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NOTES

VICARIOUS LIABILITY FOR CRIMINAL OFFENSES
OF CO-CONSPIRATORS*

To secure trial advantages and heavier sentences, public prosecutors have frequently invoked the catch-all conspiracy section of the Criminal Code. They have obtained punishment for a prior agreement to commit a minor crime rather than for the crime itself, and conspiracy counts have been added where the facts have shown merely a joint commission of a substantive offense. Although these practices have evoked judicial censure,

1. Admissions of third persons party to the conspiracy may be used against the defendant, and evidence, otherwise irrelevant as to the particular defendant, becomes relevant when conspiracy is charged. See 4 Wigmore, Evidence (3d ed. 1940) § 1079. Other advantages include the six-year statute of limitations, Braveman v. United States, 317 U. S. 49 (1942), and confusion of the jury when many defendants are joined in one indictment. See Weiss v. United States, 103 F. (2d) 759 (C. C. A. 3d, 1939); cf. Kottas v. United States, 66 Sup. Ct. 1239 (U. S. 1946). But cf. Kelly v. United States, 258 Fed. 392 (C. C. A. 6th, 1919).


3. "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. . . . Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with the crime can be disregarded." Holt, J., in United States v. Kissel, 173 Fed. 823, 828 (C. C. D. N. Y. 1909).


5. A more severe sentence for conspiracy than for the completed substantive crime does not preclude punishment on the conspiracy count. United States v. Stevenson (No. 2), 215 U. S. 200 (1909); Clune v. United States, 159 U. S. 590 (1895).


7. "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Recommendations of the Senior Circuit Judges, Rep. Atty Gen. (1925) 5–6, cited by the court in Pinkerton v. United States, 66 Sup. Ct. 1180, 1182, n. 4 (U. S. 1946).
federal courts have been hesitant to circumscribe the operation of the conspiracy statute. The only serious limitation imposed by the Supreme Court upon recourse by prosecutors to the conspiracy device has been the edict against conviction on multiple conspiracy counts where a single agreement to commit acts violating several statutes was proved.

In the recent case of *Pinkerton v. United States*, the Supreme Court refused to confine further the broad scope of the conspiracy statute. Defendant brothers, Walter and Dan Pinkerton, were indicted upon eleven counts charging violations of the Internal Revenue Code, the first ten setting out substantive offenses and the eleventh a conspiracy to violate the Code. The evidence established the conspiracy, but showed that Walter alone had committed the substantive crimes. The district judge charged the jury that both brothers could be found guilty on all counts if the substantive offenses were found to be in furtherance of an unlawful conspiracy. This imposition of vicarious liability on each conspirator for acts of others within the scope of the conspiracy was approved by the Supreme Court.


11. 53 STAT. 303 (1939), 26 U. S. C. § 2803 (1940); 53 STAT. 401 (1939), 26 U. S. C. 3321 (1940). Dan was found guilty of counts 3, 5, 6, 8, 9, 10 and 11. He had formerly been convicted of counts 1, 2 and 4. Walter was found guilty on all except count 7. Both received sentences in excess of the maximum permissible under the conspiracy statute alone. Although both defendants appealed, the only serious contention of error was Dan’s sentence on the substantive crimes.

12. CRIM. CODE § 37.

13. This fact is not disputed. Dan was, in fact, confined to prison when some of the substantive offenses were committed. Record, p. 194, Pinkerton v. United States, 66 Sup. Ct. 1180 (U. S. 1946).

14. “In connection with those counts (the substantive crimes) . . . if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy . . . then you would have a right . . . to convict each of these defendants on all these substantive counts, provided the acts . . . were . . . in furtherance of the unlawful conspiracy, or object of the unlawful conspiracy, which you have found from the evidence existed.” *Id.* at 191–2.

Although at common law conspiracy was held to merge with the successful commission of the contemplated offense,\(^1\) thus limiting punishment to the substantive crime, the rule no longer obtains under the Criminal Code.\(^1\)

The gist of the one offense is the unlawful agreement \(^1\) and of the other the substantive crime, each being separately punishable.\(^1\) Even where the overt act required by the federal statute to establish the conspiracy is the commission of the substantive crime, both offenses may be charged and a plea of double jeopardy \(^2\) will not avail.\(^2\)

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16. 1 Bishop, Criminal Law (9th ed. 1923) § 787; Harrison, Law of Conspiracy (1924) 73.

17. At common law conspiracy was a misdemeanor. When the substantive crime was a felony, there was merger for the reason that the same act cannot constitute both a felony and a misdemeanor. 1 Bishop, loc. cit. supra note 16. The practical effects of mergers in England were substantial. Forfeiture of property to the King resulted from a conviction of a felony; also, persons indicted for a misdemeanor had certain trial advantages, such as the right to a special jury, a copy of the indictment, and a full defense by counsel, which were not available to one charged with a felony. These reasons for merger have never existed in this country, and violation of the federal conspiracy statute is made a felony by operation of 35 Stat. 1152 (1909), 18 U. S. C. § 541 (1940). For a history of the conspiracy doctrine, see Sayre, Criminal Conspiracy (1922) 35 Harv. L. Rev. 393, 418. The rule has generally been rejected in the United States. See Note (1931) 17 Corn. L. Q. 136 and Notes (1925) 37 A. L. R. 778, (1931) 75 A. L. R. 1411.


20. It was petitioner's contention in the instant case that since the only act committed by Dan Pinkerton was joining the conspiracy, conviction for the substantive offenses amounted to multiple punishment and hence double jeopardy. This was the view adopted by the dissent of Justice Rutledge, who approved a decision of the Third Circuit on closely similar facts. United States v. Sail, 116 F. (2d) 745 (C. C. A. 3d, 1940). The reasoning was rejected by the majority on the theory that the same evidence did not support both charges, and it made no difference that the counts all related to one transaction. Gavieres v. United States, 220 U. S. 338 (1911); Carter v. McClaughry, 183 U. S. 365 (1902). For criticism of the "same evidence test" see Note (1940) 24 Minn. L. Rev. 522, 550 et seq.

Thus the novel issue presented by the *Pinkerton* decision was not the conviction for both the conspiracy and the substantive offenses but the conviction of Dan Pinkerton for the substantive crimes solely upon evidence of his prior agreement to commit similar acts. The majority opinion of Justice Douglas characterized conspiracy as a "partnership in crime" and, by analogy to civil liability common to partners, extended criminal liability to each conspirator for the offenses of co-conspirators. But criminal law, unlike civil law, has its foundation in personal and individual guilt, the essence of which is causation, and any doctrine of vicarious criminal liability is repugnant to common law concepts. Forced analogies between the remedial principles of civil law and the penal provisions of criminal law have received specific Congressional disapproval. The causation rationale lies behind the Criminal Code which makes liable as principal (1) the direct actor, or (2) one who "aids, abets, counsels, commands, induces, or procures" commission of the act. The requirement that criminal statutes are to be strictly construed would seem to make this categorization exclusive and to prohibit judicial creation of a third class to include all members of a conspiracy of which the direct actor was a member.

In confirming Dan's sentence on the substantive counts, the majority relied on a number of mail fraud cases in which it has been held that the overt act of mailing the letter was imputable to all members of the scheme to defraud. Although the gravamen of the offense in those cases is the use of the mails, it is the existence of a fraudulent scheme which makes the act punishable, and participation in the scheme must be proved against each defendant. Thus it is the existence of the scheme to defraud which makes the otherwise innocent act a crime, whereas in the instant situation the


24. Id. at 702 et seq.


26. 35 STAT. 1152 (1909), 18 U. S. C. § 550 (1940) provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."


criminal nature of the substantive offense is independent of the conspiracy. Where prosecutors have added a conspiracy charge to an indictment for using the mails to defraud, courts have questioned the validity of the action. Johnson v. United States, also cited by the majority, convicted a defendant in a bootlegging case of both the conspiracy and various substantive acts in which he had no part. However, in that case conviction was apparently based on the theory that the accused "aided and abetted" commission of the substantive offenses.

It is an often-repeated dogma that the act of one conspirator is the act of all when committed within the scope of the conspiracy, even if conspiracy is not charged but is shown actually to exist. Although only one court has specifically limited the doctrine, federal courts have applied it in fact only (1) to establish as the act of all members of the alleged conspiracy the overt act required by the federal conspiracy statute, (2) to show the extent and duration of the conspiracy in relation to all the conspirators, or (3) as a rule of evidence to connect all the defendants with the crime charged.


32. See 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 641; 11 AM. JUR. 548. See also notes 33-6 infra.

33. Davis v. United States, 12 F. (2d) 253 (C. C. A. 5th, 1926).


35. State decisions invoke the doctrine in holding that one need not commit the actual offense (e.g., pulling the trigger) to be convicted of the substantive crime. People v. Bringhurst, 192 Cal. 748, 221 P. 897 (1923); Hanna v. People, 86 Ill. 243 (1877); Odom v. State, 172 Miss. 687, 161 So. 141 (1935); People v. Foley, 59 Mich. 553, 26 N. W. 699 (1886). It is not necessary for the conspirator to be present when the crime is committed. People v. Pierce, 387 Ill. 608, 57 N. E. (2d) 345 (1944); People v. Payne, 359 Ill. 216, 194 N. E. 539 (1935); Spies v. People, 122 Ill. 1, 253, 12 N. E. 885, 981 (1887); People v. Michalow, 229 N. Y. 325 (1920). These cases rest not on the vicarious liability of conspirators for all the substantive offenses which may be part of a continuing conspiracy, but upon a principle, not peculiar to conspiracy law, that he who counsels, procures, or commands commission of a crime, is himself guilty as a principal. See Boyd v. United States, 142 U. S. 450, 455-6 (1892). In these cases the conspiracy was to commit one particular offense, proof of which might well be sufficient to establish aiding and abetting were the case brought under the federal statute.


38. See Wiborg v. United States, 163 U. S. 632, 657-8 (1896); American Fur Co. v.
However, prior to the *Pinkerton* case, the doctrine had not, by its own force, supported an imposition of vicarious liability for substantive offenses committed by co-conspirators. Where prosecutors had sought to hold the accused on both counts, the question of guilt was apparently submitted to the jury either on evidence that he was the direct actor or that he aided and abetted the commission of the substantive offense.

For Dan Pinkerton to be held as a principal under the aiding and abetting statute, it was not necessary to indict him specifically as an aider and abettor, inasmuch as proof of the aiding is sufficient to support an indictment as a principal. Dan’s guilt, however, was submitted to the jury not on this narrow ground but on a broader theory that he could be convicted of the substantive offenses if merely a member of the illegal conspiracy. The ruling in the instant case either incorporates the aiding and abetting clause within the conspiracy section or creates a conclusive presumption that each conspirator aids and abets every act within the scope of the conspiracy.

The permissive language of the jury charge in the *Pinkerton* case raises the question of what facts the prosecution must prove to establish the guilt of a conspirator on the substantive counts. The district judge stated that if the jury found the substantive offenses were in furtherance of an unlawful conspiracy of which Dan Pinkerton was a member, it had a “right” to hold him guilty on all counts. The implication is that despite such a finding, the jury might have acquitted Dan, had it seen fit, of all or any of the substantive crimes. If the jury’s function is that of a fact-finding body, then its verdict must be controlled by specific legal criteria enunciated by the court and not by mere whim. The only reasonable criterion lies in the application of the aiding and abetting statute to each substantive offense, a standard repudiated by the court.

