equally inapplicable against a supplier whose good is important in war production; and even when the product is non-essential, the method operates to reduce the supply of goods in an inflationary period.

The second executive penalty available is commandeering. Section 9 of the Selective Service Act provides for general commandeering powers superseding those granted in the original Priorities Act. The provision is applicable only to orders placed directly by the government and therefore affects only prime producers. Its function in the fields of priority and rationing has been that of a threat and a deterrent. Lacking flexibility, it can hardly be employed against minor violations, and the delays caused by changes in management might well outweigh its usefulness.

When the foregoing instruments are inadequate, judicial enforcement is sought. Proceedings in this field have been begun by a recommendation to the Justice Department by WPB. Although criminal suits are so treated by OPA, it does its own civil prosecution. Clear-cut evidence of respective agency jurisdiction here is lacking.

19. "Adopting the procedure of the semi-judicial agencies, branch lawyers and the accused argue the case before a compliance commissioner.

"On the basis of the commissioner's recommendation an S-order is drawn up and submitted for approval to Director Knowlson of the Division of Industry Operations. The accused may appeal to Knowlson at this point: If Knowlson approves, the order is issued." Business Week, March 21, 1942, p. 19. For the procedure adopted in rationing cases by the Office of Price Administration, see (1942) 10 U. S. L. WEEK 2832.

20. See note 7 supra.


25. The other is the injunction.


27. See note 7 supra.

28. The writer has been unable to procure exact information on the situation from the agencies involved. The questions one might ask are:

1. Does the Justice Department ever proceed in the courts without modifying the recommendations received by it?
Equitable enforcement of regulations deriving from statutory authority has been widely used. Courts have been willing to provide "appropriate remedies" if the statute intends to impose legal obligations, even though specific penalties have not been provided, and though technical equity jurisdiction is lacking. It is quite probable that Congress intended to impose legal obligations by the Priorities Act. Moreover, if the agency has received a promise to conform, the courts would probably grant specific performance based on the concept of benefits received through the order, which concept might also cover modification of the order. However, the agreement can be considered a condition of the privileges derived rather than a promise to conform.

The injunction was successfully used to prevent the Chicago Alloy Products Company from refusing to allow an inspection of its inventory and an audit of its books as evidence of priority violations. Power to inspect and enter is given by section 2(a) of the Priorities Act. This provision was intended to be mandatory in regard to all information relevant to the administration of the Act. When employed for any valid administrative purpose, such provisions have been upheld both as to inspection of books and records and as to physical entry.

The weakness of the injunctive process is revealed by the current attempt to prevent alleged infractions of steel priorities. As a method of preven-

2. Does the Justice Department ever refuse to proceed at all?
3. Does the Justice Department ever institute proceedings independently and contrary to the wishes of WPB or OPA?

It is asserted that "the working relationship between OPA and the Department of Justice has been close and effective." Communication to Yale Law Journal from H. W. Jones, Office of Price Administration. But with alternative methods of prosecution available, determination by OPA of the violations to be punished civilly restricts sharply the discretion of the Justice Department.

29. See OPM Release PM 669, July 7, 1941.
34. See United States v. Kraus, 33 F. (2d) 405, 410 (C. C. A. 7th, 1929).
37. See 87 Cong. Rec. 3829 (1941).
tion, the threat of injunction hardly carries the weight of original criminal penalties. Further, the judicial procedure might not be speedy enough to constrain a touching-off of counter measures by competitors. There may be difficulty, also, in punishing for contempt one who has transgressed regulations made after the granting of the injunction. The worth of the weapon seems to depend upon a fear of publicity as much as upon any other factor.

The government has been provided with an arsenal of criminal penalties. Some statutes dealing with specific economic activities, for example, provide penalties for violations of their conditions. The Selective Service Act makes those failing to comply with its provisions guilty of a felony and liable to fine and imprisonment. It applies, however, only to orders placed directly by the government. The Federal Powers Act states that willful or knowing violation of rules or orders deriving from its provisions is punishable by fine or imprisonment. This would seem to apply to all regulations as to power distribution made thereunder. The Ship Warrants Act in section 6 makes willful violation of rules and orders issued under the Act a crime. Orders issued under section 2 concerning freight rates, allocation of cargo space, voyages, and use of shore facilities would seem to be covered thereby. The penalties are strengthened by the fact that compliance with the provisions of the warrant is usually made a condition of its validity.

Most producers are, however, affected only indirectly by these laws. Until the Second War Powers Act was passed, therefore, most deliberate violations could be punished only by suspension of production or by injunction. Subsection (a)(1) of section 2 of that Act now makes willful performance or neglect of a prohibition issued thereunder a misdemeanor punishable by fine up to $10,000 and imprisonment up to one year. Two indictments have already been voted under this section for rationing violations. Its effectiveness is diluted by the facts that the maximum fine may be far less than the profit to be gained from violation, and that the alternative of imprisonment may be tempered by reluctance to deprive a large plant of its trained executives in war time. Nevertheless, the stigma of a criminal prosecution works as a powerful restraint, and the weapon is a necessary complement of enforcement controls.

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40. The complaints in the steel actions seek the enjoining of violations of regulations "as may be made from time to time," in addition to prevention of infractions of orders already in existence. A court may be reluctant either to grant such an injunction or, once granted, to punish for contempt a violator of such future orders, grounding its refusal on the doctrine of lack of imminent injury. See Spelling and Lewis, The Law of Injunctions (1926) § 33.


42. Ibid.


46. United States v. Stevenson, W. D. S. C., May 25, 1942; United States v. Wells, W. D. S. C., May 25, 1942. The injunction actions against steel producers (see note 39 supra) were undertaken after the Act was passed, but the indictments allege no violations as having occurred after the Act took effect.
The Second War Powers Act punishes open violations: Sections 35\textsuperscript{47} and 37\textsuperscript{48} of the Criminal Code are used to get at violations made under the pretense of innocence. The Code provisions, especially useful in enforcement of rationing, have been so employed.\textsuperscript{49} Section 35 makes a crime of false claims, statements, or representations made for the purpose of defrauding the United States or its officers. A line of decisions thereunder has held that pecuniary damage to the government need not be shown,\textsuperscript{50} and that only intent to deceive rather than actual deception need be proved.\textsuperscript{51} Further, the holding that a false statement to one who deals directly with the government is within the rubric of the section\textsuperscript{52} would seem to allow prosecution of those who make false statements to a prime producer under direct government contract.

Section 37 grants a concomitant weapon by providing for fine or imprisonment for conspiracy "to defraud the United States in any manner or for any purpose." Here, too, the courts have held that pecuniary or property loss to the government is not the issue; the focus rather is upon a conspiracy attempting to obstruct legitimate official action through fraud or trickery.\textsuperscript{53} And a case has held that this provision applies to an attempt to impair an administrative regulation which was promulgated without specific statutory authority.\textsuperscript{54} The two statutes would seem to close all avenues of escape from prosecution for misrepresentations to the government. They should prove valuable aids in the enforcement of projected inventory controls,\textsuperscript{55} the Production Requirements Plan,\textsuperscript{56} and an increased rationing program.