The logical basis for holding each conspirator liable substantively for every act within the scope of the unlawful agreement lies in the reasoning that such criminal offenses are acts to which he impliedly or directly acquiesced or which he should reasonably have foreseen as a result of the agreement. The theory, which is advanced to satisfy the causation requirement of crimi-

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41. See note 14 *supra*.
42. This view is supported by the failure of appellate courts to reverse verdicts of guilty on the conspiracy count and not guilty on the substantive counts, when the latter were the only overt acts alleged to establish the conspiracy. Such an illogical verdict is not void for want of consistency, because the counts state two distinct and separate crimes, and the jury is free to acquit on either or both charges. Heike v. United States, 227 U. S. 131 (1913); United States v. Dewinsky, 41 F. Supp. 149 (D. N. J. 1941).
nal law, might automatically bring a conspirator within the limits of the aiding and abetting statute. But the wisdom of such a rule cannot be assessed in a vacuum; it must be considered in light of the constitutional protection afforded to individuals criminally indicted, the present state of conspiracy law, and the existing practices of public prosecutors.

Even though it found no abuse of the conspiracy statute in the *Pinkerton* case, the Court took cognizance that such abuses do exist. The difficulties of a fair trial because of the large number of defendants, the lax rules of evidence, the stigma of the offense, and the consequent confusion of the jury make questionable the desirability of any further extension of a conspirator's liability. Under the *Pinkerton* decision his major defense would be proof that the act was not within the scope of the conspiracy, a concept so flexible as to afford little protection. But because of the secret nature of criminal conspiracies, explicit proof of their existence and scope would generally be unobtainable; any change of the existing doctrine to give additional protection to the accused might place such a heavy burden of proof on the prosecution as to vitiate the conspiracy statute.

The instant case is prejudicial to the defendant in another respect. Mere inaction is not sufficient to constitute withdrawal from a conspiracy, and courts require some evidence of affirmative disavowal. As a practical matter, the test proves hard to meet. On the conspiracy charge this defense would be of no avail if the disaffirmance were subsequent to the commission of an overt act not necessarily criminal in itself. If, however, one can be vicariously held for all the substantive offenses within a continuing conspiracy, proof of withdrawal at any time would be a satisfactory defense to charges of subsequent crimes. But proof of a withdrawal logically involves admission of membership in the conspiracy, and while such a situation might be ground for a severance, courts infrequently grant this motion. In practice, the defendant may be compelled to confess the conspiracy to prove his innocence of substantive acts and avoid the possibility of a cumulative sentence. Renunciation of the conspiracy can generally be shown only by

44. Although recognizing that the conspiracy statute could be abused through the addition of a conspiracy count, Mr. Justice Douglas found that the practice was not reflected in the present case. He did not comment on the practice of adding substantive counts to a conspiracy charge. *Pinkerton v. United States*, 66 Sup. Ct. 1180, 1182, n. 4. (U. S. 1946).
45. See note 3 super.
47. See *Hyde v. United States*, 225 U. S. 347 (1912) (disclosure of the conspiracy to government not in itself sufficient to constitute withdrawal). In the instant case it would appear that not even a jail sentence constituted withdrawal, but this point was not pressed in the appeal. It has, however, been urged by petitioner as grounds for a rehearing. Petition for Rehearing, pp. 8, 9. *Pinkerton v. United States*, 66 Sup. Ct. 1180 (U. S. 1946).
inaction, lack of participation in, and knowledge of, the substantive offenses; but if such proof is not sufficient to constitute withdrawal, it will not avoid liability for these crimes. While there is justification for the stringent requirement of an affirmative act of withdrawal on the charge of conspiracy, the gravamen of the offense being the unlawful agreement, the operation of that rule in conjunction with vicarious criminal liability may well leave a former conspirator, innocent of all connection with subsequent crimes, defenseless.

In the final analysis the *Pinkerton* decision extends the wide limits of the conspiracy doctrine to the breaking-point and opens the door to possible new abuses by over-zealous public prosecutors. While membership in a conspiracy may well be evidence for the jury's consideration in holding others than the direct actor guilty, it should not be sufficient, in the absence of some further showing of knowledge, acquiescence, aid or assistance, to convict one conspirator for another's criminal act. In addition to the possible prejudice to the defendant, prevalent whenever conspiracy is charged, it may have deleterious effects upon law enforcement. Any system of administration which permits the prosecution to trust to a mechanical rule of law as an alternative to unequivocal proof must itself suffer.
DOUBLE TAXATION UPON SALE OF CORPORATE ASSETS*

When the stockholders of a closely held corporation contemplate a sale of its assets, an obvious disparity in federal tax consequences may largely determine the method employed to accomplish the sale. If the corporation itself consummates the sale, any gain accruing therefrom is doubly taxable, first to the corporation and, subsequently, to the stockholders upon distribution of the proceeds. But if through a complete or partial liquidation the corporation merely distributes its assets in kind, it realizes no taxable gain however these assets may have appreciated in value since their acquisition. And if subsequent to such distribution the stockholders themselves sell this property, the income is taxable against the stockholders alone.

However, use of the avoidance device thus suggested is useful to the corporation only to the extent it is assured that the stockholders will, after distribution, be able to effect a satisfactory bargain. To insure completion of the whole plan, the corporation will frequently contact the ultimate purchaser and negotiate the terms of sale prior to actual liquidation. With the ultimate sale arranged, transfer of title through the stockholders becomes a mere matter of form, and courts have readily held the corporation itself taxable upon such a sale. Analysis of the fact situations in cases of this nature reveals the strong correlation between the corporation's ultimate taxability and the extent of its pre-liquidation negotiations. The courts' probable reliance on this

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2. "If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale. . .." U. S. Treas. Reg. 111, § 29.22 (a)-18. The method of computation and the basis for gains and losses is dealt with in I.R.C. §§ 111-3.
4. See Perlstein, loc. cit. supra note 1.
5. The corporation is often said to be held taxable on the ground that the substance of the transaction and not the form is controlling in the application of income tax laws. See Embry Realty Co. v. Glenn, 116 F. (2d) 682, 683 (C.C.A. 6th, 1940); Meurer Steel Barrel Co., Inc., 12 P-H TC Memo. Dec. 356, 362 (1943); Hellebush v. Commissioner, 65 F. (2d) 902, 904 (C.C.A. 6th, 1933); Nace Realty Co., 28 B. T. A. 467, 470 (1933). But see Commissioner v. Falcon Co., 127 F. (2d) 277, 278 (C.C.A. 5th, 1942); Chisholm v. Commissioner, 79 F. (2d) 14, 15 (C.C.A. 2nd, 1935), cert. denied, 296 U. S. 641 (1935). When courts speak of looking through the form to the substance, they are treating the several occurrences, including distribution, as parts of a single transaction. Conversely, if the stockholders alone are to be held taxable, the various steps are looked upon as separate transactions and the form is said to coincide with the substance. However, here, as in most other tax fields, attempts to distinguish between form and substance have been discouragingly unsuccessful and misleading. See Paul, Selected Studies in Federal Taxation (2d Series, 1938) 200–4.
factor has, however, been obscured by the legal analyses with which they have felt obliged to meet the contention that title was vested in the stockholders at the time of sale.

Where the corporation has bound itself to sell specific assets which were then transferred to its stockholders who consummated the transaction, the courts have rationalized the decisions holding the corporation taxable by labeling the stockholders mere conduits of title who can do nothing other than execute the corporation's obligation. 6

Where the corporation has merely conducted negotiations for the sale and contends that the stockholders themselves accomplished the binding contract, it has been more difficult for the courts to disregard the transaction's legal forms. Nevertheless, the large majority of these cases have held, upon a variety of rationales, that the gain upon sale was taxable to the corporation. 7 In numerous instances, after the corporation had begun negotiations for sale, the stockholders voted to dissolve and authorized liquidating trustees to sell the corporate assets for the benefit of the stockholders. To hold the corporation taxable, the courts have applied the long standing principle prescribed by Section 29.22(a)-20 of Treasury Regulations 111 that any sale of property made by a receiver or trustee in dissolution while winding up a corporation's affairs shall be treated as if made by the corporation. 8 The intention of stockholders and corporation that the trustees act on behalf of the stockholders and not for the corporation has not been determinative. 10 The resolution appointing the trustees has been considered only an agreement between the stockholders which would not impair the right of the government to challenge it for tax purposes. 11 It is also argued that, conceding title did vest in the trustees prior to the sale, no part of the title passed to the stockholders. 2 Several opinions have found it unnecessary to apply the thesis of this section


7. See George T. Williams, 3 T.C. 1002, 1012 (1944) in which the court holds the corporation not taxable but recognizes this rule and summarizes the rationales of the pertinent cases.

8. See cases cited infra notes 9, 10, 13.


and have merely construed the stockholders or their trustees to be acting as agents of the corporation in effecting the sale.\textsuperscript{13}

On the other hand, in those cases where the courts have found no measurable negotiations prior to liquidation, they have attributed no taxable gain to the corporation.\textsuperscript{14} In these instances, it is held that the stockholders consummated the contract of sale after title to the assets had vested in them and that they alone are taxable upon the sale. It should be noted, also, that there are cases in which, despite the presence of prior negotiations, courts have chosen neither to find nor fabricate any defect in form through which to hold the corporation taxable.\textsuperscript{15} These exceptions may be explained by the fact that the prior negotiations rationale has not been clearly expressed as the underlying justification for taxing the corporation.

A recent case, \textit{Fairfield Steamship Corporation v. Commissioner},\textsuperscript{16} provides an example of the hazards latent in attempts to justify taxing the corporation upon grounds other than its pre-liquidation negotiations. In contemplating the liquidation of Fairfield, it was planned to transfer that corporation's main asset to its sole stockholder, the Atlantic Corporation. It was intended that Atlantic would make the sale of this property in order that the anticipated gain could be set off against its losses incurred on another transaction. Lewis, president of both corporations, obtained through his agents a satisfactory offer from a buyer, but acceptance was postponed until title to the property could be passed to Atlantic. Atlantic's stockholders then authorized Lewis to complete the sale to the original offeror upon the previously arranged terms.

On the realistic ground that negotiations had been concluded by a satisfactory offer before Fairfield transferred the property, the Tax Court's finding of fact ascribed the sale to Fairfield, the subsidiary corporation, with the result that Fairfield was taxable.\textsuperscript{17} But the Circuit Court of Appeals for the Second Circuit, contending that the negotiations were by and on behalf of Atlantic, the parent, would not

\textsuperscript{13} See R. G. Trippett, 41 B.T.A. 1254, 1259 (1940); Nace Realty Co., 28 B.T.A. 467, 471 (1933); S. A. MacQueen Co., 26 B.T.A. 1337, 1341 (1932). Another theory for holding the corporation taxable is that "beneficial ownership" of the property never passed from the corporation to its stockholders. See S. A. MacQueen Co., supra at 1342; Bogg-Burnam and Co., 26 B.T.A. 988, 994 (1932).

\textsuperscript{14} See George T. Williams, 3 T.C. 1002, 1012 (1944) (dissolution begun prior to negotiations for sale); Conservative Gas Co., 30 B.T.A. 552, 554 (1934); Central National Bank, 25 B.T.A. 1123, 1128 (1932); Fruit Belt Telephone Co., 22 B.T.A. 440 (1931) (purchaser had merely made appraisal of assets prior to transfer to stockholder).


\textsuperscript{17} Fairfield Steamship Corporation, 5 T.C. 566 (1945).
impute the sale to Fairfield. Nevertheless, the court held that the transfer of the asset to Atlantic resulted in a gain taxable against Fairfield because the distribution did not comply with the provisions of Section 112(b)(6) of the Internal Revenue Code. This section specifies conditions under which no gain or loss is recognized "upon receipt by a corporation of property distributed in complete liquidation of another corporation." The court held that Fairfield therefore could and did realize a taxable gain upon liquidation. But the court unaccountably failed to recognize that the conditions of this section determine the possibility of gain or loss only of the parent corporation. The section clearly does not negate the principle that the liquidating corporation realizes no gain from mere distribution of assets. Possibly impelled by criticisms of its decision, the court subsequently issued an addendum in which the original rationale was sidestepped and the corporate tax justified under the familiar "trustee" hypothesis of the Treasury Regulations. Much of the court's difficulty would have been avoided had it chosen to follow two significant principles expressed by the Supreme Court's opinion in the slightly less recent Court Holding Co. case.

In that case, the corporation had orally contracted to sell its property and received part payment upon the agreed price. In a last minute effort to avoid the corporate tax, the corporation performed the legal steps of liquidation and deeded the property to its stockholders. A new contract of sale was thereupon drawn by the stockholders with the same purchaser and upon identical terms. Although the corporation's oral contract was unenforceable, the Tax Court did not allow the corporation to avoid the tax. But by dissociating the corporation's negotiations from those of the stockholders because the latter were "free to sell or not to sell," the Circuit Court of Appeals found that only the stockholders realized gain.

In reversing the Circuit Court of Appeals, the Supreme Court established first that the question of whether the gain from such a sale was to be attributed to the corporation was one of fact. This determination curtailed the future power of review of the circuit courts of appeals over the Tax Court's finding upon this issue. Secondly, and of equal importance, a reasonable interpretation of the opinion would seem to

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18. See note 16 supra.
19. See note 3 supra.
20. The opinion has been referred to as "... one of the most astonishing tax opinions in recent years..." and as a "... product of a complete misconception of the statute, and it may be anticipated that the rule will not be followed in subsequent cases." Tax Notes (1946) 32 A. B. A. J. 516. See also 1 RABKIN and JOHNSON, op. cit. supra note 1, at 1312.
24 Court Holding Co. v. Commissioner, 143 F. (2d) 823, 824 (C.C.A. 5th, 1944).
sanction the establishment of the prior negotiations test 25 as an adequate determinative of the corporation's taxability upon the whole transaction. This should allow the Tax Court to subordi-nate its preoccupation with the issue of whether stockholder or corporation legally held title to the property at the time of sale.

The Tax Court has, since this ruling, emphasized that the burden is upon the corporate taxpayer to prove there were no agreements entered into by its officers prior to liquidation and that the stockholders did not immediately enter into a contract with persons previously negotiated with by the corporation. 26 It is also significant that in the most recent opinion holding the stockholders alone taxable, the Tax Court pointed out that negotiations for sale were commenced only after the liquidating distribution. 27

It may reasonably be argued that the double tax which results when the sale is attributed to the corporation is unnecessarily onerous. But disproportionate severities characterize corporate tax laws, 28 and proper alleviation of these tax burdens is a legislative function. Where the corporation is employed to carry forward the sale transaction, both the corporation and its stockholders must accept the burdens imposed on those who retain the advantages of dealing through the corporate form. To avoid the taxes upon a corporate sale, the corporation and its stockholders would have to accept the inconveniences and risks of completed distribution before corporate negotiations 29 assuring the ultimate sale are undertaken. Corporate negotiations for the sale prior to actual liquidation appear to have been the court's primary motivation for circumventing this tax avoidance device; these prior negotiations should suffice as the soundest rationale and basis of predictability for future decisions.

25. See 1 RABKIN and JOHNSON, op. cit. supra note 1, at 1316.
27. See Acampo Winery and Distilleries, Inc., 7 T.C. 629, 635 (1946).
29. It should be noted that recent cases establish the right of a stockholder to negotiate and contract as an individual to sell property which he expects to acquire from the corporation without rendering the corporation taxable upon the ultimate sale. See Cooper Foundation, 7 T.C. 389 (1946); George T. Williams, 3 T.C. 1002 (1944).
WITHDRAWAL OF UNEMPLOYMENT COMPENSATION
BENEFITS FOR REFUSAL TO ACCEPT WORK IN VIOLATION
OF UNION RULES*

VARIED disqualification provisions withdrawing unemployment compensation benefits from workers who refuse without good cause to accept referrals to suitable work are included in all state statutes. To provide a measure of uniformity and to forestall the lowering of labor standards, Congress has predicated state eligibility for social security tax credits on the substantial adoption of three restrictions, commonly known as the labor standards provision, on this disqualification. The third of these prohibits the denial of benefits to any otherwise eligible unemployed worker for refusing to accept new work "if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." A question as to the applicability of this limitation arises when a union worker refuses a position, otherwise suitable, on the sole grounds that acceptance would subject him to possible expulsion from his union. The recent case of Chambers v. Owen-Ames-Kimball Co. illustrates the more restrictive point of view in resolving the problem. The claimant, a union member for

2. See Menard, Refusal of Suitable Work (1945) 55 YALE L. J. 134, 135.
3. "Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." Int. Rev. Code § 1603 (a)(5)(1939).
4. Other general disqualifications are voluntary resignation from work, discharge due to misconduct and participation in a labor dispute. These rules, in conjunction with the eligibility requirements are aimed to insure compensation only to those involuntarily unemployed. In contrast with a trend toward benefit liberalization, disqualifications have been numerically increased and frequently rendered more severe. See Burns, Unemployment Compensation and Socio-Economic Objectives (1945) 55 YALE L. J. 1, 11; Witte, Development of Unemployment Compensation (1945) 55 YALE L. J. 23, 41. Besides the problems arising out of labor disputes, the present controversy on disqualification centers around the diverse circumstances characterizing employment involuntary, and the degree of forfeiture socially desirable. For general discussions, see Eligibility and Disqualification for Benefits (1945) 55 YALE L. J. 117. Among recommendations for legislative changes, the Social Security Board included in its 1945 Report: "Provision that disqualifications for voluntary leaving without good cause, discharge for misconduct, or refusal of suitable work should entail merely postponement of benefits for not more than 4 weeks and not cancellation of benefit rights or reduction of benefits." 3 B. N. A. 1946 Employment Rep. 425:2.
6. The generally accepted dogma is that the Unemployment Compensation Acts, as welfare statutes, should be liberally construed, and their disqualification provisions corre-
twenty-seven years, refused a position in an open shop rather than be subject to union-imposed fine, suspension, or expulsion, and resultant loss of accumulated union benefits. The Ohio Supreme Court sustained the denial of unemployment insurance by the Board of Review.

The court declared that loss of union membership, if initiated by the union, did not constitute good cause. The words of the third clause of the labor standards provision, "as a condition of being employed," were construed as referring only to conditions imposed by the prospective employer, not to conditions incident to acceptance of the referral. This position was bolstered by the further interpretation that expulsion by the union is not tantamount to a compulsory resignation. Although the Ohio provision had been amended to vary from the federally prescribed norm by the addition of the phrase, "or would be denied the right to retain membership in and observe the lawful rules of any such organization," the decision in the instant case has narrowly limited its application to "Yellow Dog" contracts. The majority felt bound to this construction by constitutional considerations. Any other interpretation appeared to them to violate the


7. Section 7(c) of the trade rules of the claimant’s union, Local Carpenters Union No. 200 (A. F. L.), provides: “No members of the local union No. 200 will be permitted to work on jobs where nonunion carpenters are working, or for an employer who employs nonunion carpenters, . . . under penalty of a fine as may be determined by local union No. 200.” Section 55(c) of the constitution and by-laws of the parent organization, United Brotherhood of Carpenters and Joiners of America, provides: “Any officer or member who wilfully . . . violates the trade rules of the locality in which he is working . . . may be fined, suspended, or expelled, as the local union may decide,” quoted in Chambers v. Owen-Ames-Kimball Co., 67 N. E. (2d) 439, 440 (Ohio 1946).


9. 67 N. E. (2d) 439, 443 (Ohio 1946). For authority, the majority quoted the following: “Where, on the other hand, expulsion from a labor organization will follow upon an individual’s taking a job to be performed under conditions contrary to union rules, the clause would not apply, for, although some decisions have stated that expulsion is tantamount to resignation, expulsion is a result of being employed and is not required ‘as a condition of being employed’.” Menard, Refusal of Suitable Work (1945) 55 YALE L. J. 134, 143. The court failed to note, however, that Menard further stated that a finding should be made of good cause for refusal regardless of the reasonableness of the union rule, id. at 144.

10. OHIO GEN'L CODE ANN. (Page, 1937) § 1345-6e.

11. The legislative history of this amendment, as recounted by the dissenting member of the Ohio Board of Review, Ben. Ser. 8451-Ohio R (V7-3), seems to indicate an intent to cover the instant situation. A Commission, created in 1931 to investigate the possibilities of
Fourteenth Amendment by giving union workers benefits which, under similar circumstances, would be denied to non-union workers.

The particular issues of the *Chambers* case have seldom been resolved by the courts; 12 and the numerous administrative decisions conflict even within individual jurisdictional spheres. 13 Three general approaches in addition to the rationale of the Ohio court have been used.

The first variant, adopted by a slight majority of state administrative boards, 14 is the antithesis of the *Chambers* reasoning. "Condition" is read as

unemployment insurance, in 1933 submitted and recommended a bill in which appeared the following provision:

"Provided, however, that no unemployed employee otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept employment if:

1. Acceptance of such employment would deny to such employee his right to refrain from joining a labor organization or his right to retain membership in and observe the lawful rules of a labor organization."

No law was enacted until 1936 when a bill was hurriedly passed to become eligible for the federal tax credits. Several of the provisions that had been recommended by the Commission were omitted, but in 1937, pursuant to an agreement to reconsider these at the next session, the amendment quoted *supra* was added. The third labor standards provision in the New York and Massachusetts statutes, both approved by the Social Security Board for Federal Tax credits, more clearly cover expulsion by the union itself. The New York clause reads: "if (a) acceptance of such employment would either require the employee to join a company union, or would interfere with his joining or retaining membership in any labor organization." N. Y. LABOR LAWS § 506; the Massachusetts clause: "if acceptance of such work . . . would abridge or limit his right to join or retain membership in . . . ,” ANN. LAWS OF MASS. (1942) c. 151A, § 25. All other states incorporated the federal clause verbatim.