A possibility for future use is a civil suit for damages. Such a suit would be brought by those most likely to know of the violation and could be directed against those who refuse to take a war order or those who violate regulations by misusing materials obtained by priority.\textsuperscript{57} The difficulty here is that few

\textsuperscript{47} 48 STAT. 996 (1934), as amended by 52 STAT. 197 (1938), 18 U. S. C. §§ 89 (Supp. 1941).
\textsuperscript{49} United States v. LaSalle Motor Sales Corp., (1942) 10 U. S. L. WEEK 2531.
\textsuperscript{52} United States v. Mellon, 96 F. (2d) 462 (C. C. A. 2d, 1938).
\textsuperscript{54} United States v. Janovitz, 257 U. S. 42 (1921).
\textsuperscript{55} N. Y. Times, March 15, 1942, § 3, p. 1, col. 2.
\textsuperscript{56} (1942) 10 U. S. L. WEEK 2611. Under the plan, applicants submit figures on present inventory and their needs for a projected three-month period.
\textsuperscript{57} See Comment (1942) 55 HARV. L. REV. 427, 469. It is there suggested that refusal by a sub-contractor to accept a defense order could be made cause for a claim of triple damages, with the contract considered repudiated as of the date of rejection. An-
would be likely to sustain actual damage in such cases, even if they proved an infraction, such proof being extremely difficult without possession of a detailed audit. Further, in this complex field administrative determination of the transgressions to be punished would be lost.

Methods of enforcement change with the mode of regulation. Allocation and rationing are rapidly restricting the scope of priority. This development carries with it a growing ease of exercise of the direct power to withhold supplies. Moreover, few will be able to escape governmental scrutiny of their business activities. The Production Requirements Plan and close inventory controls require detailed figures from producers, while the increase in rationing brings the whole population of the nation within its scope. But this may not be enough. Enforcement agencies possess the instruments to meet any development. Yet they must be warned of the need for their use; the government can hardly supervise each of the countless transactions which takes place within its borders. The prevention of widespread chiseling and black-market operations depends, therefore, as much upon an alert citizenry disposed to complain of infractions as upon an organized police.

CONSTITUTIONALITY OF STATE LAW APPORTIONING INCIDENCE OF FEDERAL ESTATE TAX*

Although earlier federal inheritance taxes were levied on the receipt of each legacy, the present federal estate tax is assessed on the total net estate and paid by the executor before distribution of the estate. Because other proposal is that a supplier should be allowed to recover against a producer who had misused materials obtained under a preference rating.

It is true that civil suits would provide close supervision of business behavior, but there is danger in opening the door to constant harassment of businessmen by such suits. Economic arrangements are so intermingled that a host of firms and individuals could claim "damage" from an alleged violation; determination of their respective rights and duties would clutter the courts for years to come.

58. See N. Y. Times, Nov. 8, 1941, p. 1, col. 3.

59. The revised gasoline rationing program to take effect in July reveals how detailed this supervision can be. Coupons transmitted from consumer to dealer to supplier, periodic inventories and audits, examination of certificates and reports by state tax offices—all will be used in an effort to prevent bootlegging. N. Y. Times, June 8, 1942, p. 1, col. 2.

*In re* Del Drago's Estate, 287 N. Y. 61, 38 N. E. (2d) 131 (1941).

1. 1 Stat. 527 (1797); 12 Stat. 433, 485, 486 (1862); 13 Stat. 223, 285-91 (1864); 30 Stat. 448, 464-66 (1898) as amended 31 Stat. 946 (1901). As is evident from the dates, these inheritance taxes were war-time revenue raisers. All were repealed shortly after the emergency was over.

2. Int. Rev. Code §§ 800-938 (1939), containing the basic estate tax imposed by the Revenue Act of 1926 and subsequently amended by the Revenue Acts of 1931, 1932, 1934, 1935, 1936, 1938, 1939, and 1941. The first federal estate tax was enacted by the Revenue Act of 1916, §§ 200-12. Its basic principle, i.e., the collection of the tax from the estate rather than from the beneficiary, has remained unchanged in subsequent legislation. The controversial section 826(b) Int. Rev. Code (see p. 1206 infra) was also contained in the original statute. 39 Stat. 779 (1916).
it involves only one assessment and one collection, this form of death tax is most advantageous from the administrative point of view. The statute itself makes no provision for the incidence of the tax on the beneficiaries, and unless there are clear testamentary directions the executor frequently faces the question which funds of the estate are to be charged with the tax. If the payment is made from the residuary estate, which is often left to the widow and children, the burden falls on those whom the testator was presumably most anxious to protect. On the other hand, since the tax is graduated on the decedent's rather than on the beneficiary's ability to pay, apportionment among the specific legatees may cast a disproportionate burden on the recipient of a small legacy from a large estate.

State courts, construing these provisions of the federal statute, have held that, in the absence of clear testamentary directions, the tax falls on the residuary legatee. The New York Court of Appeals, in the *Hamlin* case, stated the rationale which came to be generally followed. Since Congress had determined upon the net estate (rather than the specific legacies) as the taxable unit, and thus departed from previous legislative practice, it was argued that Congress must have intended to place the burden on the residuary estate. The conclusion does not follow readily from the premise, and takes no account of the probability that the extent of Congressional intent in measuring the tax by the net estate had been to make the tax more certainly collectible and to ease the administrative burden. Under the *Hamlin* approach the change from specific legacy to net estate in the measure of the tax carried with it necessarily the change from specific to residuary legatee in the incidence of the tax. In *Plunkett v. Old Colony Trust Company* the Massachusetts court arrived at the same conclusion by the same line of reasoning, and the rule has been followed generally with unimportant variations.

3. Section 826(c), however, expressly subjects the beneficiaries of insurance policies to the tax. See note 25 infra.
5. This was the case in *In re Mollenhauer's Will*, 257 App. Div. 235, 13 N. Y. S. (2d) 619 (2d Dep't 1939). The decedent left a $3,000,000 estate with no provision as to the payment of the tax. Under the New York apportionment statute the recipient of a $10,000 legacy became liable for a $0,000 tax. Under the New York apportionment statute the recipient of a $10,000 legacy became liable for a $0,000 tax.
9. Typical of the cases following the rule of the *Hamlin* case is *Turner v. Cole*, 118 N. J. Eq. 497, 179 Atl. 113 (1935). Variant results are reached in situations bearing some...
The question of the incidence of the estate tax was before the Supreme Court in two cases decided on the same day in 1924. In *Y.M.C.A. v. Davis*¹ the Ohio Supreme Court affirmed a lower court decision¹¹ which had held that the tax was a debt of the decedent and that under Ohio law such debts were payable by the residuary. The Ohio Supreme Court further found indications on the face of the statute that the tax was to be born by the residuary. Without committing the Supreme Court to this view, Chief Justice Taft upheld the decision on the ground that the regulation of the incidence of the tax was a matter of state determination along with other questions of probate administration. He specifically stated that the law did not exempt any legatee from contribution if by state law he was to share in the payment of the tax.¹² In the companion *Slocum* case¹³ Justice Holmes arrived at the same conclusion. As the decision of both these cases depended on the recognition of state law¹⁴ by the Supreme Court, the New York court’s reference to the pertinent holdings as dicta seems unjustified.

New York and Massachusetts, the initiators of the Congressional intent approach, carried furthest the implications of this line of reasoning. Finding in the federal statute an “explicit command” to put the burden on the residuary, the New York court in very sweeping language refused to change this rule, and by implication denied that it had power to do so.¹⁶ The testator had to indicate his intention unmistakably if he wanted to avoid the statutory provisions as construed by the court.¹⁰ The New York court thus created analogy to that in the principal case. Martin v. Martin's Adm'r, 283 Ky. 513, 142 S. W. (2d) 164 (1940) (apportionment allowed between personalty and realty in case of intestacy); the state follows the *Hamlin* rule, see Lakes v. Lakes' Executors, 267 Ky. 684, 103 S. W. (2d) 86 (1937). Thompson v. Union & Mercantile Trust Co., 164 Ark. 411, 262 S. W. 324 (1924) (widow's dower exempted from contribution as a matter of state law). Commercial Trust Co. of N. J. v. Millard, 122 N. J. Eq. 290, 193 Atl. 814 (1937) (beneficiary of an inter vivos trust held to contribute); the jurisdiction follows the *Hamlin* rule, see Turner v. Cole, *supra*. New Hampshire first allowed apportionment [Fuller v. Gale, 78 N. H. 544, 103 Atl. 308 (1918); Williams v. State, 81 N. H. 341, 125 Atl. 661 (1924); Foster v. Farrand, 81 N. H. 448, 128 Atl. 683 (1925)]; but has recently adopted the *Hamlin* rule [Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 Atl. 786 (1938)].

10. 106 Ohio St. 366, 140 N. E. 114 (1922).

11. See id. at 367, 140 N. E. at 114.


13. Edwards v. Slocum, 264 U. S. 61 (1924), affirming the Court of Appeals for the Second Circuit which had held: "So far as the words of the statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree to the burden-bearing, the state courts can settle the matter." 287 Fed. 651, 653 (1923).

14. In the *Slocum* case the Commissioner of Internal Revenue had tried to take advantage of the New York rule of tax incidence in calculating the net estate. Holding that such use of the rules would lead to a lack of uniformity and confusion, since these rules differed among the states, the Court did not allow the application of these rules in calculating the estate.


its own dilemma by construing Congressional intent when the question before the court was to be determined according to state law.

This solution judicially arrived at was much criticized, and, in New York, was modified by statute in an attempt to protect widows and children, the usual residuary legatees. Section 12417 of the Decedent Estate Law, passed in 1930, provided that the surrogate is to apportion the federal and New York estate taxes among the beneficiaries after payment has been made by the executor. The testator still can exempt certain beneficiaries by specifying where the burden of the tax is to rest. The practical effect of this statute has been to create a presumption in favor of apportionment and abolish the presumption placing the burden on the residuary.\textsuperscript{18} In 1937 Pennsylvania followed New York's example and enacted a similar statute.\textsuperscript{19} In both New York and Pennsylvania the constitutionality of these statutes was upheld against claims that their enforcement would be an impairment of the obligation of contract.\textsuperscript{20}

The constitutionality of the New York statute was again attacked in the \textit{Del Drago}\textsuperscript{21} case. Objecting to the apportionment of a $300,000 tax, the specific legatees charged that this statute violated the "supremacy" and "uniformity" clauses of the Federal Constitution. Since the apportionment statute could not be reconciled with the rationale of the earlier New York cases, the court was obliged either to change its incongruous position or to declare the apportionment statute unconstitutional. The Court of Appeals in a four to three decision chose the latter alternative and invalidated the statute.

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\textsuperscript{17} N. Y. Laws 1930, c. 709, § 124; N. Y. Decedent Estate Law § 124. In addition to the provisions mentioned in the text, the law provides that the executor can recover the taxes from any holder of any gross estate not under the executor's administration. He does not have to distribute any part of the estate to the beneficiaries before the tax has been paid and, if there has not yet been any apportionment, until adequate security for tax payment has been obtained. The law became effective September 1, 1931.

\textsuperscript{18} In re Duryea's Estate, 277 N. Y. 310, 14 N. E. (2d) 309 (1933); In re Kaufman's Estate, 170 Misc. 436, 10 N. Y. S. (2d) 616 (Surr. Ct. 1939); In re Meyner's Estate, 173 Misc. 19, 18 N. Y. S. (2d) 62 (Surr. Ct. 1939).

\textsuperscript{19} 20 PA. STAT. ANN. (Purdon), 1941 Cumul. Annual Pocket Pt. § 844. After the enactment of the Pennsylvania statute two-fifths of the revenue derived from the federal estate tax was administered under these apportionment statutes. Rep. Comm'n of Int. Rev. (1941) 59.

\textsuperscript{20} In re Scott's Will, 274 N. Y. 538, 10 N. E. (2d) 538 (1937), \textit{cert. denied sub nom.} Northwestern Mutual Life Ins. Co. v. Central Hanover Bank and Trust Co., 302 U. S. 721 (1937). There is no impairment of the obligation of contract even if the statute is applied to an inter vivos transfer made before its passage. In re Ryle's Estate, 170 Misc. 450, 10 N. Y. S. (2d) 597 (Surr. Ct. 1939). The latter case discredited the claim that the statute violated the "due process" clause. See, for the Pennsylvania statute, In re Jeffery's Estate, 333 Pa. 15, 3 A. (2d) 393 (1939).

\textsuperscript{21} In re Del Drago's Estate, 287 N. Y. 61, 38 N. E. (2d) 131 (1941), \textit{reversing}, 175 N. Y. Misc. 489, 23 N. Y. S. (2d) 943 (Surr. Ct. 1940). Surrogate Foley, who decided the case in the surrogate's court, was the Chairman of the New York Decedent Estate Commission, which drew up and recommended the apportionment statute to the legislature.
statute by following the traditional approach of the *Hamlin* case and its successors.\(^2\)

Even if one accepts the New York court's approach to the question, its conclusions are open to doubt. The face of the federal statute gives detailed directions about the payment of the tax, but the determination of incidence is left largely to conjecture. In its attempt to read Congressional provisions on this subject into the statute the New York court has relied heavily on Section 826(b) of the Internal Revenue Code.\(^3\) This section permits persons other than the executor to be reimbursed by either the executor or the recipients of legacies for any estate taxes they might have paid. This provision was inserted into the statute without any debate on the floor of either house, and seems primarily designed to insure the collection of the tax before the distribution of the estate.\(^4\) Section 826(c) of the Internal Revenue Code, demanding proportionate contribution from beneficiaries of life insurance of over $40,000, was added to the 1918 Revenue Act and characterized as an administrative change. It was probably intended to further strengthen Section 402(f) of the same Revenue Act, which for the first time in the history of the estate tax expressly ordered the inclusion of life insurance in the gross estate.\(^5\) Although tax deficiencies can be collected from any transferee, either under Section 827(b) or by a suit in equity, the rights of transferees to contribution among each other cannot be adjusted in the proceedings; but in such cases apportionment can later be obtained by another suit in equity.\(^6\)

Congressional debates show no more than speculation about the incidence of the tax, and an authoritative statement on the issue appears nowhere.\(^7\)

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3. "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."\(^8\)

4. See Comment (1940) 40 *Col. L. Rev.* 690, 692.

5. As life insurance usually passes under a contract to which the insurance company and the beneficiary are parties, the propriety of such proceeding had been doubted and evasion of estate taxes by means of life insurance had seemed possible. H. R. Rept. No. 767, 65th Cong., 2d Sess. (1918) 42. For the constitutional and administrative difficulties created by the inclusion of life insurance in the gross estate, see *Paul, Life Insurance and the Federal Estate Tax* (1939) 52 *Harv. L. Rev.* 1037.