12. Barclay White Co. v. Unemployment Comp. Bd. of Review, 159 Pa. Super. 94, 46 A. (2d) 598, 739 (1946); Bigger v. Unemployment Comp. Comm., 46 A. (2d) 137 (Super. Ct. Del. 1946). Employment Service workers probably preclude the problem from arising in the vast majority of potential cases by withholding referrals to such work: *e.g.* oral statement of a New Haven Unemployment Compensation official to the effect that the local U. S. E. S. office took great care to avoid such problems; that a man mistakenly referred to a position in violation of his union rules was not held disqualified for refusal; and that a non-union man was similarly permitted to refuse employment in an all-union shop. See also DELAWARE UNEMPLOYMENT COMP. COMM., FOURTH ANNUAL REPORT TO THE GOVERNOR (1941) 17.


Unpublished decisions may be obtained from the state Unemployment Comp. Bds. of Review. Those cited *supra* and hereinafter were reprinted in Brief and Supp. Brief for Appellant, and Brief for Intervenor, Claimant-Appellee, Barclay White Co. v. Unemployment Comp. Bd. of Review, 159 Pa. Super. 94, 46 A. (2d) 598, 739 (1946).

meaning the effect on the worker of accepting the proffered employment;\textsuperscript{15} moreover, potential expulsion by the union as a result of acceptance is held substantially similar to the enforced resignation prohibited by the Act.\textsuperscript{16} Under this interpretation,\textsuperscript{17} the labor standards provision \textsuperscript{18} makes mandatory a decision favorable to the claimant.

A compromise has been reached by the compensation administrators in Illinois. The strictures of the third clause are there interpreted to render work contrary to union rules unsuitable.\textsuperscript{19} Yet, where the union rules are found to be so restrictive as to eliminate most opportunities for employment, the claimant is held to have removed himself from the labor market and to be “unavailable”\textsuperscript{20} for work.

A final distinctive standard for decision has recently been defined by a Pennsylvania superior court in \textit{Barcaky-White Co. v. Unemployment Compensation Board}.\textsuperscript{21} The referee held “condition” to mean only an express imposition by the employer, but admitted that the majority of state agencies used the broad interpretation.


17. It is to be emphasized that the interpretation of two phrases is involved. The broad meaning of “condition of being employed” and a finding that expulsion and resignation are substantively similar are both prerequisites of applicability of the third clause. The \textit{Bigger} case is unusual in first giving the broad meaning to “condition,” and then denying benefits because of the difference between expulsion and resignation. See notes 15 and 16 \textit{supra}.

18. An identical result would be achieved if the first clause of the labor standards provision, quoted \textit{supra} note 3, should be held applicable. Essential to its relevancy is the assumption that a continuous labor dispute exists between a union and all employers who fail to accept all union conditions. Compensation administrators have not considered the clause pertinent, probably because of the difficulty in finding that the position is vacant due \textit{directly} to a labor dispute. Only once discussed by a court, the contention was rejected on the rationale that a controversy not characterized by active union pressure does not attain the dignity of a labor dispute. \textit{Bigger v. Unemployment Compensation Board}, 46 A. (2d) 137, 141-2 (Super. Ct. Del. 1946).


20. See cases cited \textit{supra} note 19. \textit{Cf.} Ben. Ser. 8961-Ill. R (V7-12); Ben. Ser. 8966-Ill. R (V7-12); Ben. Ser. 8903-Md. A (V7-11). As being “available for work” is an eligibility requirement, complete loss of benefits results from a finding of “unavailable,” whereas usually postponement for a statutory period results from disqualification for refusal of suitable work. Jurisdictions which hold work in violation of union rules to be suitable occasionally invoke the more severe penalty by a finding that continued refusal of suitable work: without good cause renders the claimant “unavailable.” Ben. Ser. 8749-Ga. R (V7-9);
sation Board of Review.21 Presented with a factual situation substantially similar to the Chambers case, the court dismissed the labor standards provision as inapplicable,22 but allowed benefits on the ground that the claimant had "good cause" for refusal.23 This approach leaves considerable discretion to the courts and administrative boards in the determination of individual cases.24 In thus ascribing a subjective rather than objective meaning to the term "good cause,"25 the Pennsylvania court purports to dispel constitu-


23. 46 A. (2d) 598, 603. The court applied tests of "good cause" developed in Sturdevant Unemployment Comp. Case, 158 Pa. Super. 548, 557, 45 A. (2d) 898, 903 (1946). To constitute good cause "the pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances [must] compel the decision." Appeal tribunals similarly often use the language of "good cause" rather than specifically applying or not applying the labor standards provision. See Ben. Ser. 8667-Fla. A (V7-8); Ben. Ser. 8673-III. A (V7-8); Ben. Ser. 10333-Ind. R (V9-3) (dissenting opinion); Utah App. Trib. Dec. No. 44-A-236 (unpublished, 1944). In the majority of reported cases which involved the corollary problem of a non-union man refusing employment because he did not desire to join a union, the administrative boards have held his reason to be "good cause." Ben. Ser. 10336-Kan. A (V9-3); Ben. Ser. 8994-Mont. A (V7-12), (cost of joining for a short period); Ben. Ser. 8845-N.C. R (V7-10) (right to refuse to rejoin union as a matter of personal liberty); Ben. Ser. 8996-N.J. A (V7-12); cf. Ben. Ser. 8614-Ala. A (V7-7); Ben. Ser. 8494-La. A (V7-4); but cf. Ben. Ser. 8567-Ark. A (V7-6).

24. Thus, had the claimant accumulated no significant union benefits, loss of union status might not have been held good cause. See, for example, Ben. Ser. 8547-Kan. A (V7-5).

25. In so recognizing that unemployment may be involuntary, though induced or prolonged for peculiarly personal reasons, the Pennsylvania courts adopt the view of most modern commentators. See Menard, supra note 2, at 147; Simrell, Employer Fault vs. General Welfare as the Basis of Unemployment Compensation (1945) 55 YALE L. J. 181. With respect to the quitting of employment, see Kempfer, Disqualifications for Voluntary Leaving and Misconduct (1945) 55 YALE L. J. 147, 151. As to the availability requirement, see Altman and Lewis, supra note 20: Courts and Boards of Review have permitted many personal reasons for voluntary leaving, and for refusal of otherwise suitable work. Ben. Ser. 10325-III. R (V9-3) (refusal of Jewish laborer to work Saturdays); Ben. Ser. 10250-III. R (V9-2) (fear of operating punch press); Ben. Ser. 10181-Ind. R (V9-1) (allergy to powder); Sturdevant Unemployment Comp. Case, 158 Pa. Super. 548, 45 A. (2d) 898 (1946) (resignation to be with husband); Teicher Unemployment Comp. Case, 154 Pa. Super. 259, 35 A. (2d) 739 (1944) (resignation to be with husband); Ben. Ser. 10491-Pa. R (V9-4) (refusal to work Saturdays); Ben. Ser. 10285-N.Y. R (V9-2) (work too far from home to permit tending furnace during lunch hour).

tional difficulties. As the personal circumstances in each individual case are evaluated to determine "good cause," it is said that no unequal application of the law or classification of workers by union status results. The court left undiscussed how much weight would be given the length of membership in the union or the reasonableness of the union rules in determining "good cause."

Under established constitutional dogma, legislative classification does not conflict with the Fourteenth Amendment unless it is arbitrary and unreasonable. Recent labor legislation fostering labor's rights of collective action has necessarily differentiated between union and non-union men. Underlying the use of this well recognized classification in the Social Security Act is an implicit purpose to prevent the weakening of labor unions and to protect the individual's interest in his organization. Numerous decisions upholding the general validity of unemployment compensation acts support other classifications apparently more questionable. The New York statute, prohibiting disqualification whenever the claimant's union status would be jeopardized by a referral, was held constitutional by the Court of Appeals in Chamberlin, Inc. v. Andrews, subsequently affirmed by an equally divided


26. "The short and conclusive answer to the contention is that courts ... do not classify, they merely discover the presence or absence of 'good cause,' and adjudicate accordingly. If this process can in any sense be called classification, the classification consists in allocating those with and without good cause into separate categories." Barclay White Co. v. Unemployment Comp. Bd. of Review, 46 A. (2d) 598, 604 (Super. Ct. Pa. 1946).


29. Steward Machinery Co. v. Davis, 301 U. S. 548 (1937); Hower Bros. Co. v. Unemployment Comp. Comm., 296 Mass. 275, 5 N. E. (2d) 720 (1936). An Alabama Statute upheld in Carmichael v. Southern Coal and Coke Co., 301 U. S. 495, 109 A. L. R. 1327, 1346 (1937), taxed only employers of eight or more workers. The exemption of particular classes of employers according to the field of their endeavor, as those of agricultural labor was also challenged, id. at 512, 109 A. L. R. 1327, 1334. For the provisions of the Alabama law at the time, see SOCIAL SECURITY BOARD, COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS (1938) 1, 4, 17-21.

30. See note 11 supra.

Although the issue directly before the court was the validity of the entire Act as a tax on certain employers, the labor standards provision was specifically contested.

The result achieved under the New York statute has also been attacked on grounds of denial of equal protection of the law to employers. This contention is based on the assertion that under experience rating, employers of union men would suffer a higher tax rate than those of non-union men. Even if this doubtful major premise be accepted, it would probably not substantiate a holding of unreasonable tax classification. In recognizing the broad welfare purpose of the state acts, the Supreme Court, before the adoption of experience rating, held invalid the objection that tax impositions bore no relation to the employer's individual responsibility for unemployment, and even after the adoption of experience rating provisions, state courts have been in accord. The major policies of the acts are thus held paramount to the principle of tax equality.

A third constitutional issue, undue delegation of legislative power, was suggested by the Ohio Supreme Court in the instant case. The court asserted that a contrary interpretation would permit the union to determine qualifications for unemployment benefits. The contention of undue delegation of power, which has lost much of its vitality in the past decade, is as follows:


34. Experience rating is a system of differential tax rates varying in relation to each employer's past employment experience and intended to induce employer stabilization. Much controversy exists as to its merits. For discussion of the statutory variations and of the arguments pro and con, see Compton, SOCIAL SECURITY PAYROLL TAXES (1940) c. XII; Feldman and Smith, The Case for Experience Rating (1939); Lester and Kidd, The Case Against Experience Rating (1939); Arnold, Experience Rating (1945) 55 YALE L. J. 218; Prentice Hall 1946 Unemployment Ins. Serv. ¶20,204, 27,305. Largely because experience rating provided the sole permissible means of attaining a general tax reduction, and because of interstate competition for lower taxes, only 6 of 51 jurisdictions are now without it: Alaska, Mississippi, Montana, Rhode Island, Utah, and Washington. The proposed Wagner-Murray-Dingell bill, H. R. 3293, S. 1650, for increased social security, would eliminate any form of merit rating.


38. With respect to administrative bodies, the opinions still nominally turn on the question of adequate standards to guide and limit the administrative action. Of late, a policy declaration alone apparently meets constitutional objections, and administrators in fact have wide discretion. Compare Yakus v. United States, 321 U. S. 414 (1944), (1945) 30
appears to be directed at the effect of union rules and not at any alleged legislative power exercised by the board. But as to private organizations, the delegation of power objection has been confined to statutes which give express grants of power to take affirmative action.\textsuperscript{40} The rights and powers incident to private transactions which may indirectly affect the scope of legislation have been regarded as inherent;\textsuperscript{40} the power of unions to determine the rules necessary to their organizational goals cannot be said to be delegated, even if those rules do affect unemployment benefits.\textsuperscript{41} If the Ohio Court intended to imply a violation of the 14th Amendment, it seems unlikely that it would receive the support of the Supreme Court;\textsuperscript{42} and on logical grounds, the argument of the Ohio court would not be persuasive in other state jurisdictions. However, even if the Ohio reasoning be accepted, it would not obtain under the "good cause" standard of the Pennsylvania Superior Court, which leaves the question of disqualification within the discretion of the state commission. For then state courts would find that the legislature had clearly enunciated the policy and general standards\textsuperscript{43} to be followed by the state agency.