7. Cordell Hull, then a member of the House Ways and Means Committee, said: "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax
Congressman Kitchin, the Chairman of the House Ways and Means Committee reporting this section of the bill, emphasized that the tax was collected on the transfer of the net estate and that Congress was not interested in how the beneficiaries fared. There is little evidence in the debates on the floor of either house to support the view of the New York Court of Appeals that the form of an estate tax was adopted as a compromise measure between those wanting to guard death taxes as a source of state revenue and those desiring to obtain additional income for the national Government from this profitable source. Little attention was paid to the nature of the tax, i.e., that it was an estate rather than an inheritance tax, and the terms were used interchangeably throughout the debates. The few times the form of the tax was discussed its supporters extolled its administrative convenience. The only opposition to its methods came from Congressman Dillon, who feared that apportionment, to which he objected, would be the inevitable result. Since no indication of Congressional intent can be found either on the face of the statute or in the Congressional debates, the court's argument that the New York statute violates the "supremacy" clause of the federal constitution is unsupported.

The court's view that the New York statute contravenes the "uniformity" clause is equally untenable. The function of this clause in the constitution is to keep Congress from discriminating between the states, so that geographical uniformity throughout the United States can be preserved. Only in cases where application of state law actually would have interfered with established federal tax procedure has the Supreme Court ignored state law. As much of our present system of Federal taxation is affected by the operation of state law, it is evident that the Supreme Court does not consider interdependence and interference synonymous terms.

to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." 53 Cong. Rec. 10657 (1916). This statement is too vague and speculative to show that there was any intent on the part of Congress that the tax should be borne by the residuary.

29. In the report of the Ways and Means Committee on the estate tax there is a suggestion that such considerations may have taken place in committee; see H. Rep. No. 922, 64th Cong., 1st Sess. (1916). As such views were never aired in the debates on the floor of the House, they cannot be considered as having been generally accepted.
30. See 53 Cong. Rec. 10647, 10752, 13043-44, 13060, 13098; Appendix 1403, 1415, 1708 (1916).
31. See id. at 10596; Appendix 1398.
32. For a good example see Congressman Kitchin's speech, id. Appendix 1942 (1916).
33. Ibid; see also id. at 10596.
34. Id., Appendix 1495. See also id. at 10583 (1916).
35. See Knowlton v. Moore, 178 U. S. 41 (1900).
The field of estate taxation is one where such overlapping occurs frequently. Traditionally the administration of decedents' estates has been left to the States, and after the executor pays the tax to the Federal Government he accounts for such payment to the state courts. The state courts have had to decide whether to allow the federal estate tax as an administrative expense when calculating their own estate and inheritance taxes. The New York statute is only one other step in the States' dealings with the estate tax after payment has been made to the Federal Government. It regulates the incidence of the tax only, a subject in which the Federal Government has not yet evinced any interest, although for purposes of social policy it might be desirable that it should do so.

Such an interest could take the form of either a federal statute expressly fixing the incidence of the tax or one that would permit the States to do so. As under our present system of estate taxation apportionment seems to provide the most equitable solution to the problem of tax incidence, apportionment by either Congress or by the States with Congressional permission would be desirable. Action by the states separately would probably cause less administrative difficulty, and a bill currently before Congress would allow apportionment by the States. While such Congressional action would clarify the determination of tax incidence in the future, many wills which relied on the apportionment statute have been probated since the Del Drago case; and the confusion caused in the administration of these wills can only be remedied by a reversal of the Del Drago decision.

An express finding by the Supreme Court that the present estate tax statute permits state determination of tax incidence would end the anomalous situation created by the state courts' insistence on deciding state law by investigating Congressional intent. This action might involve an expansion of the views suggested in various cases which treat the tax either as an administrative expense or as a debt of the estate, the liability for which is to be determined by the State. Such an approach to the problem would be in line with the Y.M.C.A. and Slocum decisions and vastly superior to a search for a non-existent Congressional intent.

38. For a discussion of the problem caused by state dominance in a field which is so greatly influenced by federal action, see Cahn, Federal Regulation of Inheritance (1940) 88 U. of Pa. L. Rev. 297.

39. See, e.g., Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647 (1918); People v. Northern Trust Co., 289 Ill. 475, 124 N. E. 662 (1919); Estate of Roebling, 89 N. J. Eq. 163, 104 Atl. 295 (1918); Tax Comm. v. Lamprecht, 107 Ohio St. 535, 140 N. E. 333 (1923).

40. See 1 PAUL, op. cit. supra note 26, at 784; Comment (1940) 40 Col. L. Rev. 690, 699-701; Karch, The Apportionment of Death Taxes (1940) 54 Harv. L. Rev. 10, 49.


FREEDOM OF SPEECH IN SECONDARY PICKETING

Picketing, to be effective, must present to the public the facts of a labor dispute in such a way that the public, entering the controversy, can force a decision. When a product is sold through retail outlets, secondary picketing directed against the employer's vendee, is the only effective means of publicizing the facts of a labor contest. State courts, nevertheless, have generally refused to permit the picketing of "innocent" and "helpless" third parties. The power of the states to limit the area of peaceful picketing assumed a constitutional aspect with the Thornhill case; but not until two recent decisions did the United States Supreme Court pass on the question of freedom of speech in secondary picketing.

In the Wohl case members of the Bakery Drivers' Union, alarmed at the inroads which the "peddler" or independent jobber system of distributing bread was making into their ranks, sought to unionize the "peddlers". After failing in that attempt, the Union picketed the retail stores which bought from the "peddlers" as well as the bakeries whose products the latter handled. The New York courts held that no "labor dispute" was involved within the meaning of the state anti-injunction act and enjoined the admittedly peaceful picketing. In a unanimous holding the Supreme Court reversed on free speech grounds.


1. Secondary picketing involves employees engaged in a primary labor dispute who extend their activity so as to exert pressure on their employer's vendee. A secondary strike, however, involves activity, not by employees engaged in the primary dispute, but rather by other employees connected therewith through employment on the product which is the subject of the primary dispute. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 122.


In the Ritter case members of the Carpenters and Joiners Union picketed in front of a restaurant whose sole proprietor had awarded a building contract to a contractor who employed non-union labor. The picketing was completely peaceful and the placards truthful in every respect. Yet the Texas court enjoined the picketing as a violation of the state anti-trust law. In a five to four decision, the Supreme Court affirmed on the ground that there existed no "economic interdependence of all engaged in the same industry" and that the restaurant business, "as a business, has no nexus with the building dispute."

The rule apparently laid down in the two cases is that secondary picketing will be upheld as a valid exercise of free speech only if the same industry is involved and the unfair product can be followed into the hands of a retailer who resells it for profit. This doctrine ignores the principle of the


7. Originally a single picket carried this sign: "This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213 and Painters Local No. 130, Affiliated with American Federation of Labor." Later, and before the injunction issued, the wording was changed to read: "The Owner of this Cafe has awarded a Contract to Erect a Building to W. A. Plaster who is unfair to the Carpenters Union 213 and Painters' Union 130, Affiliated with the American Federation of Labor."


9. Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) arts. 7426, 7428. The Texas court's opinion, contrary to the statement of Frankfurter, J., was not the result of a careful balancing of the community's interest against the individual's right of free speech. Borden Co. v. International Brotherhood of Teamsters, 152 S. W. (2d) 828 (Tex. Civ. App. 1941) involved the same facts as the Wohl case. The case came before the same court, the same statutes and precedents were discussed, and the opinion was written by the same judge as in the Ritter case. And again peaceful picketing was enjoined. There was thus no attempt by the Texas courts to regulate the use of its streets by a reasonable exercise of the state police power. See Black, J., dissenting in Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 305 (1941), regarding misinterpretation of state court's holding by Frankfurter, J.


11. But cf. Haibach v. Carpenters Union, 2 Prentice-Hall Labor Cases § 22,482 (Ct. Com. Pls., Erie Co., Pa., 1941) (facts same as in Ritter case except that the non-union construction was an already existing addition to an already existing building).
"unity of interest" test used in some of the states. For example, there is a strong argument against the application in the Ritter case. The Court there concludes that the restaurant owner is a "stranger" to the dispute between the non-union building contractor and the Carpenters' Union. Nevertheless Ritter was the person really responsible for the fact that Union men were not employed. Practically speaking, the third party who continues to buy the product of an "unfair" manufacturer at a depressed price is not a "neutral", for he profits by the working conditions against which the primary employer's workers are striking. In the instant case, Ritter gained financially through the use of non-union labor and was thereby enabled to compete more successfully with restaurant owners who employed union contractors.

That one who uses non-union services receives the same sort of economic benefit as one who resells non-union products has been impliedly recognized in New York. If there is no distinction between the two, then it is difficult to reconcile the Wohl and Ritter holdings. The right to picket should not depend upon the type of industry involved or upon whether a product capable of being physically delivered passes into the third party's hands for resale to the public. At least two New York decisions have sanctioned the

12. Fortenbury v. Superior Court of Los Angeles County, 16 Cal. (2d) 405, 106 P. (2d) 41 (1940); Johnson v. Milk Drivers & Dairy Employees Union, 195 So. 791 (La. App. 1940); People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941); Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937). Several factors are pertinent in determining whether there is sufficient "unity of interest" between the third party and the manufacturer to warrant secondary picketing of the former by the manufacturer's employees: (1) whether the relationship between the third party (T) and the employer involved in the primary dispute (R) is so remote that pressure against T can have but a very indirect effect upon R—if this is the case, then the secondary picketing of T can be enjoined; (2) whether there are other equally effective means available to R's employees (E) to obtain the results sought—ineffectiveness of E's pressure against R may justify pressure against T; (3) whether E is arbitrarily singling out T as the object of pressure while not subjecting other persons similarly situated to the same treatment. Under any one of these criteria "unity of interest" could be found between Ritter and the non-union building contractor. See Barnard and Graham, Labor and the Secondary Boycott (1940) 15 Wash. L. Rev. 137, 160; Comment (1941) 90 U. of Pa. L. Rev. 201, 214.


14. People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941). Here a dispute existed between a union and a company installing and maintaining a burglar alarm apparatus. Judge Finch dissented on the ground that the complaining haberdasher was not in the same trade as the burglar alarm company. Thus the New York Court of Appeals refused to follow the "area of the industry" criterion which the Supreme Court lays down in the Ritter case.

15. One difficulty involved in the case of the "non-deliverable" service is that the secondary picketing may have the effect of a general boycott of the third party instead of simply a boycott of the "unfair" product which he handles. The New York courts have faced this problem in window-cleaning, neon sign, and advertising cases in which no specific product was being resold. Commercial House & Window Cleaning Co., Inc. v. Awerkin, 138 Misc. 512, 240 N. Y. Supp. 797 (Sup. Ct. 1930) (window-cleaning); People v. Bells, 281 N. Y. 67, 22 N. E. (2d) 238 (1939) (neon sign—overruled by People v. Muller, 286 N. Y. 281, 36 N. E. (2d) 206 (1941)); Mlle. Raif v. Randau, 155 Misc. 427, 1 N. Y. S. (2d) 515 (Sup. Ct. 1937) (advertising). Accord: Evening Times
cooperation of dockworkers and building trades unions in aid of teamsters on the ground that transportation workers are a part of the industry which they serve. But Carpenters, joiners, and painters should likewise be considered part of the industry which benefits from their labor.

But even granting that the Wohl and Ritter cases are distinguishable on a "following-the-subject-matter-of-the-dispute" rationale, the "area of the industry" criterion laid down in the latter case presents embarrassing administrative difficulties. Mr. Justice Reed points out in dissent: "We are not told whether the test of eligibility to picket is to be applied by crafts or enterprises or how we are to determine economic interdependence or the boundaries of particular industries." If, for example, a single individual were engaged in two separate industries, in one of which there was a labor dispute, then apparently business A would be immune from picketing because, "as a business, it has no nexus" with the dispute in business B, even though one proprietor were common to both. Or suppose that the "real adversary" of the Carpenters' Union, the non-union contractor, were also engaged in the restaurant business, his restaurant then would seem to be immune from picketing because, "as a business, has no nexus with the building dispute." Or assume the dispute arose because an addition to Ritter's present cafe was being constructed with non-union labor. Presumably the Carpenters' Union could picket where the unfair construction was actually taking place.

Would the Court attempt to draw a precise line in front of the restaurant and allow picketing only of the actual frontage of the additional

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18. There is no intimation in the majority opinion of the result that would be reached if the Union picketed the contractor's residence. The problem of two separate industries would certainly not be involved. Would the "area" of the building industry be held to include a non-union contractor's home as well as his place of business?

19. See Restatement, Torts (1939) § 805, illustration 2. If the Restatement is followed, it appears that Ritter's restaurant employees could strike secondarily in protest against non-union carpenters making repairs of constructing an addition to the restaurant. Cf. Haibach v. Carpenters Union, 2 Prentice-Hall Labor Cases 22,482 (Cl. Com. Pls., Erie Co., Pa., 1941). If there is sufficient "interest" between the restaurant employees and the union carpenters for a legal secondary strike, then there ought to be sufficient "interest" to permit the picketing of Ritter's restaurant by the Carpenters Union.

20. But if the Court's opinion is strictly followed, even this picketing could be forbidden on the ground that two separate industries are involved.
construction? Or, again, suppose there were new construction, to be used by Ritter as another restaurant. If picketing were limited to the site of the new restaurant, then Ritter's present trade would not be injured. But if the picketing occurred because of an addition to present facilities, then Ritter's immediate restaurant trade would certainly suffer. The Court then would seem to be, by result if not by rationale, in the anomalous position of making the geography of non-union work rather than the "area of the industry" the decisive factor in determining fundamental rights.

The point of distribution of goods or services is a logical place for workers to appeal to the consuming public for aid. Indeed picketing in front of a retail store, as in the Ritter case, is often the only effective way of reaching the public—a fact which the Supreme Court seemed to recognize in permitting secondary picketing in the Wohl case. A building in process of construction is not one being patronized by the public. And once a building is occupied by tenants there is little advantage in further picketing against the builder. To picket the contractor at the place of construction has long been recognized by the building trades unions as almost useless. Further, the view of the majority that "restriction of peaceful picketing to the area of the industry leaves open to the disputants other traditional modes of communication" seems directly contrary to a previous Court pronouncement in Schneider v. State. There it was said that liberty of expression in appropriate places cannot be abridged simply on the ground that it can be exercised elsewhere. For the Carpenters' Union to reach the public via newspapers, the radio, circulars, or announcements at public meetings would entail much greater expense than picketing. Perhaps, if the "no nexus" rule were consistently followed, the use of even these means of communication would be enjoined since they, like the picketing, might cause the boycott of an industry which is not concerned in the primary dispute.


22. See Hellerstein, supra note 6, at 350.

23. Compare: "To count the cost of union weapons is to count the cost of free competition in industrial controversy. Without breeding other ills and, above all, without hurting the prestige of law, that cost is not to be diminished by curtailing in the name of law the most effective union tactics." Frankfurter and Greene, The Labor Injunction (1930) 205.

24. "But so far as we can tell, respondents' [the peddlers'] mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated." Bakery and Pastry Drivers and Helpers Local 802 of Internat. Brotherhood of Teamsters v. Wohl, 62 Sup. Ct. 816, 819 (U. S. 1942).