40. See Jaffe, \textit{supra} note 39, at 216-21.


42. The Supreme Court has not invalidated any legislation as an unconstitutional delegation since Carter v. Carter Coal Co., 298 U. S. 238 (1936). By § 9(a) of the \textit{"Wagner Act,"} 49 Stat. 453 (1935), 29 U. S. C. § 159 (1940), the majority union of \"a unit appropriate for such purposes\" was made the exclusive bargaining agent for all employees in the unit; yet the Court, in upholding the act, did not even discuss delegation. See Jaffe, \textit{supra} note 39, at 235. See also Hale, \textit{supra} note 39, at 575.

43. The typical state law provision reads: \"In determining whether or not any work is suitable for an individual the commissioner shall consider the degree of risk involved to his health, safety, morale, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.\" The Ohio statute uses only the terms \"work for which he is reasonably fitted.\" Ohio Gen'l Code Ann. (Page, 1937) 1345-6 d(2). The Ohio Supreme Court held that this variation implied a more objective test than that of other states. Chambers v. Owen-Ames-Kimball Co., 67 N. E. (2d) 439, 441-2 (1946). The majority of the Ohio Board of Review also felt the absence of the word
Apart from the question of constitutionality, a choice among the differing interpretations must be dictated by a resolution of federal legislative intent. Since the hearings on the Social Security Act and the Congressional Record provide no real clues, an answer must come from the apparent wording and purposes of the statute. Congressional design to limit application of the third clause to "Yellow Dog" contracts is plausible since the states had not previously been obliged to follow federal legislation outlawing such contracts. Moreover, the actual phraseology appears to be directed to conditions laid down by an employer and not to penalties enforced by a union after employment is accepted. It could well be held, therefore, that the matter of union rules should come up under the broader phrase of "good cause."

The majority of states, however, have chosen to limit the dispute to ap-


45. There was no debate on the meaning of the phrase, nor were any applicable amendments offered. 79 CONG. REC. 6055-68 (1935). Organized labor had clearly indicated its desire for a provision enjoining disqualification of benefits for refusal of work contrary to union rules. "... The American Federation of Labor, after mature consideration and discussion, has formulated the following principles which should guide in the framing of state unemployment insurance bills: 1. Protection of union standards. Every unemployment insurance act should contain specific provisions to protect union members from being obliged to accept work contrary to the rules and regulations of their organizations or employment under conditions such as tend to depress wages or working conditions." Report of the Executive Council adopted by the Fifty-Second Annual Convention of the A. F. L., Cincinnati, Ohio, Hearings before Committee on Labor on H. R. 2827, 74th Cong., 1st Sess. (1935) 111.

46. "Norris La Guardia Act" 47 STAT. 70 (1932), 29 U. S. C. §§ 101, 103 (1940). The statute wording is not similar to that of the labor standards provision and does not include the phrase "as a condition of employment." But see the appearance of the phrase in the "Wagner Act" in a different context clearly indicating a requirement imposed by the employer. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940).


The concepts of suitability and good cause are theoretically not identical; see Menard, supra note 2, at 138, n. 15. Yet, in practice a similar decline in value is frequently ascribed to "good cause." See Kempfer, supra note 25, at 155, n. 26; Utah App. Trib. Decision No.
plication of the labor standards provision itself. With disagreement thus centered on an "all or none" basis, the Ohio interpretation of "no application" normally results in hardship to the unemployed worker. Its possible alternative effect of forcing a union to waive its rules or provide benefits for those unemployed as a result of the rules may not be too harsh, for example in England, where unionization is so highly developed that suitable work is defined in terms of the generally achieved union standard. But in sections of this country where industrial conflict still centers on the issue of unionization such an interpretation might serve rather as a weapon to block union growth.

In addition, the broad functions of unemployment insurance as a general welfare measure to alleviate unemployment and to prevent serious decrease in purchasing power should be kept in mind. A narrow interpretation of the disqualification provision may cause undue hardship when the weight of

44-A-239 (unpublished, 1944). Thus the danger exists that under the "good cause" doctrine the disqualification would be imposed and would induce the worker to sacrifice his union status at the very time when the weight of other economic pressures would be the heaviest.

48. See note 14 supra.

49. See 34 HALSBURY, LAWS OF ENGLAND (2d ed. 1940) 527.

50. 25 & 26 GEO. V, c. 8 § 28 (2)(c)(1935). The provision is not concerned with loss of membership for any cause. Much of the Federal Act, including the labor standards provisions, was apparently adopted from the English prototype. See 25 & 26 GEO. V, c. 8 §§ 24, 28 (1935). Variations in otherwise similar sections thus strongly indicate a difference in legislative purpose. For these reasons the English Umpire decisions should not properly be considered guiding precedents for the instant case.

51. Thus employers, deliberately framing employment policies that violated union rules, could rely on the impetus of denial of compensation to aid in weakening existing union membership or unity.

52. For conflicting views as to the functions of Unemployment Insurance see Burns, Unemployment Compensation and Socio-Economic Objectives (1945) 55 YALE L. J. 1; Clague, The Economics of Unemployment Compensation (1945) 55 YALE L. J. 53, 68–75. For a history of the development of Unemployment Insurance in the United States, see Witte, Development of Unemployment Compensation (1945) 55 YALE L. J. 21; Malisoff, The Emergence of Unemployment Compensation (1939) 54 POL. SCI. Q. 237, 391, 577. The narrow view emphasizes the importance of employer stabilization, which was the primary objective of the earliest enacted American unemployment insurance legislation. Wis. Laws 1931, c. 20, Spec. Sess. 1931, WIS. STAT. (1945) § 108.01–26. The demonstrated success in reduction of unemployment achieved by the private insurance plans of progressive corporations and unions was an important factor in the evolution of this concept. See STEWART, UNEMPLOYMENT BENEFITS IN THE UNITED STATES (1930) Part II; Witte, supra at 23–5; Hearings before Committee on Ways and Means on H. R. 7659, 73d Cong., 2d Sess. (1934) 65 et seq. Under the broader view, the Act is considered more of a general welfare statute with eventual replacement of other direct relief methods and partial maintenance of national purchasing power as correlative objectives. See Burns, supra at 10, 12; Clague, supra at 63–72. In general the legislatures have tended to implement this view by cautious liberalization. In comparison with their originally enacted laws, 42 states have reduced waiting periods, 40 have increased the maximum weekly benefit amount, 41 have increased the maximum duration of benefit payments, and 12 have decreased the number of employees required to bring an employer within the Act. See Schmidt, Experience Rating and Unemployment Compensation (1945) 55 YALE L. J. 242, 245.
other economic pressures is the heaviest. Moreover, the adoption of unemployment compensation indicates at least partial rejection of the thesis that wage deflation and rapid readjustment of the labor market are essential to recovery from a depression. Social aims, and perhaps economic theory, favor further support of the organized resistance of labor to such deflation.

Admitting the validity of these considerations, there still exists the problem of how “unrestricted” an interpretation should be adopted. Whether an objective use of “good cause” or “availability,” including an appraisal of the reasonableness of the union rules, leads to better results than a purely subjective use of “good cause” or a direct application of the labor standards provision, is a question difficult to resolve. In support of the view urging appraisal are the arguments that: (1) it should not be the function of unemployment compensation to give indirect support to unpalatable union rules; (2) if a rule is held unreasonable, a worker fined or expelled for accepting the employment has judicial remedies against the union; (3) failure to determine reasonableness results in the anomaly of granting more protection to those who simply refuse employment than to those who, already employed, strike to demand adoption of the union standard.

Nevertheless, these considerations seem outweighed. They ignore the fact that judgments as to reasonableness would of necessity be made by officials unsuited to the task, that a worker’s practical remedies are severely limited by the problem of litigation expenses inside the union and in the courts, and that many union members would abide by the rule and bear the burden. In addition, the anomaly of giving more protection to refusers of employment than to strikers exists on a broader plane than on this problem alone; it obtains, for instance, even more clearly in the first clause of the provision, where it is specifically stated that compensation will not be denied for failure to take employment in a strike-bound plant.

53. The second clause of the labor standards provision, quoted supra note 1, insures greater economic ability to the worker to resist accepting lower-than-average standards. See Clague, supra note 52, at 71–2.
54. For a summary of the conflicting views of economic theorists, see Sufrin, Labor Policy and the Business Cycle (1943) 15–44.
55. “Guaranteed wage plans,” represent a more direct attempt of labor to preclude wage deflation and labor market readjustment. See Ellickson, Labor’s Demand for Real Employment Security (1945) 55 Yale L. J. 253, 259, 261. A compromise between the two economic philosophies has been suggested in “wage subsidy plans,” which would permit lowered labor costs to employers, yet maintain the workers’ living standards and purchasing power. See Sufrin, op. cit. supra note 54, at 24–7.
56. See conclusion of Menard, paraphrased supra note 9.
57. All states have adopted provisions, varying in severity, which disqualify strikers. See Lesser, Labor Disputes and Unemployment Compensation (1945) 55 Yale L. J. 167.
58. Even assuming that the worker would accept employment if the rule were held unreasonable, hardship would often result. Because of the delay in hearing and appeal, the worker refusing a job in violation of a union rule would find out only in retrospect that the rule was “unreasonable” and his benefits retroactively nonexistent.
59. See note 3 supra. The anomaly appears as well in application of the second clause.
little danger that complete protection of union rules would encourage voluntary unemployment. The normal disparity between earnings and benefits, in consonance with the permitted scope of eligibility requirements and disqualifications, insures that idleness as such is not rewarded, and a union adopting regulations unreasonably restricting the labor market to its members promotes its own dissolution.

Disputes over statutory interpretation are usually resolved by a call for more distinct legislative pronouncement. The labor standards provision is no exception. Probably the best solution would be legislative coordination of the labor laws and unemployment compensation, including detailed designation of union practices, conformance to which would cause loss of compensation. Thus benefits would cease to lend support to union regulations thought contrary to public policy, and the discretion of compensation officials and courts would be reduced to the application of the specific legislative ban to the rule in question. In the absence of such action by the legislature, however, the view taken by the majority of states at present provides a reasonable, if incomplete solution to a knotty problem.

The argument runs both ways; the existence of the anomaly has thus been urged as one reason for eliminating or amending the disqualification of strikers. See Lesser, supra note 57, at 170.

60. The danger of fraudulent claims is always present. One advantage of experience rating is the incentive to employers to unearth and expose fraud. See Delaware Unemployment Comp. Comm., Fifth Annual Report to the Governor (1942) 14–6.

61. As of 1945, the maximum weekly benefit in any state was $28 and 12 states still provided for a maximum of $15 or $16. For the CIO viewpoint on the inadequacies of present laws, see Ellickson, supra note 55, at 253.
CONSENT DECREES AND ABSENT CARTEL PARTICIPANTS*

The Antitrust Division’s campaign to break American connections with international cartels by proceeding against domestic participants has left uncertain the contractual obligations of American promisors, where the foreign promisee was not a party to the civil antitrust action. In those circumstances, the absent party may deny being bound by a decree holding the agreement violative of the Sherman Act, and assert a continuing right to receive payments under the cartel contract.

In the first such case to reach the courts, General Aniline & Film Corporation v. Bayer Company, plaintiff, a former affiliate of I. G. Farben, suing in *General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492 (Sup. Ct. 1946).*


2. See Oseas, supra note 1, at 57–8.

3. See note 1, supra. While in some cases the foreign participants neither did business nor had offices in this country, in other instances the foreign firms were doing business in various states and available for process. See notes 10 and 34 infra.


5. It has been suggested that many of the absentee foreign firms will assert such claims. See Oseas, supra note 1, at 57.

6. 64 N. Y. S. (2d) 492 (Sup. Ct. 1946).

7. I. G. Farben incorporated the American I. G. Chemical Corporation in the State of
the New York Supreme Court to collect sums overdue for staying out of the Cuban market, successfully moved to strike the defense that performance was impossible because a 1941 federal court consent decree had enjoined Delaware in 1929 to operate part of its American business. Subsequently the American I. G. Chemical Corporation became General Aniline & Film Corporation. Information, United States v. Alba Pharmaceutical Co., Inc., Criminal No. 110-311 (S. D. N. Y. 1941) 7. In 1942 title to General Aniline vested in the Alien Property Custodian. General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492, 495 (Sup. Ct. 1946). The Alien Property Custodian, however, is not conducting this suit.

8. The contract in the instant case was part of a series comprising an agreement allocating world markets, originally entered into between Bayer and Farbenfabriken vorm. Friedr. Bayer and Co. of Leverkusen, Germany (hereafter called Leverkusen). General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492, 494-5 (Sup. Ct. 1946). Prior to its seizure by the Alien Property Custodian in 1917, the Bayer Company had been owned by Leverkusen. In 1919 Sterling Products, a West Virginia corporation, acquired from the Alien Property Custodian all of the capital stock of Bayer. Complaint, United States v. Bayer Co., Civil No. 15-364 (S. D. N. Y. 1941) 4. The 1923 agreement, in addition to its cartel features, settled disputes between Bayer and Leverkusen as to the ownership of certain patents and the trade marks "Bayer" and "Bayer Cross," General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492, 494-5 (Sup. Ct. 1946).

The contract provided for Bayer to have the exclusive Cuban market for "Bayer Cross" products, in return for remitting one half of the yearly net profits to Leverkusen. The contract, due to run for 55 years, was renewed in 1926 with Leverkusen's assignee, I. G. Farben. In 1929, I. G. Farben assigned the contract to its American subsidiary, the American I. G. Chemical Corporation, predecessor of General Aniline.

Bayer made payments until 1941, when a consent decree enjoined further performance. See note 9, infra. General Aniline claims payments totalling $1,000,000 due since 1941. General Aniline & Film Corp. v. Bayer Co., supra at 495.


10. United States v. Bayer Co., Civil Action No. 15-364 (S. D. N. Y. 1941). Joined with Bayer were the American firm Sterling Products, Inc., and two of its principal officers. Concurrent with the civil suit, an information was filed against the same defendants and a third American firm all of whom pleaded nolo contendere, and fines were assessed. United States v. Alba Pharmaceutical Co., Inc., Criminal No. 110-311 (S. D. N. Y. 1941). The plea of nolo contendere admits the guilt of the defendants for the purposes of that suit only. See Lenzin and Meyers, Nolo Contendere: Its Nature and Implications (1942) 51 YALE L. J. 1255, 1267.

No reason is apparent for the failure to join General Aniline or I. G. Farben in either the civil or criminal proceedings. Bayer's explanation is that I. G. Farben was presumably not available for service. Reply Memorandum of Defendants in Opposition to Motion to Strike, General Aniline & Film Corp. v. Bayer Co., New York Supreme Court, Special Term, p. 10. Yet the information in the criminal proceedings, while not naming I. G. Farben or General Aniline as defendants, cites them as co-conspirators and states that I. G. Farben, though a German corporation, does business within the Southern District of New York where the suits were instituted, and that General Aniline is incorporated under the laws of Delaware and also does business in New York. Information, United States v. Alba Pharmaceutical Co., Criminal No. 110-311 (S. D. N. Y. 1941) 6-7. Thus, both seem to have been available for prosecution. One official of the Antitrust Division, no longer associated with that agency, stated, without explanation, that joinder of the Alien Property Custodian in similar cases, brought after the outbreak of war where the foreign property vested in the Alien Property Custodian, was unnecessary. Berman, Cartels and Enemy Property (1945) 11 LAW & CONTEMP. PROB. 109, 115.
defendant, a New York corporation, from further adherence to the agreement. The court reasoned that General Aniline could not be precluded from an opportunity to litigate the legality of the contract by defendants' pleading of an adjudication to which plaintiff was not a party. The defense that prior judicial proceedings to which the promisee was not a party excuse non-performance of a contract has been successfully maintained in subsequent actions for breach where the contract itself was not before the initial court and the breach was an incidental result of that court's order. However, courts have been reluctant to sustain such a defense where, as in the *Bayer* case, the contract itself was the immediate subject of the earlier litigation. Rationalia to avoid the restraint of the previous adjudication have varied. Courts examining the facts leading to the breach have overridden an earlier restraining order because it was issued without valid cause or obtained through duplicity, or because performance was still possible outside the scope of the order. Other courts have found doctrinal solutions to the problem: that the present claimant, not having been a party to the previous action, was not enjoined by the decree, nor would

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11. For the genesis of the Bayer Company, see note 8 *supra*. The Bayer Company was dissolved without judicial proceedings pursuant to the New York Stock Corporation Law, Art. 10, on Dec. 31, 1942. All its assets were distributed to the sole stockholder, Sterling Products, Inc., who was joined as defendant in the instant suit by General Aniline. General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492, 494 (Sup. Ct. 1946).
the earlier proceedings be res judicata\textsuperscript{18} or even stare decisis\textsuperscript{19} as to the illegality of the contract. Moreover, it is generally held that if the previous injunction results from consent\textsuperscript{20} or fault\textsuperscript{21} of the promisor, he is precluded from using the injunction as a defense; the reasoning appears to be that the obligor has not done all in his power to perform his contract, and should pay damages for the breach.

While conventional doctrine supports the \textit{Bayer} decision, the court apparently gave inadequate consideration to implementation of the antitrust policy. If the impossibility of performance had been due to legislative action or executive action pursuant to legislative mandate, the promisor would have been discharged of his liability on the ground that the legislature or the executive act in the public interest and such acts are operative on all persons within the jurisdiction.\textsuperscript{22} Antitrust enforcement, while achieved through the courts, likewise represents action in the public interest.\textsuperscript{23} Forcing parties in the position of Bayer to litigate the contract's legality in a separate action offers unscrupulous defendants an opportunity to avoid the restraint of a consent decree by making a sham defense in such subsequent action and allowing judgment to go against them.\textsuperscript{24}

Moreover, the \textit{Bayer} decision will weaken the general effectiveness of the

\textit{18. Carr v. Illinois Central R.R., 180 Ala. 159, 166, 60 So. 277, 280 (1917).}
\textit{19. McGillis v. McGillis, 154 N. Y. 532, 545, 49 N. E. 145 (1898); see Demulso Corp. v. Tretolite Co., 74 F. (2d) 805, 808 (C. C. A. 10th, 1934). Where an injunction was decreed after a litigated antitrust proceeding, the decree was held to be stare decisis as to the issue of illegality of that part of the contract litigated in a subsequent suit between parties only one of whom had been represented at the injunction proceedings. Paramount Famous Lasky Corp. v. National Theatre Corp., 49 F. (2d) 64 (C. C. A. 4th, 1931). However, this was a uniform contract standardizing licensing arrangements between motion picture distributors and exhibitors each of whom was represented, though unofficially, by a large group at the antitrust proceedings.}
\textit{21. Restatement, Contracts (1932) § 458; 6 Williston, Contracts (Revised ed. 1938) § 1939; 6 id. at § 1939 n. 7; see Peckham v. Industrial Securities Co., 31 Del. 200, 205-9, 113 A. 799, 802 (1921); National Carbon Co. v. Bankers' Mortgage Co., 77 F. (2d) 614 (C. C. A. 10th, 1935).}
\textit{24. A judgment for General Aniline in the New York court would not, on its face, nullify the antitrust injunction. However, practical nullification would seemingly result,
consent decree as a device for antitrust enforcement. While the court ruled that performance by the promisor would not be excused by any in personam decree to which the promisee was not a party, there is language in the opinion indicating a heavy reliance on the "self-created dilemma" of the consenter. Accordingly, it may be expected that antitrust defendants will hesitate to enter into agreement with the government for fear some contracting party may be left out, and will prefer to litigate the issues so as to avoid the possible onus of consent or fault. However, joinder of all contracting and sub-contracting parties may be well-nigh impossible where the ramifications of a trust agreement are industry-wide.

In the instant case, Bayer is not only put in the embarrassing position of positively asserting, rather than merely admitting, the illegality of its own past actions, but also may find it difficult to collect all the evidence available to the government in its suit five years ago. A verdict for General Aniline would lead to conflicting judicial declarations that a single contract is at once legal and illegal, a result which, although it presumably would not subject Bayer to contempt proceedings, would probably impel either Bayer or the government to seek modification of the decree and thus lead to further litigation of the same issues.

Admittedly, the court in the Bayer case was faced with a difficult decision. To force Bayer to defend on the merits would disregard, if not nullify, the federal antitrust proceedings. To sustain the defense would deny General Aniline an opportunity to contest the alleged illegality of the contract.

since General Aniline, while remaining out of the proscribed market, could collect its share of the profits as damages for breach of the contract. Thus, defendants in the position of Bayer might be able to preserve their exclusive markets while ostensibly observing the antitrust decree.

Conversely, if the New York court had sustained Bayer's defense, it might seem that a party seeking to avoid an unprofitable contract might consent to a sham decree in antitrust proceedings. Such an abuse of the consent decree, however, presupposes that the Antitrust Division will bring unwarranted antitrust proceedings to which the defendant can consent for ulterior purposes.


27. "Whether or not the District Court will modify its injunction to the extent necessary to permit defendants to comply with any lawful order or judgment of this court which may be made in the instant action, the difficulty caused by the existence of that injunction has resulted from defendants' own acts in consenting thereto, despite their denial of the illegality of the Agreement on which the injunction was predicated. They must, therefore, extricate themselves as best they can from this self-created dilemma." General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. (2d) 492, 498 (Sup. Ct. 1946).

These alternatives highlight the fundamental clash between protection of individual rights, by ensuring adversary litigation of disputed claims, and preservation of a competitive economic system by antitrust enforcement. Where choice of conflicting legal devices masks a choice between competing interests, each deemed worthy of vigilant judicial guardianship, it is frequently desirable to sacrifice adherence to precedent rather than jettison one of the interests. In the *Bayer* case, protection of both plaintiff and public could have been achieved by dismissing General Aniline’s complaint without prejudice, and remitting plaintiff to the Federal Court, which has maintained jurisdiction over the consent decree.29

General Aniline cannot claim to be remediless while intervention in the earlier proceeding is untried and possible.30 If intervention is denied, Bayer, as a party to the decree, can still avoid return to the New York court and reinstatement of the complaint by seeking modification in the federal court and impleading General Aniline. Since the government is an indispensable party to modification proceedings,31 a final settlement would thus be reached in a single litigation.