25. 308 U. S. 147 (1939).

26. Id. at 163. But see Jones v. Opelika, 10 U. S. L. Week 4462, 4464 (U. S. 1942).

27. Essentially there is no difference between the distribution of circulars, pamphlets, and cards and the display of a printed statement on a banner carried by a picket. See Feinberg, Picketing, Free Speech, and "Labor Disputes" (1940) 17 N. Y. U. L. Q. Rev. 385, 401.
The inconsistency in the Wohl and Ritter opinions, handed down on the same day, reflects the uncertainty of the Court in peaceful picketing cases. In the former a state policy was unhesitatingly condemned; in the latter deference was paid to a state determination. The majority is not oblivious to the criticism of those who say that the analogy to free speech is unwise because incomplete. Apparently this bare majority is alarmed at the prospects of peaceful picketing in non-labor disputes and the consequent judicial hamstringing of state legislatures if the free speech analogy is strictly followed. But if there is to be a retreat from the Thornhill doctrine, it would be less confusing if the Court would say so. With the worded affirmation of the Thornhill philosophy in the Carlson and Swing cases the doctrinal issue was believed moot. The high court at last appeared to accept the Holmesian rule, “Let the public decide”. So long as traditional safeguards—truthful placards, no violence, no blocking of entrances and exits—are maintained, there seems no justification for interference with the process of telling the consumers the truth, whether

28. The reluctance of the Court to admit that secondary picketing no longer necessarily implies illegality is analogous to the former unwillingness of the courts to grant that there might be lawful picketing. See (1938) 15 N. Y. U. L. Q. Rsv. 282, 284.

29. Such critics contend that picketing, even though peaceful, is not directed towards the intellect and is not, therefore, within the idea-protecting purpose of a free speech rationale. The picket appeals basically to sympathy and to the customer's sense of embarrassment rather than to reason; the union rule never to cross a picket line is a concept antithetical to faith in the healthfulness of discussion and debate; the issues involved in a single labor dispute are too complex to be encompassed by a mere banner or placard; the employer usually keeps silent—these are some of the more common attacks upon the free speech analogy. See 1 TELLER, op. cit. supra note 1 (Supp. 1941) at 54 et seq.

30. Under a logical extension of the rationale there would be legalized picketing of residences, picketing in jurisdictional disputes, picketing for a closed shop where a union is closed to competent non-union workers, picketing to induce a small business to hire more employees, picketing by racial and religious minorities, picketing by competitors to enforce rules of competition, picketing in violation of a collective bargaining agreement, etc.


32. A. F. of L. v. Swing, 312 U. S. 321 (1941). There was no intimation here that the result would have been different had the picketing been done by teamsters or carpenters.

33. “Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.” Thornhill v. Alabama, 310 U. S. 88, 104-05 (1940).

34. It is difficult to understand the statement of Frankfurter, J., that the granting of the Union's contentions here would make peaceful picketing “wholly immune from regulation by the community in order to protect the general interest.” 62 Sup. Ct. 807, 809 (1942). As pointed out by Reed, J., in dissent, id. at 815: “We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing, reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required.”

35. The tendency is to widen the opportunities for consumers to secure facts about the products they buy. See Hellerstein, supra note 6, at 350.
it be done by picket sign, by pamphlet, or by announcement at a public gathering. And if public opinion is to decide industrial contests, then individuals who are injured by the workers' exercise of their right of appeal to the public should have no recourse against labor.30

Opponents of labor, ever since the Thornhill doctrine was announced, have concentrated on establishing lines beyond which picketing could not be employed. That important objective was partially attained in the Meadowmoor case37 with its “background of violence” restriction. Since traditional anti-labor courts have shown a desire to avoid the free speech labor decisions of the court, the decision of the majority in the Ritter case will provide an opportunity to find “no nexus” if two separate industries are concerned.

CANCELLATION OF CITIZENSHIP BECAUSE OF COMMUNISM*

Wartime pressure for political conformity has given new impetus to government action designed to restrict radical activities.1 Restrictive techniques have in the past included legislative investigations;2 the enforcement of criminal syndicalism statutes;3 the closing of government jobs4 and the exclusion of left-wing parties from the ballot.5

36. If the picketed one has been granted every means of peacefully fighting back: but still loses the battle because public opinion has ruled against him, he has not been destroyed economically any more than the many employers defeated in labor strikes. All that he has lost is a little of the individualism he formerly possessed. See Comment (1941) 41 Col. L. Rev. 89, 104 n. 97; Hellerstein, supra note 6, at 352.


2. The Rapp-Coudert Committee in New York, the Dies Committee in Washington, and the Yorty Committee in California have all made much use of newspaper publicity. See Legislative Investigations (1941) 9 Int. Jurid. Ass'n Bull. 73.

3. State criminal syndicalist laws: State v. Sentner, 230 Iowa 500, 298 N. W. 813 (1941), 36 Ill. L. Rev. 357; 14 Equal Justice No. 2 (1941) (Oklahoma); (1941) Civil Liberties Q. No. 40, p. 1, 3. On the Federal Smith Act, see Novak, Witch Hunt in Minnesota (1941); American Civil Liberties Union, Sedition: (1941); Chafee, Free Speech in United States (1941) c. 15; Symposium on Civil Liberties (1941) 9 Am. L. School Rev. 881; (1941) 41 Col. L. Rev. 159. Radicals have been prosecuted on other charges. See (1941) 9 Int. Jurid. Ass'n Bull. 123 (inaccurate election registration); (1942) Civil Liberties Q. No. 44, p. 3 (fraud in collection of election petition signatures).

4. E.g., New York's Devaney Act, Civil Service Law § 12a; 1941 U. S. Emergency Relief Appropriations Act, § 15(f), 54 Stat. 620 (1940); see (1941) 15 St. John's L. Rev. 335; Smith, Current Attacks on Our Civil Liberties (1941) 1 Nat. Lawyers Guild Q. No. 4, p. 5.

5. See Ward, The Communist Party and the Ballot (1941) 1 Bill of Rights Rev. 286; Legisl. (1941) 54 Harv. L. Rev. 155. Banning has been accomplished indirectly, by
A newer method of attack, which emphasizes the popular tendency to equate foreign birth with extremism, is suggested by a recent case. Schneiderman, an official of the California branch of the Communist Party, was a naturalized citizen. In his petition for naturalization and in his declaration of intention to become a citizen he had disavowed any opposition to organized government and affirmed his attachment to the principles of the Federal Constitution. On the other hand, he had not been asked nor had he volunteered information concerning his Communist Party membership. The Government brought suit to cancel his certificate of naturalization, on the ground that it had been illegally and fraudulently issued, and has been upheld in the District Court and the Circuit Court of Appeals. The District Court held that the certificate had been illegally procured, on the theory that the defendant's party membership at the time of naturalization prevented fulfillment of the statutory requirement that a prospective citizen must have "behaved as a person . . . attached to the principles of the Constitution of the United States." Secondly, the District Court found that the certificate had been obtained by fraud because the defendant had misled the naturalization court by a false oath of allegiance. The Circuit Court of Appeals affirmed on the grounds of illegality, finding it unnecessary to determine the issue of fraud.

The government claim that Schneiderman cannot be regarded as a person attached to the Constitution is to a degree supported by the legislative history of the Naturalization Act, although it can be argued that Congress in passing the original Act in 1795 may have intended the phrase "attached to the principles of the Constitution" as little more than a general norm to be clarified in the future by legislative enumeration of undesirable classes. An indication that the requirement was simply meant to be synonymous with "having regard and affection for" the Constitution is found in the early national policy of admitting to citizenship all persons whatever their political beliefs. However, regardless of the outcome of the argument from legislative history, at the time Schneiderman was naturalized only anarchists had been expressly singled out by the legislature as ineligible for citizenship; and not until 1940, if then, did Congress manifest any direct intent to bar

8. See 4 ANNALS OF CONGRESS 1004-66 (1793-95) passim; FRANKLIN, LEGISLATIVE HISTORY OF NATURALIZATION IN UNITED STATES (1906) 49-72. The Third Congress proceeded itself to include one class—those holding titles or orders of nobility.
10. See Flournoy, NATURALITY ACT OF 1940, CONTEMP. LAW PAMPH. Series 5, No. 4. The short-lived Alien and Sedition Acts were the one exception. See KOHLER, IMMIGRATION AND ALIENS IN THE UNITED STATES (1936) 329.
Communists. Therefore the court in the instant case might well have decided that a Communist was not ineligible in 1927.¹¹

Despite this doubtful legislative history, courts have sought intrinsic meaning in "attachment to the principles of the Constitution". One criterion has been whether the applicant for citizenship desires to amend that document. At one extreme are the decisions holding that an alien cannot be attached to a constitution and at the same time desire change in any respect.¹² A more moderate view permits the declarant to believe in change, provided the desired alterations do not go to basic principles.¹³ Since the Communist aim of destruction of private property admittedly necessitates a broad revision of the Constitution, acceptance of the amendment criterion in either form would disqualify all Communists from naturalization. But this criterion is fundamentally undesirable, if only because of the subjectivity inevitable in the choice of basic principles.¹⁴ Furthermore the right to amend can itself be labeled an unalterable principle. An inference to that effect can be drawn from the pacifist naturalization cases, where the Supreme Court denied citizenship only because the declarants declined to limit themselves to espousal of amendment.¹⁵ The absence of Supreme Court precedent deny-
ing to citizenship applicants the right to work for amendments finds justifica-
tion in the First Amendment, since its guarantee of freedom of speech runs to aliens as well as citizens.\(^{16}\) Moreover, aliens may actually vote, if state legislatures grant them the ballot, and before 1915 many aliens, thus enfranchised, voted for the representatives who pass on amendments.\(^{17}\)

One logical extreme of the desire to amend would be the desire to overthrow violently. Such a belief in means of force and violence is a clear ground for the refusal of citizenship, particularly where it is accompanied by overt acts or by any “clear and present danger” of actual overthrow.\(^{18}\) It is hard to credit “attachment” to an institution which the applicant avowedly seeks to destroy.

Where, however, the belief in force is not admitted but must be proved by the Government, there arise obvious evidentiary difficulties, as well as the possibility of a miscarriage of justice. In the Schneiderman case, for example, the defendant protested his belief in peaceful change, and there was no clear evidence that he personally believed in force. Therefore the court had to determine two issues: (1) The tenets of the Communist Party; (2) the correctness of imputation of these views to an individual Communist. The great majority of the lower courts have held that the Communist Party believes in force and violence. Some courts have merely assumed the belief, others have taken judicial notice of its correctness, and still others, including the court in the instant case, have insisted on the presentation of evidence.\(^{19}\) No court can realistically assume or take judicial notice of one side of a controverted issue of fact. In those cases where proof has been required, the evidence offered has been inconclusive.\(^{20}\) Despite Supreme Court holdings that convention statements are the proper criteria for determining the principles of political parties,\(^{21}\) manifestoes, speeches by individual Communists, and opinions of non-Communist “experts” have been accepted as conclusive. In the absence of Party statements advocating force and violence, reliance has been placed upon writings of deceased forc-


\(^{17}\) See Alexander, Rights of Aliens Under the Federal Constitution (1931) 94.

\(^{18}\) But see Hayes, Revolution as a Constitutional Right (1938) 13 Temp. L. Q. 18.


\(^{20}\) See (1938) 52 Harv. L. Rev. 157.

runners of the modern Communist Party. There is a very real difficulty in discovering the actual beliefs of an organization which, like the Communist Party, has been obliged to operate in considerable secrecy. In addition, the pragmatic character of Communist statements is evidenced by constant readaptation and reversal of the "party line". A survey of the literature indicates merely that the Party may contemplate the use of any one of a number of methods: (1) the ballot, (2) economic pressure, (3) force and violence, (4) indefinite large-scale political and economic effort, (5) self-defense.

In view of the difficulty of determining Communist Party dogma, it may be argued that individual Communists differ in their interpretation of Party documents, that not all Communists will agree on support of force and violence, and that the views of members may differ from those of leaders. Yet the majority of the lower courts, disregarding the evidentiary value of the applicant's protestations of peaceful designs, have held that membership in the Communist Party is equivalent to support of force and violence. Nor is the fact of membership an easy one to prove. Yet courts, administrative bodies and legislatures have declared such diverse details as the possession of a card, presence at a meeting sponsored by the Party, the lending of money to the Party, and association with others known to be members to be relevant evidence on this score. That Congress has not desired to make mere membership in the Communist Party subject to punishment or disqualification from privileges may be argued from the defeat of bills thus naming the Communist Party. Furthermore, despite the "H' lyn case's


23. In De Jonge v. Oregon, 299 U. S. 353, 365 (1937), the Supreme Court expressly left open the question of the actual objectives of the Communist Party, adding that, "Notwithstanding these objectives, the defendant still enjoyed his personal right of free speech." But see Katz, National Defense and Individual Liberties (1940) 16 IND. L. J. 31.

24. See (1940) 54 HARV. L. REV. 155. The formation of splinter groups further complicates the issue. The stock Communist answer to literature usually introduced to show their approval of force and violence is that revolutions are no longer invoked by manifestoes and that they are prophesying, not preaching. See (1938) 43 YALE L. J. 111, 115. The difficulty of determining what "Communist" means was recognized by Fiske, D. J., when he dismissed as too vague an indictment of five W. P. A. workers accused of falsely swearing that they were not Communists. United States v. Hautau, 43 F. Supp. 507 (D. N. J. 1942).


apparent approval of the idea of “guilt by association”, the Supreme Court has more recently frowned upon proscription for mere membership.\(^{27a}\) The later view of the Court seems especially applicable to naturalization, for the provision that one must have \textit{behaved} as a person attached to the Constitution indicates a Congressional intent to require more tangible proof of lack of attachment to the Constitution than imputed beliefs.

The broad standard used to determine attachment to the Constitution in naturalization proceedings is extended to cancellation cases by the \textit{Schneiderman} decision. The decision of the Circuit Court of Appeals gives no weight to the consideration that greater hardship results to individuals from revocation of citizenship than from denial of it in the first place. Other arguments which might have led to a contrary decision are passed over. Through the rationale that the cancellation action and the naturalization proceeding are independent actions, limitations imposed by the doctrine of collateral attack are avoided.\(^{28}\) And since the Nationality Act specifically gives the United States cumulative remedies, res judicata is no obstacle.\(^{29}\) But several courts, motivated possibly by the ample investigatory facilities put at the Government’s disposal since 1926 in an attempt to make the naturalization hearing no longer perfunctory,\(^{30}\) have refused to rule out completely the res judicata defense.\(^{31}\)

The Government as plaintiff in the cancellation proceedings must sustain the burden of proof of showing that the certificate of naturalization was secured fraudulently or illegally.\(^{32}\) It may be noted that in the naturali-

\(^{27a}\) Whitney v. California, 274 U. S. 357 (1927); cf. Burns v. United States, 274 U. S. 328 (1927). See Borchard, \textit{Supreme Court and Private Rights} (1938) 47 YALE L. J. 1051, 1073. The recent cases express a contrary attitude by their disregard of evi-


\(^{30}\) Beitz, \textit{Naturalization} (1929) 1 LINCOLN L. REV. 11, 14.