However, blame for the instant legal snarl should not lie entirely at the door of the New York Supreme Court. The difficulties that have stemmed from the government’s choice to proceed against Bayer alone in 1941 are the very difficulties that equity undertook to avoid by the rule permitting joinder of all indispensable and necessary parties.32 The rule purports not only to protect the interests of unrepresented parties who would otherwise be adversely affected, but also to prevent the enjoined parties from subjecting to future double liability.33 Repetition of the situation that led to the *Bayer* decision can be obviated if the government, in future antitrust proceedings, attempts to join as parties defendant all those with a direct interest in the proceedings, or, failing this, to procure a decree providing for the

29. "Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification or termination of any of the provisions thereof . . . ." United States v. Bayer Co., Civil Action No. 15-364 (S. D. N. Y. 1941) 37.

30. Under F. R. Civ. P. 24(b) General Aniline would have only a permissive right to intervene within the discretion of the court and would face the oft-cited dictum of Mr. Justice Brandeis, "... intervention will not be allowed for the purpose of impeaching a decree already made." United States v. California Cooperative Canneries, 279 U. S. 553, 556 (1929). Yet the instant case does not present the complicated problem vexing the Supreme Court in the *Canneries* case where there was an attempt to reopen the packers’ consent decree finally settled after years of litigation. See Demulso Corp. v. Tretolite Co., 74 F. (2d) 805, 807-8 (C. C. A. 10th, 1934). See generally 2 Moore’s *Federal Practice* (1938) § 24.04 et seq.


33. 1 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) § 114; see Note (1932) 41 *Yale L. J.* 1241, 1243.
absolute right of intervention by such parties. While defendants are in a weaker position to object to the absence of parties in proceedings leading to consent decree, because of the threat of criminal prosecution if the consent decree fails, nevertheless defendants aware of the *Bayer* case would do well to attempt to bring all such parties within the scope of the injunction. The antitrust court should not hesitate to stay proceedings until absent parties are brought in, or to embody in the decree safeguards against repetition of the *Bayer* impasse.

34. It may be difficult to obtain jurisdiction over foreign firms who are not engaged in business in the United States. See De Beers Mines v. United States, 325 U. S. 212 (1945); Oseas, *supra* note 1, at 56–8. Parties doing business or maintaining offices anywhere in the United States may be reached by process of any federal court in antitrust proceedings, 38 STAT. 736 (1914), 15 U. S. C. § 22 (1940).

A different problem is posed when a general settlement by consent may be thwarted by one recalcitrant defendant. The Government should be allowed to enter into an agreement with the cooperative defendants, proceeding thereafter to trial against any others.
RESTRICTIONS ON JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES EXERCISING EMERGENCY POWERS—DUTY TO OBEY ORDERS PRIOR TO DETERMINATION OF INVALIDITY

Court review of the orders of war-emergency agencies involves a problem, sometimes urgent, of securing obedience to orders without the delay which may attend judicial review in its usual forms. This was a major consideration under the Selective Training and Service Act, where it became necessary during the war to induct a large number of men into the armed forces in a short time.

Congress was not required to provide for judicial determination of the status of selectees, and no Constitutional right exists to be exempt from service in the armed forces because of religious or conscientious objection or other personal condition. Such exemption is a matter of grace. Congress, however, chose to defer and exempt certain classes in the national interest.

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3. Compare Martin v. Mott, 12 Wheat. 19, 29–30 (U. S. 1827); 40 STAT. 361 (1898); 12 STAT. 731 (1863).


5. The Act exempts from service: resident nationals of neutral countries who make application to be relieved [§ 3(a)]; diplomatic representatives of foreign countries [§ 5(a)]; certain categories of public officials [§ 5(c)]; and regular or duly ordained ministers of religion [§ 5(d)]. Conscientious objectors, whose claims are sustained by the local board, are exempted from combat service and also from non-combatant military service if conscientiously opposed to the latter, but are not exempted from alternative service in work of national importance under civilian direction [§ 5(g)]. Deferment, but not exemption, is authorized for reasons of occupation, dependency, physical, mental, or moral deficiency, or membership in an age group deferred by the President [§§ 5(e), (b)].
and provided for designation of such persons by the Selective Service System, the decisions of which were made "final." 6

Federal district courts were given jurisdiction to punish violators but no specific authority to review draft board classifications. 7 For this purpose habeas corpus, in the absence of its suspension, 8 was available after induction; 9 and in view of the finality provision it became, with few exceptions, 10 the sole avenue of review, 11 particularly after the Supreme Court in the case of Falbo v. United States 12 held that one who had failed to report for induction could not defend a criminal indictment by attacking his classification.

However, in the case of Estep v. United States, 13 decided after cessation of hostilities, the Court modified this rule, holding that one who has completed the administrative process 14 before refusing to be inducted may contest the validity of his classification at the criminal trial. Estep and Smith were convicted of willfully refusing to submit to induction. Both men were members of Jehovah's Witnesses, claimed exemption from service as ministers of

6. §§ 10(a) (2), 5(1).
7. §11.
11. See cases collected by Mr. Justice Frankfurter, concurring in Estep v. United States, 327 U. S. 114, 139 (1946).
14. The administrative process is considered complete when the registrant has not merely pursued his administrative appeals but has reported as directed to the induction center and been pronounced acceptable by the Army or Navy. See id. at 123, 124, n. 17.
religion and pursued unsuccessful administrative appeals from 1-A classifications by their local boards. When ordered to report for induction, they reported at the time and place indicated and were accepted for service but refused to be inducted. They sought to defend on the ground that they had been improperly classified and their draft boards had committed irregularities in the handling of their cases. On the authority of the *Falbo* case, the trial courts rejected these defenses.

The Supreme Court, basing its opinion on interpretation of the statute, reversed on the theory that Congress could not have intended to make "final" draft board actions so contrary to granted authority as to amount to jurisdictional error.15 and thus to send men to jail for refusing to obey unlawful administrative orders.16 Hence the defenses should have been received and evaluated.17 The *Falbo* case was distinguished on the ground that there the defendant had not exhausted his administrative remedies before disobeying the board's order,18 in that he had not reported at the civilian

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15. The theory is that where a board acts in disregard of law or without evidence to support its finding, it acts outside its jurisdiction. See Interstate Commerce Commission v. Louisville and Nashville R.R., 227 U.S. 88, 92 (1913); **DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES** (1927) 307.

16. The opinion of the Court, by Mr. Justice Douglas, was concurred in by Justices Black, Reed, and Rutledge. Mr. Justice Murphy, in a concurring opinion, went further, holding that Congress would have no power and that it would be a denial of due process of law to deny to one indicted for disobeying draft orders the right to contest their validity at the criminal trial. 327 U.S. 114, 125 (1946).

17. The Court provided added support for its construction of the Act by reasoning that, if the right to make their defense at the criminal trial were denied these defendants, habeas corpus would be available for the purpose after conviction, resulting in a multiplicity of actions. *Id.* at 123–5. Previously, however, relief by habeas corpus after conviction had been denied on the theory that a defense unavailable at the trial could not be raised afterward by habeas corpus. United States *ex rel.* Falbo v. Kennedy, 141 F. (2d) 689 (C. C. A. 4th, 1944), *cert. denied*, 322 U. S. 744 (1944); United States v. Flakowicz, 146 F. (2d) 874 (C. C. A. 2d, 1945); Albert *ex rel.* Ravin v. Goguen, 141 F. (2d) 302 (C. C. A. 1st, 1944); Ex parte Catanzaro, 138 F. (2d) 109 (C. C. A. 3d, 1943), *cert. denied*, 321 U. S. 793 (1944). Since the *Estep* decision the Second and Fourth Circuits have differed on the extent to which earlier convictions, where the defendant was not allowed to attack his classification, should now be reopened. In Sunal v. Large, 157 F. (2d) 165 (C. C. A. 4th, 1946) it was held sufficient to reexamine on habeas corpus defendant's draft board "cover file" and to determine that the local Board did have a basis in fact for its classification. In United States *ex rel.* Kulick v. Kennedy, C. C. A. 2d, Oct. 29, 1946, the defendant was discharged subject to re-trial under the same indictment, to be permitted to present evidence and to carry the question of arbitrary classification to the jury.

18. In the case of *Billings* v. Truesdell, 321 U. S. 542 (1944), decided soon after the *Falbo* case, it was held that a registrant who reported at the induction center could not be forcibly inducted against his will and subjected to trial by court martial for his refusal to submit willingly. Language in that case suggested that a registrant who had "exhausted his administrative remedies" might be allowed to attack his classification without actually submitting to induction. *Id.* at 558. This dictum was not, however, taken seriously by the lower courts in view of the recency of the *Falbo* decision and another statement, apparently contrary to that in the *Billings* case, by Mr. Justice Douglas concurring in Hirabayashi v. United States, 320 U. S. 81, 108–9 (1943). See Smith v. United States, 148 F. (2d) 283,
public service camp to undergo final examination which might have absolved him from the duty to submit to service.

However, judicial review of draft classifications before induction was permissible only if exceptions to the mandate of finality could be read into the statute, since there were no constitutional grounds for review. By constructing a special category of error, styled jurisdictional, it was possible to say that Congress did not intend to make classifications “final” where a board had disregarded the prescribed formalities or arbitrarily classified a registrant.\(^9\) The board would then be acting without jurisdiction, and the courts could afford review for arbitrary or capricious action to registrants who were accepted by the military authorities but refused to be inducted.

The jurisdiction-of-the-board doctrine, as applied in the Estep case, is open to the criticism that it renders statutory provisions for finality of administrative determinations meaningless,\(^1\) since all agencies have author-


19. Other cases have suggested that board action in excess of jurisdiction would be reviewable. See United States ex rel. Trainin v. Cain, 144 F. (2d) 944, 947 (C. C. A. 2d, 1944), cert. denied, 323 U. S. 795 (1945); Angelus v. Sullivan, 246 Fed. 54, 67 (C. C. A. 2d, 1917).

Since the scope of review was not enlarged (note 20 infra), the Estep case does not represent a revival of the “jurisdictional fact” doctrine which has been useful in the past to justify court re-determination of facts previously determined by an administrator. Crowell v. Benson, 285 U. S. 22 (1932); Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287 (1920); Miller v. Horton, 152 Mass. 540, 26 N. E. 100 (1891); see generally Landis, Administrative Policies and the Courts, (1938) 47 YALE L. J. 519; Black, The “Jurisdictional Fact" Theory and Administrative Finality (1937) 22 CORN. L. Q. 349; Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact," (1932) 80 U. OF PA. L. REV. 1055; Comments (1933) 46 HARV. L. REV. 478; (1932) 41 YALE L. J. 1037. Jehovah’s Witnesses have urged that ministerial status should be regarded as a jurisdictional fact upon which a registrant would be entitled to a determination de novo by a court. This claim has been rejected. United States v. Rinko, 147 F. (2d) 1 (C. C. A. 7th, 1945), cert. denied, 325 U. S. 851 (1945); Fletcher v. United States, 129 F. (2d) 262 (C. C. A. 5th, 1942).