\(^{32}\) United States v. Der Manelian, 39 F. Supp. 959 (D. R. I. 1941). Since the can-
cellation action is so similar to a criminal case (cf. note 48 \textit{infra}) the government should be required to prove virtually beyond a reasonable doubt, rather than by a mere prepon-
derence. United States v. Knight, 299 Fed. 571 (C. C. A. 9th, 1924); see United States v. Sharrock, 276 Fed. 30 (D. Mont. 1921); Black, \textit{Disloyalty and Denaturalization} (1941)
tion hearing the declarant is held to a strict compliance with the letter of the naturalization statute, which provides that citizenship may be granted upon fulfillment of certain conditions "and not otherwise." This strict construction is further sought to be justified by the doctrine that citizenship is a privilege and not a right. But this attitude has no place in the cancellation proceeding, and given the quasi-criminal nature of the cancellation action, the Government-plaintiff might well be held to a high standard of proof in making its case.

Another possible obstacle to the success of the cancellation action is presented by the fraud count. Although the lower courts have tended to slur over the manifold common law requirements for proof of fraud, on the theory that the naturalization court should not be denied its right to examine all facts, regardless of relevance, some cases have refused cancellation for fraud when none of the elements was present. Since, however, Section Fifteen of the Nationality Code provides alternative grounds of fraud and illegality, and since "fraud" would duplicate "illegality" if materiality and reliance had to be proven, a reasonable assumption is that Congress meant fraud to cover non-material misrepresentations. On the other hand, a clue to the meaning of fraud and illegality is suggested by those courts which limit "illegally procured" to cases of subornation or other imposition on the court. But the majority view equates a lack of meticulous adherence to the letter of the naturalization law to illegality, regardless of the dishonest intent of the defendant.

The citizenship of all naturalized persons is made uncertain by the wide scope given to the phrase "attachment to the Constitution" and in view of


34. 54 Stat. 1140 (1940), 8 U. S. C. §701(d) (1940).


42. See Weber v. United States, 119 F. (2d) 932 (C. C. A. 9th, 1941), aff'd, 32 Sup. Ct. 911 (1942) (receipt of relief evidence of lack of attachment); (1941) CIVIL LIBERTIES
of the unavailability of the doctrines of res judicata and collateral attack in the cancellation proceedings. This construction defeats Congressional intent. Section Fifteen was passed to insure uniformity and to prevent collusive naturalization. Instead, the broad interpretation leads to diversity and uncertainty. The scope of cancellation is rendered even wider by the rule that actions and statements of the citizen made after naturalization are admissible as evidence of his prior state of attachment to the Constitution. Because of this rule and because the naturalized citizen's utterances and actions after he has become a citizen provide in practice the impetus for prosecution of the suit, the naturalized citizen must shy away from the expression of left-wing thoughts and membership in radical organizations.

Once the citizen's certificate is cancelled, he becomes an alien, and, as such, is subject to deportation for his views, for Turner v. Williams held that the First Amendment protects aliens only until Congress decides to expel them for the use of their free speech. Moreover the procedural safeguards of the Bill of Rights are somewhat summary in expulsion proceeding. The net result is that the naturalized citizen is liable to banishment.


4 & 5 Geo. V. c. 17, § 17(1). See FLOURNOY AND HUDSON, A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES (1929) 64. A bill has been introduced into Congress to incorporate a similar provision into American law. H. R. 6250, 77th Cong., 2d Sess. (1942). This bill, which passed the House, would permit courts to cancel the naturalization of any citizen whose "utterances, writings, action or course of conduct establishes that his political allegiance is to a foreign state or sovereignty." It was attacked by civil liberties groups. See Hearings before Committee on Immigration on H. R. 6250, 77th Cong., 2d Sess. (1942). But its constitutionality is dubious because it unreasonably discriminates against naturalized citizens. See United States v. Wong Kim Ark, 169 U. S. 649, 703 (1898); Osborn v. United States Bank, 9 Wheat. 738, 827 (U. S. 1824). And its vagueness precludes considering the citizen as having voluntarily renounced citizenship. See Mackenzie v. Hare, 239 U. S. 299, 312 (1915).

46. 194 U. S. 279 (1904).

47. On this problem see CHAFFEE, op. cit. supra note 3, at 228-40; Oppenheimer, Constitutional Rights of Aliens (1941) 1 Bill of Rights Rev. 100; Oppenheimer, Recent Developments in the Deportation Process (1938) 36 Mich. L. Rev. 355; Bevis, The Deportation of Aliens (1920) 68 U. of Pa. L. Rev. 97; (1940) 3 Nat. Lawyers Guild Q. 43.

48. The basis of determination of the procedural safeguards is the wording of the particular amendments—"criminal" or not, "person" or "citizen." The due process
for expressing ideas which may not be criminal and is not provided the protection which would be accorded him if he were tried for a crime.\textsuperscript{49} The disability thus attaching to naturalized citizens is inconsistent with the lack of power to create two classes of citizens,\textsuperscript{60} and with the spirit, if not the letter, of the Bill of Rights, which guarantees freedom of speech to native-born citizen, foreign-born citizen, and alien alike.\textsuperscript{51} When a clear and present danger to the government exists, instead of cancellation proceedings assisted by a piling of imputation upon implication to prove lack of attachment to the Constitution, the criminal statutes, which do not take advantage of a naturalized citizen's status, should be the means of punishing the advocacy of force and violence.\textsuperscript{52}

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\textsuperscript{49} See Van Vleck, \textit{The Administrative Control of Aliens} (1932) 149-85; Oppenheimer, \textit{loc. cit. supra} note 52; Comments (1931) 31 Col. L. Rev. 1013; (1938) 41 Harv. L. Rev. 522; (1928) 37 Yale L. J. 380.

\textsuperscript{50} United States v. Wong Kim Ark, 169 U. S. 649 (1893).

\textsuperscript{51} See Kohler, \textit{Immigration and Aliens in the United States} (1936) 337; Comment (1922) 31 Yale L. J. 422. But see State v. Sinchuk, 56 Conn. 605, 115 Atl. 33 (1921).

\textsuperscript{52} See Dowell, \textit{A History of Criminal Syndicate Legislation in the United States} (1939); Berge, \textit{America's Answer to Subversive Activities}, I. L. D. Yearbook (1941); Comment (1941) 36 Ill. L. Rev. 357; (1936) 84 U. of Pa. L. Rev. 390; (1941) 1 Bill of Rights Rev. 55. Compare the treatment in other nations. See Greene v. Sec'y of State for Home Affairs, 58 T. L. R. 53 (1941); Liversidge v. Anderson, 53 T. L. R. 35 (1941); Lowenstein, \textit{Legislative Control of Political Extremism in European Democracies} (1938) 38 Col. L. Rev. 591, 725; Brewin, \textit{Civil Liberties in Canada During Wartime} (1941) 1 Bill of Rights Rev. 112. For a summary of the clear and present danger test, see Fraenkel, \textit{One Hundred Years of the Bill of Rights} (1939) 23 Minn. L. Rev. 719, 751-55; Chaifetz, \textit{Free Speech in the United States} (1941) passim.

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