20. The scope of review was not enlarged, but that previously available by habeas corpus after induction was extended to defendants under criminal indictment. This review accords a high degree of finality to the administrative determination, affirming it, according to various views, if supported by “substantial evidence” or, more strictly, if supported by “any evidence” or if the board “considered all the evidence.” The “exact formula is not of greatest importance, since under all the degree of finality accorded actions of local boards during both wars has been very great.” United States ex rel. Trainin v. Cain, 144 F. (2d) 944, 947–8 (C. C. A. 2d, 1944), cert. denied, 323 U. S. 795 (1945); see Goff v. United States, 135 F. (2d) 610, 612 (C. C. A. 4th, 1943).

21. See Mr. Justice Frankfurter, concurring on other grounds, 327 U. S. 114, 142 (1946). The Justice was of the opinion that jurisdiction as used in the Act had a geographic
ity only within their respective jurisdictions, and, by construing error as jurisdictional, the courts can undertake review whenever they lack sympathy with the statutory scheme of regulation.\textsuperscript{22}

In the strict sense, the Court's distinction of the \textit{Falbo} case is valid, in that the narrow question decided there was that Congress had not authorized review of the propriety of a board's classification when the violator had failed to report for the last step in the induction process,\textsuperscript{23} but the language of the \textit{Falbo} opinion justified the broader interpretation generally given it by the lower courts.\textsuperscript{24} That opinion stressed the need for quick mobilization of manpower and the intention of Congress to establish an efficient machinery for so doing.\textsuperscript{25} Litigious interruption was deemed harmful to this purpose if it occurred at any time before induction was actually completed.

The doctrine of exhaustion of administrative remedies as developed in the pre-war cases was not concerned with obedience to orders before contest in court but with exhaustion of administrative appeal before burdening the courts with inconclusive litigation.\textsuperscript{26} It was founded on considerations of orderly procedure,\textsuperscript{27} comity,\textsuperscript{28} and the assimilation of presence of an administrative remedy to the availability in equity of an adequate remedy at law.\textsuperscript{29} Thus under the doctrine of exhaustion of remedy alone it need never have been held that one must enter service before contesting a selective service classification. The real reason, then, for so holding in the cases before \textit{Estep} was the power and intent of Congress to foreclose review until orders were complied with, and not a procedural rule of court.\textsuperscript{30}

\textsuperscript{22} See Dickinson, \textit{supra} note 19, at 1064.

\textsuperscript{23} The Court admitted, however, that the defense had been denied in four cases corresponding on their facts to the \textit{Estep} case, where the defendants had reported for the last step. Koch v. United States, 150 F. (2d) 762 (C. C. A. 4th, 1945); Gibson v. United States, 149 F. (2d) 751 (C. C. A. 8th, 1945), \textit{cert. granted}, 326 U. S. 708 (1945); United States v. Rinko, 147 F. (2d) 1 (C. C. A. 7th, 1945); \textit{cert. denied}, 325 U. S. 851 (1945); Fletcher v. United States, 129 F. (2d) 262 (C. C. A. 5th, 1942).

\textsuperscript{24} See cases cited \textit{supra} note 18.

\textsuperscript{25} 320 U. S. 549, 554 (1944).


\textsuperscript{29} See Berger, \textit{supra} note 26, at 985, n. 28.

Behind the Estep decision lay compelling considerations in the plight of Jehovah's Witnesses under the Act.\(^{31}\) They had accounted for three out of every four convictions involving some sort of religious objection. Complete exemption from service as ministers of religion was frequently denied them by Selective Service; and Witnesses generally refused to claim classification as conscientious objectors, considering themselves not conscientiously opposed to war, but neutrals in conflicts between world governments and not subject to call under any classification.\(^{32}\) Theirs was a type of religious objection not provided for by Congress, and before the Estep decision thousands who defied draft orders were sent to jail without being allowed to attack their classifications.

It may be questioned, however, whether the softening of the rule should not have been the function of Congress. Balancing tolerance for minorities against military necessity is primarily a political matter. The Jehovah's Witnesses problem had existed and no allowance was made for it when Congress renewed the Selective Service Act in 1945.\(^{33}\) Moreover, the House Committee on Military Affairs, in considering amendments, noted that the courts had refused to review classifications prior to induction.\(^{34}\) Congress renewed the Act without any amendment changing this procedure.

Analogous problems of reconciling the availability of judicial review with the necessity for securing immediate obedience to orders arose under the Emergency Price Control Act\(^{35}\) and the regulation of West-Coast Japanese.\(^{36}\)

In the case of *Hirabayashi v. United States* \(^{37}\) the Court refused to review the validity of curfew regulations under which defendant, a Japanese-American, had been convicted, considering them to be within the broad discretion of Congress and the Executive in exercising the war power and not a proper subject for court review. In a concurring opinion,\(^{38}\) Mr. Justice Douglas preferred to reach the same result by holding that one who defied such an order would not be heard to contest its validity. He pointed to the

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32. *Id.* at 811, 821 *et seq.*
37. 320 U. S. 81 (1943).
38. *Id.* at 105.
Selective Service cases as other instances "where one must obey an order before he can attack as erroneous the classification in which he has been placed." 39

Under the Emergency Price Control Act of 1942 40 the process of review was spelled out more fully. Jurisdiction to review the validity of price regulations was restricted exclusively to the Emergency Court of Appeals; 41 regulations were open to attack only during a limited time after they became applicable; 42 and district courts, given jurisdiction for enforcement purposes, were denied authority to restrain or set aside price orders, or to consider the validity of such orders involved in enforcement suits. 43 The Office of Price Administration took the position that these provisions "created a substantive duty to obey all regulations unless and until they were declared invalid by the exclusive forum and prescribed liability for disobedience even to an invalid regulation before such [determination]." 44 Some courts adopted this view. 45 The Supreme Court, however, in upholding the review provisions of the Act, 46 found it unnecessary to pass upon the question whether Congress had made, or constitutionally could make, violations of invalid orders punishable. 47 It was sufficient in deciding the case presented to rely on the familiar principle that a right to contest the validity of an order might be forfeited by failure to make timely assertion of it.

A 1944 amendment to the Price Control Act 48 expanded opportunities for review of regulations and provided a process for contesting them even after indictment for their violation. 49 The substantial effect of this amendment was to permit violation of an outstanding price regulation at the peril of the violator that the regulation be held valid, 50 a result virtually duplicated in the law of review of Selective Service orders by the Estep decision.

39. Id. at 108.
40. 56 Stat. 23 (1942).
41. Id. at 32 [§ 204(d)].
42. Id. at 31 [§ 203(a)].
43. Id. at 32, 33 [§§ 204(d), 205(c)].
44. Weekly News Letter of Litigation Division, Office of Price Administration, June 26, 1944, p. 3-4.
47. It was theoretically possible to be convicted of violating an OPA order which, after the violation but before the trial, had been declared invalid by the administrator or the Emergency Court of Appeals, even though the violator had launched an administrative protest before violating. No such case was ever presented before the 1944 amendment (infra note 48) eliminated the possibility.
49. This was to remove any doubt after the Yakus case as to whether the act granted due process. See 90 Cong. Rec. 5305 (1944). And see note 47 supra. However, the Emergency Court of Appeals remained the only avenue for review of OPA orders.
50. See Weekly News Letter of the Litigation Division, loc. cit. supra note 44. It is significant that Congress made no similar change in the process of review of draft orders when it renewed the Selective Service Act in 1945. See note 33 supra.
The amelioration of earlier stringency marked by the *Estep* decision and the 1944 Amendment to the Price Control Act need not, however, mean that the more severe sanction of foreclosing review to violators is invalid as an exercise of *emergency* power. So strong a sanction involves doctrinal difficulties if described as punishment for violation of invalid orders. However, an order need not be regarded as invalid until it has been declared so by a court of competent authority. No difficulty is encountered in foreclosing review to defendants who have failed to pursue prescribed administrative remedies or have previously neglected opportunities to obtain judicial review. Harder cases arise where it is thought necessary to compel the recalcitrant to obey prior to and during the time he seeks to attack an order. Such a requirement apparently can be justified only as a necessary response to emergency conditions. When the nation faces an existing emergency, courts may, as in the *Hirabayashi* case, decline to review an order which is considered to lie within the special competence of Congress and the Executive, or obedience may be made a condition precedent to obtaining review. Where, as in raising an army, the power of Congress is plenary and a classification is not a matter of constitutional right, orders need not be made reviewable unless Congress so chooses.

The extent to which the court will apply rationalia embodying the concept of "emergency" to limit judicial review of administrative orders appears to vary with the immediacy of the crisis. In the *Falbo* and *Hirabayashi* cases, as in the OPA wartime cases, the court subordinated review to administrative expediency. The *Estep* decision, however, reflects an inarticulate reaction to the fact that the war emergency has substantially subsided. The opinion is based on an interpretation of the statute and does not purport to define the constitutional power of Congress and the Executive. It would be

51. See *supra* note 26.
55. See notes 3 and 4 *supra*.
56. A tightening of the court's hand in the administration of the Price Control Act may be seen in the case of *M. Kraus & Bros. v. United States*, 66 Sup. Ct. 705 (U. S. 1946). In reviewing a conviction for violating price regulations by use of tie-in sales, the Court gave little weight to the administrator's published interpretation of his own regulations and reversed on the ground that the regulations did not forbid with sufficient clarity the action charged. Compare *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 414 (1945), "... the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." See also Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143, n. 6 (1940); A. T. & T. Co. v. United States, 299 U. S. 232, 242 (1936); Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 325 (1933). In *United States v. George F. Fish, Inc.*, 154 F.
unfortunate to draw from it an implied restriction on the power to act in future emergencies.

Realistic appraisal of the review problem in emergency legislation and of the proper role of the Court during the present decontrol period suggests a frank recognition that the Court may properly take into account changed conditions within its knowledge and competence and make them a basis for statutory interpretation and decision. Although determination of the extent and duration of an emergency and the measures necessary to cope with it are normally matters in which a broad discretion is reserved to Congress and the Executive, there is precedent for the use of judicial notice or inquiry to ascertain the extent of an emergency.53

(2d) 798, 799–800 (C. C. A. 2d, 1946), cert. denied, 66 Sup. Ct. 1377 (U. S. 1946), it was suggested that whether an OPA regulation was ambiguous and thus failed to forbid the violation charged could only be raised by appeal to the administrator and the Emergency Court of Appeals.

57. Hamilton v. Kentucky Distilleries, 251 U. S. 146 (1919); Block v. Hirsh, 256 U. S. 135, 154 (1921); see cases cited supra note 3.

58. In Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924), the Supreme Court directed that inquiry be made by the lower court to determine whether an emergency still existed to support continued validity of the District of Columbia Rent Act. In Ex parte Milligan, 4 Wall. 2, 121 (U. S. 1866) the Court used its judicial knowledge that the courts had been open in Indiana in holding that the trial of Milligan, a civilian citizen, by military commission was not justified. Judicial notice has of course been used in sustaining exercises of emergency power. See Hirabayashi v. United States, 320 U. S. 81, 93–4 (1943); Block v. Hirsh, 256 U. S. 135, 154–5 (1921).